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Submission to Victorian Labour Hire and Insecure Work Inquiry
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Content

1. Introduction

Independent Contractors Australia is pleased to have the opportunity to make a submission to the Victorian Inquiry. This Inquiry is one of a long list in the history of inquiries into the issues of 'insecure' (sometimes called 'precarious') work and labour hire (frequently referred to as the 'triangular relationship') both in Australia and internationally, dating back to the 1990s. In many respects the Inquiry covers old ground, well-canvassed (and somewhat resolved) in the past. However, it is also pleasing to read this Inquiry's Background Paper and observe that it takes a balanced approach. Many inquiries in the past have started with the assumption that 'insecure work' and labour hire are bad, that they threaten the structure of society and as such must somehow be closed down or contained. Such assumptions predetermine inquiry

outcomes. This Inquiry's Background Paper, however, raises both the positives and the negatives surrounding the argument and asks for input. This is refreshing.

ICA's submission looks primarily at the issue of 'insecure' work, but comments on labour hire as a subset of the 'insecure' work issue.

2. Background: Developments in the United Kingdom. Where are the new jobs?
Recent developments and current debate in the UK provide a relevant and valuable backdrop to the Victorian Inquiry. This is because 'insecure' work (ie, self-employment) has become the primary driver of jobs growth in the UK. This phenomenon has ignited a major debate in the UK around the same questions that are being raised in the Victorian Inquiry. That is, in the UK, even with the jobs growth, questions are being asked about whether this surge in self-employment is a good or a bad thing.

Since the 'great recession' of 2008, the UK has been experiencing a jobs surge. From 2008 to 2014, the self-employed (insecure) sector has grown by 750,000, accounting for 75 per cent of the total jobs growth in the UK over the same period. But, since 2010, the self-employed numbers growth (of 570,000) makes up all of the UK's jobs growth. (See attachment 1 and attachment 2) The UK self-employed sector now stands at around 4.5 million or 14.7 per cent of the workforce – the highest percentage since records began. The Governor of the Bank of England has stated that this represents a structural shift in the UK economy.

The UK debate has focused on whether this is the result of 'push' or 'pull' factors. That is, on the negative side, that people are 'pushed' into self-employment because they have no opportunity to become employed. Alternatively, on the positive side, that people are 'pulled' into self-employment because it offers greater opportunity. This is actually the core question being researched in the Victorian Inquiry. (Note: The UK research on the push–pull question is covered further in this submission (see item 7)

Notwithstanding the outcome of the push–pull question, we ask the Victorian Inquiry to consider the proposition that, based on the UK experience, 'insecure work' actually offers significant potential for new jobs in this changed economic environment. In fact, we go further and question whether 'secure' work actually exists (see below).

Traditionally, it has been considered that jobs growth stems from 'employment' and that 'good' jobs come from permanent employment that delivers 'security'. That is, that 'employers' are the people who create work/jobs and then 'employ' people. Government policy has focused on how to make this happen. But the UK is showing (dramatically) that 'non-employment' – that is, people creating their own work/business in an 'insecure' environment – also offers jobs growth.

***ICA submits* that the Victorian Inquiry should consider how policy can actually encourage self-employment, even if labelled as 'insecure' work, as a legitimate avenue for jobs creation

3. Question: what is 'Insecure' work?

The Background Paper makes the point that the structure of work in societies has changed dramatically since the 1990s from one of 'secure' work to one of 'insecure' work. Insecure work, it is argued, is evidenced by the existence of independent contracting, casual work and labour hire.

Under the heading of 'insecure' work the Paper says:

> Over the last 20 years, the traditional Australian model of full-time, ongoing employment has been eroded with the rise of various new forms of working.

and

> In 2013, around 17 per cent of workers were either independent contractors or business owners, and another 20 per cent were casual employees.

Yes, the Paper does say that for some people, mainly higher paid professionals, independent contracting can be 'secure', but the Paper asserts that:

> … some features of particular working arrangements, such as casual or fixed term employment, independent contracting and seasonal work, may contribute to a lack of security for workers.

ICA submits that this perception of 'insecure' work is excessively narrow, erroneous, and misses the reality of the change in the nature of work in society. It assumes that 'secure' work comes from a full-time, permanent job. This, however, is a perception that is unhelpful to the formulation of good public policy.

Rather, no work is any longer 'secure' whatever its legal form or structure. The perception of 'security' arising from permanent, full-time employment is largely an irrelevant myth that unfortunately continues to drive much of the discussion and debate around work regulation. Permanent, full-time employment jobs are only 'secure' to the extent that a business or government department maintains its prevailing structure and revenue. Governments change. They restructure and downsize their public service, and alter their priorities. 'Secure' public sector employees are sacked (usually with generous payouts) or moved to jobs they may or may not prefer. Private-sector firms expand or contract, as dictated by the demands of their markets and the need to maintain profit. 'Secure' employees, likewise are sacked, made redundant, 'let go' or 'managed out'. This is the reality for full-time, 'permanent' employees just as it is for casual employees and self-employed, independent contractors. The only practical difference between full-time, permanent employees and casuals and independent contractors is the way in which 'insecurity' is managed within and by firms and government departments.

ICA submits that there is no value in discussions around 'secure' and 'insecure' work. In fact such discussions are a distraction from the achievement of good public policy outcomes. Further, the relevant issue is NOT the security or otherwise of work. Rather, what people actually need and crave is continuity and certainty of income.

Whether income continuity and certainty is achieved via permanent full-time work, casual, seasonal or fixed contract work, independent contracting or a combination of these is not relevant. The outcome people seek is income continuity and certainty. And this may be achieved in different ways for different people and may well change during individuals' work life-cycles and over time. This can include the use of labour hire, investments, social welfare support as well as paid work in all its forms.

**_ICA asks_ that the Inquiry consider this point. It is timely, we submit, for the debate to move on from the narrowness of considering work 'security' to the broader issue of continuity and certainty of income.

The Background Paper indicates an openness to alternative ideas and concepts. And based on previous Victorian inquiries on related matters we have cause to be confident that such concepts are likely to be considered. We expand on this point below. (see item 6)

4. International Labour Organisation Recommendation; Australia

We have made the point that the Victorian Inquiry is looking at issues well covered internationally and somewhat resolved. The Inquiry seeks to report on Victoria's/Australia's compliance with ILO standards on this issue.

In fact the ILO spent a decade considering the issues in depth under the heading of the 'Scope of Employment'. The ILO considered the legitimacy of independent contracting and labour hire (the 'triangular relationship).

The history of the ILO process was 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'.
- 2004/05 To guide further debate an ILO committee of experts undertook arguably the most wide-ranging, global study of the definition of independent contracting. (see attachment 3)
- 2006: The matter was again debate in June 2006 with a Recommendation (attachment 4) being finalized.

The 2003 ILO Conclusion made an important statement on definitions. It said:

> The term *employee* is a legal term which refers to a person who is party to a certain kind of legal relationship which is normally called an employment relationship. The term *worker* is a broader term that can be applied to any workers, regardless of whether or not she or he is an employee. *Employer* is used to refer to the natural or legal person for whom an employee performs work or provides services within an employment relationship..... *Self-employment and independent* work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.

The ILO Conclusion clarified that:

- 'Worker' is a generic term.
- 'Employee' is a legal term for someone working under an employment contract.
- 'Self-employment/independent contracting' is also a legal term for someone working under a commercial/civil contract.

**ICA submits that it would be constructive for the Inquiry to recognize and undertake its inquiries within the framework of these ILO definitions rather than the framework of 'secure' versus 'insecure' work.

Certainly the ILO's 2005 Report was framed around the definitional recognition stated in the 2003 Conclusion but it delved deeper into the issue. In ICA's view the 2005 Report (see attachment 3) is the most authoritative statement on what constitutes independent contracting – namely, that it is a commercial relationship. As such it is inherently a relationship that is driven by market forces and in that sense is 'insecure' (if that term has to be used) because 'markets' are 'insecure'.

In recognizing the commerciality of independent contracting, the 2005 Report states the importance 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 asked

> …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)

In fact the 2006 debate and the ultimate 2006 Recommendation stated the need to protect commercial relationships. Item 8 of the Recommendation states:

> National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships,…

**ICA submits that, consistent with the ILO Recommendation, the Victorian Inquiry should recognize the legitimacy of independent contracting as a commercial relationship and highlight that policy should not interfere with independent contracting.

Likewise, the 2006 Recommendation also discussed 'disguised employment'. Item 4 states:

> National policy should at least include measures to:
>
> (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due …

Subsequent to the 2006 ILO Recommendation, Australia was arguably the first nation to respond, creating the (federal) *Independent Contractors Act* in late 2006 and at the same time within the *WorkChoices* (now Fair Work) *Act* arguably the world's first and perhaps strongest 'sham contracting' provisions.

- The Independent Contractors Act effectively states the legitimacy of independent contracting as a commercial relationship and overrides laws that seek to interfere with or deconstruct the commercial relationship.
- The sham contracting provisions give teeth to the ILO Recommendation on disguised employment, outlawing it and creating an enforcement mechanism (through the Fair Work Ombudsman)

The Victorian Inquiry seeks input on Australian compliance with ILO standards. In the order of ILO positioning, a *Convention* stands at the top. A *Recommendation* is second in the order of importance, establishing ILO standards for labour regulation. Nations are expected to report on their compliance with Recommendations.

**ICA recommends that the Victorian Inquiry recognizes that the *Independent Contractors Act* and the sham contracting provisions represent Australia's substantial compliance with the 2006 ILO Recommendation.

In relation to the 'triangular relationship' (labour hire) the 2006 Recommendation stated at item 23:

> This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

**To ICA's knowledge this Recommendation and Convention continue to stand as the defining ILO standards for labour hire and should be the guiding principles for the Victorian Inquiry's consideration of labour hire.

5. Is there such a category as Dependent Contractor? ILO

In its Background Paper the Victorian Inquiry canvasses the contested issue of 'dependent contractor' stating:

> A further category of 'dependent contractors' has been identified by some commentators and researchers, to refer to contractors who despite the nature of their work arrangement, are economically dependent on a single client and/or have little control over their own work. Dependent contractors 'lack the economic freedom that is generally claimed as a justification for exempting them from labour laws.'

ICA submits that the very idea of 'dependent contracting' is legally impossible and hence irrelevant to a proper discussion on independent contracting and the commercial relationship. It breaches ILO standards.

The concept of dependent contractor was created by a Professor HW Arthurs in 1965 (The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' by Prof HW Arthurs. 1965. Pub University of Toronto Law Journal 89) who argued in his paper that fishermen operating trawlers on the west coast of Canada were 'dependent' because they supplied their catches to just one processing plant. His argument has subsequently been adopted and promoted heavily within the labour regulation sector to form a general thesis that independent contractors with one client are 'dependent' and thus need to be regulated as employees.

Until 2003 the ILO included discussion on 'dependent contracting' within its debates on the scope of employment. However, the 2005 Report (referenced above) dropped the term entirely. This, in ICA's experience and observations, reflected the discovery

by the ILO committee of experts that jurisdictions across the globe (some 78 were studied) consistently identify the difference between employment and independent contracting in one way. That is 'employment' entails a form of legal 'dependence' under contract. Independent contracting entails legal 'independence' under (commercial/civil) contract. The distinction is legally solid.

The 2006 Recommendation included a statement to this effect in item 12:

> For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

The legal reality is that the difference between employment and independent contracting is clear. Employment requires an 'employment' contract and independent contracting requires a commercial/civil contract. There is no third category.

It is illogical, legally erroneous and entirely unhelpful to sound public policy discussion to include considerations about 'dependent' contracting. If such a concept were considered, then the reverse should also be included in discussion – namely, the idea of 'independent' employment. That is, workers who seek to be independent but are forced into employment either directly or by their lack of opportunity to be an independent contractor. For example, independent contractors in the construction sector in Victoria are frequently forced to be employees if they are to work on some construction sites. Such 'employees', it could be argued, should be classified as 'independent employees' and regulated under commercial not employment law. ICA rejects both concepts – 'dependent contracting' and 'independent employment' – as being legally nonsensical and counterproductive to proper public policy considerations.

It is important to note that the ILO dropped any reference to 'dependent' contracting. It did not appear in the 2006 Recommendation. The promotion and/or discussion of policy based around 'dependent contracting' is in fact *inconsistent* with the ILO standards stated in the 2003 Conclusion, the 2005 Experts Report and the 2006 Recommendation.

**ICA submits that the Victorian Inquiry should not only drop, but also reject, discussion and consideration of 'dependent' contracting as an erroneous concept that is unhelpful for quality public policy consideration.

6. Previous Victorian inquiries

In 2003, Victoria conducted an important inquiry into work safety laws as a prelude to a new Occupational Health and Safety Act. The 'Maxwell' Inquiry addressed a core issue similar to that being investigated by this current Victorian Inquiry. Given the change in the work environment in which many workers were not employees, Maxwell was in part addressing, the question about how to incorporate independent contractors within OHS laws. ICA made a detailed submission.
http://www.independentcontractors.net.au/Archives/work-safety/ica-submission-to-victorian-ohs-inquiry-2003

We quote from our submission at some length because the principles we enunciated there, we believe, are relevant to this current Victorian Inquiry. We said:

> Employment is a legal and managerial state which in many respects presupposes that an employee is a person who is less than an adult. That is, that

in exchange for payment, an adult enters a work environment where they agree to surrender significant levels of control over their own actions to the managerial group (delegates of the employer) within the firm. The legal idea of employment holds that the employer has the 'right to control' the employee.

Around the period when the Robens principles (that everyone is responsible for safety according to what they control) were established, employment had near total dominance of the work engagement arrangements used inside firms. Further, full-time, permanent and loyalty and career-based employment applied heavily. It was only natural that legislative draftspeople crafted OHS legislation and regulation using 'employment' language. Hence, OHS legislation almost universally identifies the 'controllers' of worksites by describing them as 'employers' and describing the persons to whom 'employers' owe a 'duty of care' as 'employees'. To embrace others who are not employees, legislation generally attempts to describe contractors and others under 'employment deeming' type language.

This structuring of OHS legislation around employment language has created two flaws potentially limiting the full implementation of the Robens principles:

(1) Demonise the changes. Create legislation, regulation and enforcement practices that discriminate against the changes and try to push businesses and people into reverting to traditional (and OHS familiar) employment structures of full-time and permanent engagement. ICA believes that this approach will not improve OHS outcomes and runs a high risk of worsening OHS outcomes.

(2) Seek to understand the changes. Work with the new forms of work engagement to ensure that any recrafting of legislation, regulations and OHS practices are aligned with the Robens principles. ICA supports this approach, believing that this offers the best opportunity to further improve OHS outcomes.

ICA agrees that *accommodating* the new arrangements is the process most likely to improve OHS outcomes.

ICA strongly supported the subsequent Maxwell Report on OHS law. ICA stated in response to the Report: http://www.independentcontractors.net.au/Archives/work-safety/ica-response-to-the-maxwell-review-report

The Report appears to be a genuine and largely successful attempt to look beyond the policy and debate distortions that often occur because of ideologies and politics associated with most discussions about labour issues (OHS and other).

The Report's tone, language and approach concentrate on issues of 'control'. It considers: how controlling behaviours can be influenced so as to minimize the incidence of accidents; how sanctions for accidents can be better directed against those who had actual control; and how sanctions should be apportioned according to the levels of actual control exercised.

> This approach is consistent with general community ideas of natural justice and should lead to enhanced community confidence in the integrity of OHS legislation.

The Maxwell Recommendations were adopted to form the template for the Victorian *Occupational Health and Safety Act 2004*. ICA considers this Victorian OHS Act to be easily the best in Australia and arguably one of the best in the world. It is superior to the Federal model OHS laws. ICA understands that Victoria now has the best work safety record in Australia, although jurisdictions avoid discussing comparisons.

We argue that the Victorian OHS Act is superior because the Maxwell Review looked and accepted the facts and realities of the emergent mix of work engagement systems operating in the modern economy. It accommodated that mix rather than trying to defy it. It focused on the true essence of the objective of work safety laws –namely, that safety behaviours will be maximized when everyone in the work environment is held responsible and liable for the matters over which they have control. Work safety is a shared responsibility.

**ICA recommends to this 2015 Inquiry that the approach of the Maxwell OHS review set the standard for this Inquiry. That is, that the various forms of work engagement -permanent, temporary, casual, labour hire, independent contracting and so on be considered on their merits, that each be considered legitimate and worthwhile and that none be demonized and considered degrading or harmful. The Background Paper is broad enough in its discussion to give ICA hope that this is the Inquiry's intent.

7. The UK evidence: Push or Pull?

We referred earlier to the debate in the UK focused on whether the jobs driver arising from self-employment is a good or a bad thing and whether it is 'push' or 'pull' related. In many respects this is the same issue that the Victorian Inquiry is investigating. That is, whether the emergence of 'insecure' work in Victoria is damaging or benefiting society. A recent paper from the UK perhaps provides a helpful international comparison for the Victorian Inquiry to consider.

The paper is titled *The Post Crisis Growth in the Self-Employed: Volunteers or Reluctant Recruits?* by Andrew Henley, dated July 2015. (See attachment 1)

The paper makes it clear that the question is not new:

> The debate concerning self-employment as opportunity-driven or necessity-driven is not new, and has attracted research attention in the past (for example GILAD AND LEVINE, 1986; AMIT, 1994; HESSELS et al., 2008; THURIK et al., 2008; DAWSON et al., 2014).

The paper's research then compares self-employment growth in areas of the UK that suffer depressed employment with areas of higher employment and better incomes to see whether 'push' or 'pull' factors dominate. On the basis of that research the paper concludes that:

> The vast majority of the self-employed appear to report opportunity-related or personal independence-related motives for their choice of economic status, and not to attribute any significance to "recession-push" factors.

> The paper concludes that there is little evidence for any net "push" effect into self-employment from weak local labour market conditions. The data are consistent with a net "pull" effect in which improved local labour market conditions indicate better local business opportunities and spending power. "Pull" effects appear to be stronger for women and stronger still for those considering a transition into self-employment from inactivity.
>
> This suggests that local pull factors are far more significant in driving transitions into self-employment, and explains why business formation rates are higher, post-2008, in more advantaged UK areas. Self-employed business ownership does not appear to be a significant alternative to unemployment for those areas where paid employment demand is weak. Entrepreneurial activity prospers were wages are higher and unemployment lower.

That is, the paper's conclusion is that the rise in self-employment (in the language of the Victorian Inquiry, 'insecure work') is occurring in the UK because people seek it as a way to respond to opportunity. ICA submits that this reflects a positive development in the UK at least. It is a sign that entrepreneurship as a driver of economic development and human well-being is penetrating deeper into economies at the level of individual workers. It's something that should be understood and encouraged, certainly not blocked and definitely not demonized.

**ICA recommends that the Victorian Inquiry should take note of the UK experience and consider self-employment (insecure work) as a positive with potential for a better society.

8. How Australian and Victorian laws have responded to the new work environment

Notwithstanding that the Victorian Inquiry is raising questions and concerns about the rise of 'insecure' work, the Background Paper recognizes that there is already a considerable body of regulation and legislation covering 'insecure work'. In other words, that the environment is not unregulated. ICA's observation is that regulation is extensive and probably covers the fields needed to be regulated. ICA was formed in 2000 and our brief is to advocate for self-employed people. We do that by looking to encourage regulation that is appropriate for the self-employed.

**ICA submits that self-employment (as insecure work) does need regulatory assistance and coverage. We do not support an unregulated environment. Regulation is required to ensure payment of taxes and government charges, maintenance of work safety and so on. But beyond this more is also needed.

For a self-employed people to be able to operate effectively and exercise their rights to be a business they need three key regulatory structures.

1. Certainty, consistency and clarity under regulation.
2. Fair, equitable business tax treatment.
3. The effective rule of law under commercial contract.

ICA believes that item 1 has generally been achieved. Matters are reasonable under item 2, although some reform is needed. And item 3 is moving forward given some recent developments.

What follows is a summary of the regulations covering self-employed people in Victoria, with some brief commentary.

8.1 Income tax withholding

Before 2000, the legal power of the Federal Tax Commissioner to require income tax withholding was tied to the existence of 'employment' under PAYE. The 2000 reforms fixed this by expanding the Tax Commissioner's legal authority to require withholding under self-employment and even through the independent contractor 'triangular' relationship often referred to 'Odco'. (The Victorian Inquiry Background Paper includes 'so called Odco' in its discussion.)

Tax withholding is now required for all workers regardless of their legal status and administered under the processes of ABNs, BAS and IASs. The new system is known as PAYG.

8.2 Australian Business Numbers

For self-employed people to operate it is imperative that they have and quote an ABN. Without an ABN a self-employed person effectively cannot issue an invoice. ICA is highly critical of the Australian Taxation Office for its 'holier than thou' approach to denying people ABNs. The Inspector-General of Taxation has been critical of the ATO on this issue. Denial of ABNs is effectively an intrusion into the legitimate right of individuals to operate in the commercial environment and breaches ILO standards as detailed above.

8.3 Personal Services Income Tax laws

The federal PSI laws are an extremely robust process through which the ATO monitors and denies or allows self-employed people to claim (or not claim) business tax deductions. This area is fraught with complexity and ICA believes the PSI laws are probably as well designed as can be expected at this stage. However, ICA is critical of the ATO for administrative overreach and even frequently failing to apply the laws correctly. The Inspector-General of Taxation has likewise been critical of the ATO. See ICA commentary here http://www.independentcontractors.net.au/latest-news/tax-update-on-self-employed-issues-good-news-bad-news and here http://www.independentcontractors.net.au/latest-news/ato-discriminates-against-small-business-people

8.4 Superannuation

The law on the legal reach of employer superannuation contribution requirements is, in ICA's view, somewhat hazy. However, it is clear that the ATO's enforcement is strong and extends to all employees and even to many independent contractors. For example, the (so-called) Odco arrangements include payment of superannuation by the agency for the engaged independent contractors.

8.5 Victorian Workers' Compensation

The Victorian Workcover laws have long covered independent contracting. In fact the High Court test case of 1991 of the coverage of the laws to the (so called) Odco arrangements confirmed that the laws covered independent contractors through the engaging party. However, the laws still prevent a self-employed, independent contractor from directly registering for workers' compensation coverage (unless the individual is a company). ICA sees this as a flaw in the laws. If anything, self-

employed people (operating as individuals or partnerships) should have the opportunity to register for workers' compensation coverage if they wish.

8.6 Victorian Payroll Tax

As with the Victorian workers' compensation laws, the Victorian payroll tax laws also require engaging parties to declare independent contractors in their payroll tax returns and to pay payroll tax on individual independent contractors they engage. The laws are so strong that they were the model used by all other states when payroll tax laws were harmonized in 2009.

8.7 OHS

As mentioned earlier, ICA is highly supportive of the Victorian OHS laws.

8.8 *Independent Contractors Act*

As mentioned before, the federal Independent Contractors Act reflects the ILO Recommendation of 2006 and aims to prevent intrusion into the commercial contracts that independent contractors may have.

However, the 'fair contracts' provisions in the Act have proven to be ineffective because of an excessively legalistic approach that is expensive and time-consuming.

8.9 Sham contract laws.

Also mentioned earlier, the federal sham contracting laws are arguably one of the strongest such set of laws across the globe and are strongly enforced by the Fair Work Ombudsman. Perhaps the most high-profile case (*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37) involves the (so called) Odco arrangements where the FWO has aggressively prosecuted the allegation of sham contracting. The case is currently before the High Court where the FWO is asking the question:

> Can an employer avoid the sham contracting provision in s.357 of the *Fair Work Act 2009* (Cth) (FW Act) by introducing a third party (such as an incorporated entity, which, as in this case, was a labour hire company) into the contractual arrangements between the employer and the person who is, in truth, the employee?

This current case demonstrates the difficulties of proof. The laws first require a finding that an alleged independent contractor was in fact an employee. Then there is a requirement to prove that the engaging party behaved 'recklessly' in misrepresenting the engagement status.

It is easy to make an allegation of 'sham' contracting, but another thing to prove the case as demonstrated above. ICA believes that the laws provide a robust process striking a correct balance with a reliance on proof. It would be helpful, however, if the processes of the law were not so expensive.

8.10 Victorian Small Business Commissioner

In 2003 the Victorian government created the office of the Small Business Commissioner (SBC). The SBC's key role lies with the supply of cheap commercial dispute-resolution for small business people (self-employed, independent contractors). Operating in the commercial environment can be 'precarious' for individuals if dispute resolution is complex, legalistic, expensive and time-consuming. The

formation of the SBC was a major step forward for self-employed people in Victoria and has proven highly successful.

ICA has played a major role in promoting the SBC model across Australia and we are pleased to see the model operating in Western Australia, South Australia and New South Wales. A version is currently being implemented federally. Of interest and something of which Victoria should be proud is that the United Kingdom is in the process of implementing a SBC based on the Victorian model.

It should be noted that the Victorian SBC consistently reports that government departments are frequently the bodies that most resist the use of the SBC's services to resolve disputes with small business people.
** ICA recommends to the Inquiry that it discuss this issue with the SBC to see whether government policy could be implemented to require Victorian government entities, including local councils, to engage in dispute resolution with small businesses through the SBC.

8.11 Unfair Contract protections
Since 2009 ICA has been campaigning http://www.independentcontractors.net.au/Current-Issues/fair-contracts/index.html for unfair contract protections for small business people, especially for self-employed, independent contractors. Those laws, passed by Federal Parliament in October this year, http://www.independentcontractors.net.au/latest-news/yes-massive-win-for-australian-business-small-and-big were recently proclaimed and are set to come into effect around November 2016.

This is an extremely important reform. Self-employment can be unnecessarily 'precarious' if self-employed people have imposed upon them contracts that are inherently 'unfair'. One example of unfairness (set to be outlawed) is where a standard form contract allows for one party to change the terms of the contract without agreement from the other party.

The new laws in effect codify in statute the essential elements of commercial contract embedded in common law. The problem has always been that individuals (as self-employed workers) have not been able to afford the expenses associated with the legal process of enforcing their contract rights under law.

For Victorians who choose to be self-employed, independent contractors, the commercial contract environment in which they operate is in the process of becoming much fairer.

9. Some General Conclusions
It is obvious that the structure of the work environment in Victoria has changed substantially over the last few decades, as it has globally. Victoria's experiences are no different in a general sense to movements across the globe. That is, that markets, which reflect the fluctuating choices that consumers make, new technology and changed attitudes are all affecting the way in which work is structured. Permanent full-time employment as the dominant form of engagement is on the decline. Casual, temporary, seasonal employment are the new realities along with 'non-employment' – they are all different forms of independent work conducted under commercial or civil

contracts. This is not a new story. What is relevant to consider is the extent to which regulations have responded to this in appropriate ways. ICA submits that the regulatory response has generally been in positive directions.

As an summary, over at least the last decade:

- Federal tax law has been reformed and now fully covers the field in terms of the legal requirements for income tax withholding and entitlements to legitimate tax deductions. However, ICA argues that, on the evidence, the ATO's enforcement discriminates against self-employed people and is legally questionable at times.
- Superannuation law is robust in requiring employers and others to remit superannuation contributions.
- Victorian workers' compensation, occupational health and safety and payroll tax laws are strong, covering all employees whether permanent, casual or otherwise as well as independent contractors.
- The *Independent Contractors Act* generally protects Victorian independent contractors from regulations that may otherwise deny them their rights to operate under commercial contracts.
- The sham contracting laws provide protection for people who are employees from being illegally classified as independent contractors. Evidence suggests that the FWO aggressively enforces this.
- The Victorian Small Business Commissioner plays an important role in assisting self-employed, independent contractors to achieve a significant measure of justice when they are in commercial dispute with larger organisations.
- The new unfair contract laws are an important initiative which will, over time, significantly improve the integrity and quality of contracts in which independent contractors in Victoria (and nationally) engage.

10. A note on Labour Hire

Labour hire is a legitimate form of work engagement and is accepted as such under ILO labour standards. The Inquiry's Background Paper likewise recognises that labour hire is legitimate. Labour hire operates both as systems of engaging and supplying employees of the labour hire firm and as systems where the workers are independent contractors (the so-called Odco arrangements).

Federal tax law, workers' compensation, payroll tax, superannuation, OHS, sham contracting and other laws (as described above) all apply to labour hire as they do to direct employment. In fact, one legislative leg of the PAYG provisions was designed specifically to ensure that independent contracting labour hire (Odco) was caught within the withholding tax net. That is, labour hire companies have clearly defined legal obligations which match those of direct employers.

ICA also has considerable direct experience in the farming sector, specifically with the itinerant 'crop picking' industry where the supply of labour to the Gippsland and Swan Hill areas mostly comprises Asian workers drawn from the Springvale/Dandenong and Footscray suburbs of Melbourne. For the most part, the workers were/are supplied through very small labour hire businesses owned and operated by Asian/Australians who have personal, community networks. Some of those labour hire companies operate legitimately. Many do not. Many have been and

are ‘fly-by-nighters’. They charge the farmers full rates but do not pay workers’ compensation premiums, PAYG tax, superannuation and so on. They then close and disappear. They are a source of constant frustration and difficulty for farmers. In many respects the farmers are often ‘exploited’ by such ‘fly-by-nighters’.

Finding labour for the picking industry is exceedingly difficult across Australia, including Victoria. The pay rates are at the bottom end of the income scale although ICA knows of many people who earn good money as professional pickers ‘following the seasons’ across Australia. To draw in workers it’s necessary to have networks in relevant communities. This is a specialist area that requires time and local knowledge, something that the farmers do not have.

The problem is not with labour hire as such or the regulations covering labour hire. Rather, the problem rather lies with the fly-by-nighters illegally ignoring the law and the difficulty of enforcement. It is a problem that is decades old. Enforcement agencies from the Australian Taxation Office, Immigration, Social Security, Victoria Police, the Fair Work Ombudsman and others have a long history of coordination in enforcement activities. They conduct roadblocks, farm raids and so on. Unfortunately the problem seems to be very much like the squeezing of a balloon. The problem is fixed in one area but then pops up in another.

The Inquiry’s Background Paper raises the prospect of introducing a labour hire registration process and presumably a new regulatory system. Yet the Paper also cites the following statistics:

> In Victoria, data provided by WorkSafe Victoria[7] indicates that the number of labour hire businesses[8] registered for WorkCover premium services has remained stable over the last four years, as follows:
>
> - 2011-12: **968**
> - 2012-13: **947**
> - 2013-14: **916**
> - 2014-15: **933**
>
> In 2014-15, of the 933 labour hire businesses registered with WorkSafe Victoria, 531 employed 100 or less labour hire employees; 136 employed 500 or less labour hire employees; and 52 employed more than 500 labour hire employees.
>
> Two recent analyses indicate labour hire workers make up between 1.2 per cent[10] and 2.5 per cent[11] of Australian workers.

ICA understands that the Victorian State Revenue Office also has labour hire businesses registered for payroll tax purposes and conducts cross-referencing with WorkCover on the registrations. In other words, Victorian labour hire businesses are already registered and considerable information is already available on their turnover, location/s, nature and types of operations.

**Given that labour hire registration and regulation is already extensive, covering the field required by direct employers, ICA cannot see any reason for requiring additional labour hire regulation in Victoria. As we have pointed out above, the problem in our experience is one of illegal activity. Requiring existing, legal labour hire companies to

bear an additional layer of registration would not, in our view, do anything to overcome the problem of illegality and do nothing to deal with those who would simply not register.

11. The problem is largely one of illegality

The objective of ICA has and continues to be to advocate for improvements to the regulatory environment in which independent contractors ('insecure workers' in the Inquiry's language) are able to work. We are pleased with the positive direction in which regulations are moving.

ICA has considerable contact with people (employees and independent contractors) who experience concerns over sham contracting, non-payment of their invoices and so on. Our experiences suggest that:

- The regulatory environment is improving, and improved systems for vulnerable people to achieve justice are in place or are being implemented, particularly in Victoria. The highlights are the Small Business Commissioner and the soon-to-be-implemented unfair contract laws.
- Many problems of non-payment, under-payment and so on relate to employees (including permanent employees) not independent contractors and involve blatant illegal activity on behalf of the engaging party.

That is, it is often the illegality that is the problem confronting 'vulnerable' workers and not the regulatory environment itself. Nonetheless, there is also a need to be cautious and circumspect when allegations of illegality are made in this area.

**Sometimes an allegation of 'exploitation of vulnerable' workers can be done for other purposes and can in fact be a fabrication. That is, some parties conduct a sham and a scam of their own. ICA asks the Victorian Inquiry to be alert to the strong possibility that in the course of its investigations scammers may attempt to pervert the truth. The following example demonstrates how some allegations of a "sham" refuse to let the facts get in the way of a good story.

12. Case study of misrepresentation

ICA offers the following case study as a cautionary example to the Inquiry. It involves a 2002 Channel 7 *Today Tonight* 'exposé' of alleged exploitation of 'vulnerable' clothing outworkers. The program involved a blatant lie and misrepresentation of the pay rate that the workers were receiving. The program misrepresented a pay rate of $13 per hour as being $5 an hour.

Included with this submission is a video clip of the program.
The transcript is as follows:

Naomi Robson " Now Australia prides itself as a nation that gives workers a fair go. But tonight we uncover a secret army of workers treated like slaves toiling around the clock for a few dollars. L… Cassidy joined a crack unit exposing these sweatshops." (-1.43sec)

The report opens with Cassidy, the camera crew and Annie Delaney (an official of the TCFU) bursting into a small factory where a Vietnamese man was overseeing the work of about 10 Asian women.

Cassidy. "It's a bust. Behind these closed doors and tinted windows lies a sweatshop where desperate workers are exploited by greedy bosses looking for a quick profit" (-1.25 sec)

Cassidy confronts the Vietnamese manager who does not speak English.

Cassidy " How much are you paying your workers per hour?" and again "I'd like to know how much you're paying your workers?" (-0.56 sec)

The Vietnamese manager appears confused and then another Vietnamese man appears who acts as an interpreter. The interpreter speaks to the Vietnamese manager in Vietnamese presumably repeating Cassidy's question. The Vietnamese manager replies in Vietnamese to the interpreter. The reply by the Vietnamese manager has subsequently been translated by a qualified interpreter as

Manager *"Tell that thirteen dollars per hour"*

The Today Tonight interpreter says to Cassidy
"Thirteen dollars per hour"

Cassidy responds
"Five (5) dollars per hour?"

Cassidy continues
"The workers earn as little as $2 to $5 per hour slaving around the clock for a pittance. (-0.35 sec)

The report moves to other scenes continuing to assert that people sewing are exploited. The true response of the Vietnamese manager is ignored. It promotes Annie Delaney and another TCFU official as "exposing exploitation" and saving workers.

13. Summary of recommendations/comments

Independent Contractors Australia:

a) submits that the Victorian Inquiry should consider how policy can actually encourage self-employment, even if labelled as 'insecure' work, as a legitimate avenue for jobs creation

b) submits that it is timely for the debate to move on from the narrowness of considering work 'security' to the broader issue of continuity and certainty of income. Further, that it would be constructive for the Inquiry to recognize and undertake its inquiries within the framework of these ILO definitions rather than the framework of 'secure' versus 'insecure' work.

c) submits that, consistent with the ILO Recommendation, the Victorian Inquiry should recognize the legitimacy of independent contracting as a commercial

relationship and highlight that policy should not interfere with independent contracting.

d) recommends that the Victorian Inquiry recognizes that the *Independent Contractors Act* and the sham contracting provisions represent Australia's substantial compliance with the 2006 ILO Recommendation.

e) believes that the ILO Recommendation and Convention relating to labour hire continue to stand as the defining ILO standards for labour hire and should be the guiding principles for the Victorian Inquiry's consideration of labour hire.

f) submits that the Victorian Inquiry should not only drop, but also reject, discussion and consideration of 'dependent' contracting as an erroneous concept that is unhelpful for quality public policy consideration.

g) recommends to this 2015 Inquiry that the approach of the Maxwell OHS review set the standard for this Inquiry. That is, that the various forms of work engagement -permanent, temporary, casual, labour hire, independent contracting and so on be considered on their merits, that each be considered legitimate and worthwhile and that none be demonized and considered degrading or harmful.

h) recommends that the Victorian Inquiry should take note of the UK experience and consider self-employment (insecure work) as a positive with potential for a better society.

i) submits that self-employment (as insecure work) does need regulatory assistance and coverage. We do not support an unregulated environment. However the evidence is that regulations are extensive, generally cover the areas required and that improvements to the regulation environment are occurring.

j) recommends to the Inquiry that it discuss this issue with the SBC to see whether government policy could be implemented to require Victorian government entities, including local councils, to engage in dispute resolution with small businesses through the SBC.

k) submits that given that labour hire registration and regulation is already extensive, covering the field required by direct employers, ICA cannot see any reason for requiring additional labour hire regulation in Victoria.

l) cautions that sometimes an allegation of 'exploitation of vulnerable' workers can be done for other purposes and can in fact be a fabrication. That is, some parties conduct a sham and a scam of their own. ICA asks the Victorian Inquiry to be alert to the strong possibility that in the course of its investigations scammers may attempt to pervert the truth.