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Submission to Senate Inquiry
Independent Contractors Bill
July 2006

Introduction

Independent Contractors of Australia (ICA) is a strong and public supporter of the proposal to introduce an Independent Contractors Act.

The Act is needed to ensure that independent contractors are delivered the rights, protections and obligations that are due to them and owed by them under commercial law and regulation. Independent contractors are entitled to have their status respected and protected. It is not appropriate for independent contractors to be treated as employees or declared to be employees for the purposes of employment or industrial relations law. To be so declared is to deny independent contractors their very status as self-employed persons and to deny their right to be their own boss.

The International Labour Organisation (ILO) endorsed this principle when setting a new international labour standard with its June 2006 Recommendation on 'The employment relationship'.

The Independent Contractors Bill largely achieves the objectives established under the ILO Recommendation, except where the Bill excludes certain types of independent contractors.

ICA supports the Bill with appropriate amendments.

This submission:

- Provides ICA's understanding of the Bill.
- Gives some detail on the ILO Recommendation.
- Compares the Bill with the ILO Recommendation, highlighting consistencies and inconsistencies between the two.
- Proposes a series of amendments to enhance the achievement of the Bill's objectives.

Summary of recommended amendments

In relation to the Independent Contractors Bill:

a) Delete Clause 7(2).
b) If Clause 7(2) is retained,
   - delete Clause 7(2) (c)

   and
   - amend Clause 35(4) to enable owner-drivers in Victoria and NSW to access (4)(a) [opt-in agreement] (and/or)
   - insert a two-year sunset clause
c) Delete Clause 35 (5)
d) Extend Clause 27 to all independent contractors.

In relation to the WRA (Independent Contractors) Amendment Bill:

e) Delete Clause 904 (3) (c)

Clause 7(2):
Removes outworkers and Victorian and NSW owner-drivers from the protections of the Independent Contractors Bill.

Clause 7(2)(c)
Gives power under regulations to remove any other sector of independent contractors from the protections of the Independent Contractors Bill.

Clause 35(4)
Is a transition clause enabling independent contractors to 'opt-in' to the Independent Contractors Act in the three-year transition period.

Clause 35(5)
Enables regulations to override the opt-in clause.

Clause 27
Provides a small-claims process for clothing outworkers.

Clause 904 (3) (c)
Enables unions to conduct a sham contractor prosecution.

Contents

1. ICA's understanding of the Bill and our response

1A. Definition

The Bill recognizes and accepts the status of independent contractors as individuals who work through the commercial contract. This applies to individuals working

- on their own account (or)
- through a partnership (or)
- through a corporate structure where the individual personally performs the work.

The identification of a commercial contract is that which applies under common law.
[ICA agrees with this approach.]

1B. Constitutional hook

For the Bill to apply, one party to the commercial contract must be either

- A corporation (or)
- The Commonwealth or a Territory (or)
- Resident or registered as a business in a Territory.

[ICA agrees that this provides a wide ambit for the Bill. It is likely that most independent contractors would normally come within the reach of the Bill at some stage during a working year, even if not for all of a year.]

1C. Overriding State laws

The principal effect of the Bill is to nullify State laws that treat independent contractors as employees.
[ICA strongly agrees with this effect.]

1D. Does not override some State employment laws

The Bill does not override State clothing outworker laws or NSW and Victorian owner-driver laws. These State laws treat specified independent contractors as employees.
[ICA strongly disagrees with this approach. There is no justifiable public policy reason for this position. It breaches the new ILO labour standard. It undermines the integrity of the Bill.]

1E. Regulations to not override state employment laws

The Bill enables regulations to declare that other state employment laws will be exempt from the legislation.

[ICA strongly disagrees with this approach. If other State laws are to be removed from the provisions of the Independent Contractors Act, this should only occur through legislative change by Federal Parliament.]

1F. Unfair contracts identification

The Bill establishes a Federal Unfair Contracts jurisdiction which encourages processes of mediation. A court is required to consider:

- The relative bargaining strengths of the parties.
- Whether undue influence, pressure or unfair tactics were applied.
- Whether remuneration was less than an employee would receive for similar work based on an industry standard.

[ICA agrees with the approach, but with qualification. There is some concern about whether comparison with 'similar employee remuneration' should apply. However, under a common-law test to determine if independent contractor status exists, the courts normally would consider comparative remuneration as part of the indicator of 'intent'. Within this context, remuneration consideration for the purposes of unfair contract determination is probably consistent with common law.]

1G. Fixing unfair contracts

A Court is only empowered to change or nullify a contract or part of a contract to the extent of the unfairness identified by the Court.

[ICA strongly agrees with this.]

1H. Sham contracts

Amendments to the Workplace Relations legislation create a civil offence of engaging in a sham contract.

[ICA strongly agrees, but with a strong qualification.]

The Bill enables prosecution to be undertaken by:

- a workplace inspector;
- an affected individual; or
- a union.

[ICA strongly objects to unions being able to undertake prosecution. An allegation of a sham contract is akin to an allegation of a form of fraud. It is a serious allegation that can damage reputations. Given the gravity of such an allegation, the power to undertake prosecution should reside exclusively with an appropriate, independent government body. If parties to contracts and/or their representatives have the power to prosecute, they can readily use that power for malicious purposes or even for commercial blackmail. This would undermine the integrity of the sham contract protections.]

It is assumed (but not specified in the Bill) that for sham contract litigation to occur, it would first be necessary to establish at law that a contract in question was in fact an employment contract and not a commercial contract.

[ICA would like to see the relevant clauses clarified to ensure that a prosecution for a sham contract could not be conducted until the Courts had established that the contract under consideration was in fact an employment contract.]

1I. Transition

The Bill enables the Federal Unfair Contracts provisions to apply immediately upon proclamation.

[ICA strongly agrees with this]

For all other matters, the Bill allows for a three-year transition period in which State employment laws would not be overridden

- Until the three years had expired (or)
- If parties to a contract signed an 'opt-in' agreement.

[ICA agrees with this. If parties have existing arrangements structured around State employment laws, even if those laws are bad policy, it is reasonable to allow for a transition period. It is also appropriate that if the parties to a contract wish to avail themselves of the Bill's protection from State employment laws, they should be able to agree to do this.]

1J. Victorian and NSW owner-drivers not covered

Victorian and NSW owner-drivers are prevented from accessing the protections of the Bill from State employment laws.

[ICA strongly objects to the denial of the protections of the Bill for Victorian and NSW owner-drivers.] A full discussion is provided later in this submission. However, if the exclusion is to be maintained, ICA requests one or both of the following options:

- That the 'opt-in' provisions be made available to Victorian and NSW owner-drivers. This would enable owner-drivers to directly express their views about whether or not they benefited from the Victorian or NSW laws.
- That the exclusions from the protections of the Federal Bill have a two-year sunset clause. This would give players in the industry time to adjust.

1K. Clothing outworkers

Clothing outworkers are also prevented from accessing the protections of the Bill from State employment laws.

[ICA objects to this. State outworker laws generally have provisions that not only impose highly detailed price-fixing on commercial contracts but also impose commercial obligations on parties where the parties do not have a direct contract. These provisions breach the ILO labour standards in its June 2006 Recommendation. They destroy the integrity of contracts and create huge uncertainty in commercial transactions. ICA contends that these State laws have severely damaged the clothing industry and have cost significant numbers of jobs of the most vulnerable people in our community. These laws should be overridden.]

The Bill applies specific provisions for outworkers which require that a clothing outworker not be paid less than that which an employee would have earned under the Fair Pay and Conditions Standard.

[ICA always has difficulty with legislation establishing rates of pay under commercial contracts, however the political sensitivity of the issue is understood. To the extent that this provision would probably have the effect of establishing a minimum base pay rate, this is probably reasonable and would reflect a common-law consideration of contract status in any event.]

The Bill restricts clothing outworker commercial obligations to parties in direct contracts. That is, it prevents commercial obligations being imposed where no contract exists.

[ICA strongly supports this provision. It is likely to assist commercial certainty in the clothing industry where State outworker laws do not apply, thus creating opportunities for industry and job growth. This provision should override State laws in this area.]

The Bill applies a small-claims process for clothing outworkers.

[ICA strongly supports this and recommends the extension of this provision to all independent contractors. Most commercial disputes for independent contractors involve non-payment of comparatively small sums. The disputed amounts are so small as not to warrant litigation. This creates many opportunities for exploitation. Clothing outworkers have suffered in this regard. Simple, small-claims processes can secure payment and significantly restrict the opportunities for exploitation.]

Areas not covered by the Bill

1L. Small-claims

The unfair contracts provisions enable consideration of an unfair contract to occur. However, for independent contractors, most disputes under commercial contracts would occur even where the contract was considered fair. Most disputes would ordinarily relate to non-payment for services rendered or services not rendered when payment had been made. Quick resolution of disputes in such circumstances enhances confidence in commercial contract transactions.

Most States have small-claims dispute mechanisms available for independent contractors under the trader-to-trader provisions of their Fair Trading Acts. These tend to reflect consumer small-claims processes in that legal representation is prohibited for disputes below $10,000, there is minimal legalism in the process, and decisions cannot be appealed.

ICA recommends that parallel small-claims processes be made available in the Federal Magistrates jurisdiction in addition to State jurisdictions.

1M. Intent

To assist parties in clarifying that they have a commercial contract arrangement in relation to independent contracting, ICA recommends the annexing to the Bill of a 'statement of intent'. Parties could choose to sign such a statement that would have the force of creating a presumption of being in a commercial contract arrangement—albeit, one which would not override common law.

2. International Labour Standards
Does the Bill conform with the most recent International Labour Organisation Recommendation of June 2006?

The Independent Contractors Act should be considered within the context of the new international labour instrument created by the International Labour Organisation in June 2006.

The principles of the Independent Contractors Act are in conformity with the new ILO standard. The detail of the Independent Contractors Bill, however, needs some changes to conform with the ILO Recommendation.

2A. Understanding the ILO Recommendation

Since 1996, the ILO has been debating the creation of an 'international instrument' which could effectively have enabled labour regulators around the globe to (a) declare a commercial contract to be an employment contract, and (b) declare independent contractors to be employees.

If such an outcome had occurred, it would have created international endorsement for the likes of the employment deeming provisions in the Queensland IR Act (Section 275) and other related aggressive IR actions taken against Australian independent contractors over recent years.

The ILO debate began in 1996, occurred again in 1998, had a committee of 'experts' report in 2000 and reached a major 'Conclusion' in 2003. This year's debate targeted the achievement of a 'Recommendation' to finalize the debate.

The 2003 ILO Conclusion contained a statement that independent contractors are legitimately outside employment regulations. This was an historic occurrence in the ILO debate. A key part of the Conclusion read:

> *Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*

In 2005, the ILO released a major discussion paper on the issue that displayed a significant shift in the thinking of the ILO. Primarily, the legitimacy of independent contractors was accepted and the definitional differences between employees and independent contractors were found to be clear and consistent across the globe.

In June 2006, the ILO passed an historic Recommendation. The key clause is clause 8 which reads as follows:

> *National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.*

All other clauses in the Recommendation are predicated on this statement.

Other important clauses read:

> *4. National policy should at least include measures to:*
> *b) combat disguised employment relationships ... 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…'*
>
> *9. [T]he determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker.*
>
> *14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.*

2B. The ILO and the IC Bill

The Independent Contractors Bill is consistent with and reflects the ILO Recommendation. The Bill:

1) Recognizes that the commercial contract—and hence independent contractors—should not be regulated under employment law. The Bill does not and should not go to issues of employment protection as they are handled under other Federal and State legislation.
2) Applies a highly robust process for combating disguised employment relationships. The reference to 'sham' in the Bill and 'disguised' in the ILO Recommendation have the same effect. The identification of disguised/sham relationships in the Recommendation and the Bill are the same.
3) The determination of the existence of independent contractor status through common law under the Bill is consistent with the Recommendation. Common law primarily interests itself in the facts. Under common law, how a relationship is described is only relevant to the extent of being an indicator of intent and the extent to which the description matches the facts.
4) National law and practice in Australia requires that disputes over the existence of an employment/independent contractor relationship are handled within the courts. The Bill maintains this custom and practice and is consistent with the Recommendation.

However, the Bill is not consistent with the ILO Recommendation in that it excludes some independent contractors (outworkers, and Victorian and NSW owner-drivers). The Recommendation requires special consideration for vulnerable workers to have clarity in their contractual relationships, but it does not allow for lack of clarity and confusion to be maintained.

By excluding Victorian and NSW owner-drivers and outworkers from the protection afforded under the Bill—that is, protection from the States' industrial relations deeming provisions—the Bill effectively endorses and maintains both a lack of clarity and a sense of confusion. In this respect the Bill breaches the ILO Recommendation.

2C. Dependent Contractor and Triangular Relationship not valid concepts

The ILO Recommendation is also significant for what it does not say. This is relevant for the Independent Contractors Bill.

Absent from the ILO Recommendation and 2005 discussion paper are all references to the terms '*dependent contractor*' and '*triangular relationships*'. Both of these terms have long histories going back to 1996. They formed the principal, intellectual concepts upon which attacks against independent contractors were mounted.

For example:

> The term 'dependent contractor' has long been used in Australia and internationally to argue that even if a person was an independent contractor, if they had only one client, then they were 'dependent'. Hence, so the argument went, they should be treated as if they were employees. This was the academic argument that justified Section 275 in the Queensland IR Act, that underpins the unfair contracts provisions and owner-driver provisions in NSW, and was used in the attempts to outlaw independent contractors in Victoria, SA and NSW. Its removal from the Recommendation is a recognition that the idea of 'dependent contractor' is not acceptable in industrial relations or other contexts.

- The term the 'problem of the triangular relationship' was a key term used in a backdoor attempt to redefine independent contractors as employees. It's a concept that goes much further, however, as it effectively outlaws franchising, labour hire and contracting-out by applying commercial obligations where no contract exists. The term has been used constantly in Australia to attack the labour hire industry—particularly in NSW.

  There would be obvious, massive distortions to commercial activity globally, if this concept had been accepted by the ILO. The complete removal of the term 'triangular relationship' from the text of the ILO Recommendation is highly significant. Its removal from the Recommendation is a recognition that the idea of 'triangular relationships' is not acceptable in industrial relations or other contexts.

  The Recommendation takes an appropriate and practical approach, however, by recognizing that where multiple contracts occur in the organization of work, that an individual employee's status may become confused. The Recommendation most appropriately takes steps to require clarity in identifying employment status in such situations.

The Independent Contractors Bill is consistent with the ILO Recommendation in that it does not attempt to introduce terms such as 'dependent contractor' or 'triangular relationship'. In fact, the outworker provision of the Bill ensures that 'triangular relationship' concepts are removed by ensuring that commercial obligations are tied to the existence of contracts.

3. The Owner-Driver Issue

ICA objects to preventing NSW and Victorian owner-drivers accessing the protections otherwise available under the Bill that would shield them from State laws that treat owner-drivers as employees.

Some transport lobby organizations in NSW claim that treating owner-drivers as employees is necessary. However, the justification for such treatment fails once the claims are analyzed.

3A. Some basic facts

NSW: Chapter 6 (Public Vehicles and Carriers) of the *NSW Industrial Relations Act* 1996, turns a commercial carriage contract into an award-type document. Independent contractor owner-drivers are effectively turned into industrial relations-controlled employees by virtue of Chapter 6.

This is unique. It does not apply in any other State, nor does it occur under Federal law.

In NSW:

- There are at least 50,000 owner-drivers.
- Under the NSW IRC, there are more than 170 enterprise-specific arrangements and 25 contract determinations relating to owner-drivers. Between them, these control contract prices and arrangements for areas such as couriers, concrete movers, quarries, waterfront, waste collection, breweries, taxis, car carriers and general freight.

3B. NSW IR capturing owner-drivers

The provisions of Chapter 6 (Section 106) apply specifically to owner-drivers. Unfair contract provisions apply to all independent contractors. The measures under the NSW IR Act mean that owner-drivers' commercial contracts are subject to industrial relations control. In particular, the Act:

- Governs payment of remuneration.
- Prohibits cashing-in of accumulated sick leave.
- Establishes industrial committees.
- Allows entry and inspection of company commercial records by unions.
- Gives unions rights over all contract carriers, whether carriers are union members or not.

The Act defines:

- Employment as engagement under a contract of bailment or carriage.
- A principal contractor as an employer.
- A contract carrier as an employee.
- Payments under a contract of carriage as remuneration of an employee.
- A contract as an award.
- An association of contract carriers as a union.

This means that, in NSW, owner-drivers are subject to industrial relations control as if they were employees. As a result:

- Unions can create industry-wide 'disputes'.
- Unions have exclusive control over contract negotiations, resulting in IRC-determined rates and arrangements being imposed on every owner-driver.
- Business goodwill is controlled by the Contract of Carriage Tribunal that can order 'compensation' for goodwill.
- The 'unfair contracts' jurisdiction enables the IRC retrospectively to change commercial contracts in a costs jurisdiction.

The Independent Contractors Bill should override these provisions in NSW, thereby bringing NSW owner-drivers within the same regulatory regimes that exist for owner-driver, independent contractors across the nation.

3C. The position of NSW unions

The Transport Workers Unions says it has significant numbers of owner-drivers as members.

The TWU argues that:

- Owner-drivers are 'dependent' because most of them work for just one client.
- Minimum contract prices should be set by industrial tribunals.
- 'Unsafe' pay rates contribute to road accidents.
- Unions should have the exclusive right to 'represent' all contract drivers.
- All contract drivers should be required to operate on standard contracts as set by industrial tribunals.
- Reinstatement of terminated contracts should occur through industrial tribunals.
- Contract driver 'goodwill' should be controlled by tribunals.
- The NSW arrangements deliver 'logistical and economic certainty' to transport operators and 'settled arrangements' to the sector.

The unions argue that '...there is a prevalence of owner-drivers relying on the current guarantee of at least cost recovery...' and that the industrial relations laws save owner-drivers from 'destructive competition'.

3D. The policy position of Independent Contractors of Australia

ICA believes that independent contractors are businesses and should not be subject to the control of industrial relations law, systems or institutions. Independent contractors, as with all businesses, are subject to commercial law—including the *Trade Practices Act* and Fair Trading Acts of each State. Business-type regulation applies responsibilities but also affords protections.

Being 'a business' has the advantage that profit can be made and the disadvantage that risk exists that can lead to losses. By comparison, employees are 'protected' from business-type risk but lose the advantages of business-type profit. Normally, laws ensure a clear distinction between the two because to confuse or mix the two damages business and free economic activity. However, NSW industrial relations laws for owner-drivers have created confusion. This confusion should be removed.

The Independent Contractors Bill should overcome this confusion. But where individuals have undertaken loans for their owner-driver business or structured their

businesses on the basis of the current NSW IR laws, there is a risk that overriding NSW's IR laws immediately could lead to some individuals suffering losses. There may be a case for a transition period or other compensating arrangements for such individuals.

The unions discuss a number of issues that they believe need to be addressed for owner-drivers.

3E. Dependency: Unions argue that what distinguishes owner-drivers is that most work for one client and, as such, are 'dependent contractors'. They say that this justifies taking all owner-drivers into industrial relations regulation.

Discussion: The International Labour Organisation has dropped the concept of a 'dependent contractor'. In their latest discussion paper the ILO refers to 'independent workers' as being self-employed and 'dependent workers' as being employees. This reflects the content of the latest 'Conclusion' on the subject by the ILO (2003) and the new international labour standard created by the ILO Recommendation of June 2006. Internationally, it is recognized that it is not appropriate to regulate independent contractors under industrial regulations. Working for one client as an independent contractor is a commercial situation and does not, of itself, create legal dependency.

3F. Exclusivity: Unions allege that some transport companies insert exclusivity clauses into contracts which prevent owner-drivers offering their services to a wider range of clients.

Discussion: Prevention of the right to offer services generally is a breach of a key independent contractor indicator. Affected owner-drivers, in fact, may well be employees and, if so, should be subject to industrial relations laws. If owner-drivers are, in fact, still independent contractors, the exclusivity clauses may be unconscionable and illegal under common law and the *Trade Practices Act (TPA)*. Making compulsory exclusivity clauses illegal or restricted under owner-driver contracts may assist the policy debate.

3G. Advertising: Unions claim that some transport companies require owner-drivers to paint their vehicles in company livery, thereby achieving cheap advertising. This effectively creates a commercial prohibition on owner-drivers offering their services widely and replicates the exclusivity problem (above).

Discussion: Requirements to paint vehicles as part of the contract could well constitute third-line forcing under the *TPA* and are potentially illegal.

3H. Goodwill: The NSW Contract of Carriage Tribunal potentially entrenches the price of goodwill in some owner-driver contracts. Apparently, this provision has rarely been used and is complex. It appears, however, that some entrants to the industry may have bought into the sector and paid goodwill in the belief that the goodwill was secure at law.

Discussion: It is extraordinary that any laws should lock in a goodwill price. This completely distorts business and free market activity and destroys a key indicator of being an independent contractor—namely, 'risk'. This should/would ordinarily be a

breach of free market laws. The removal of this 'risk' also potentially unsettles the business tax status of NSW owner-drivers. Nonetheless, the NSW laws appear to have created an expectation that goodwill is a form of property right for those currently in the industry. In effect, to remove that property right (if it exists) could amount to a form of State theft. If this situation exists, there could be a justification for accommodating people who are currently in this position. Investigation would need to occur as to how many persons believe they could be affected and in what circumstances. However, the laws should be overridden to prevent similar outcomes arising in the future.

3I. Safety issues: Unions and some labour academics allege that there is such a thing as an 'unsafe pay rate'. That is, they allege that if owner-driver remuneration is not controlled, drivers will accept remuneration that forces them to break road laws to meet delivery deadlines.

Discussion: It is dangerous to run the argument that because an owner-driver accepts a particular pay rate that, if they break the law, another party is responsible. Owner-drivers must be responsible for compliance with road laws. Lending support to transference of responsibility encourages breaking the law and contributes to unsafe roads. Road safety for owner-drivers, in fact for all commercial drivers, should be addressed exclusively through strong road laws and codes of conduct and enforcement under Occupational Health and Safety (OHS) laws. In this respect, OHS laws for drivers could make it an offence for a driver to accept a contract, or a person to offer a contract, where the terms of the contract required the driver to break road laws. Prices would then find levels consistent with the requirement to comply with road and OHS laws.

3J. Minimum rates: NSW unions believe that the NSW IR system's delivery of minimum contract rates serves the industry well.

Discussion: Some industry analysts observe, however, that the minimums set by the various determinations for contractors by the NSW IRC have provided a level of perceived comfort. Yet the result in practice is that the minimums have become maximums. That is, rates do not vary above the minimums. Contractors perceive that they cannot negotiate because of the determinations. As the determinations have become the maximum, this has propped up the lower end of the industry, although at the expense of the higher achievers. Earnings across contractors have flattened as a result.

The determinations also restrict competition, as they pigeon-hole couriers, taxi truck, general freight movers and so on. The determinations do not take account of the movements of the market and the differing products offered. This is to the detriment of the industry as a whole. The determinations target a social and moral idea, but distort the free operation of the transport market, thus damaging all players—including owner-drivers.

3K. Delays: Unions claim that it is common for owner-drivers to be fined by principal contractors for being late, but that when a driver is delayed by the actions of a principal contractor and/or client, the driver is not compensated accordingly.

Discussion: It may be that fining owner-drivers for lateness could constitute unconscionable conduct. Further, where such fines effectively require a driver to break road laws, such fines could constitute a breach of OHS laws as discussed under safety issues (above).

3L. NSW in comparison with other States

NSW has had industrial relations laws covering owner-drivers for a considerable period of time. The other States do not have these laws, although some are moving to replicate NSW-type provisions. These should be overridden by the Independent Contractors Act.

An Example: The Victorian Owner-Drivers Act 2005

Victoria has introduced laws covering owner-drivers that:

- Enable a tribunal to control and fix the prices of commercial contracts in the transport sector. They can do this retrospectively.
- Enable the same tribunal to apply a decision made about one commercial contract to a 'class of contracts'. This facilitates legalized price collusion.

This effectively creates industrial relations-type law by stealth, under the guise of commercial law. This has only been possible because of a clause in the Act which removes the Act from the ambit of the *Trade Practices Act*.

Because this law has not been in place long enough to have significant commercial application, it should be overridden by the Independent Contractors Bill to prevent distortion of the free market in the Victorian transport sector.

3M. Contract compliance and protection

Under the commercial contract, the law ensures protections by:

- Requiring contracts to be *bona fide*.
- Preventing unconscionable conduct.
- Requiring parties to comply with the terms of the *bona fide* contract to which they have freely entered.

Parties can access the commercial courts for these protections or make use of the *TPA*. For independent contractors, however, these processes can be expensive and exceed the cost of the amount under dispute.

Further, it has become common for industry-specific codes to be developed under State and Federal commercial law that address behaviours which damage contract integrity and the effectiveness of free markets. Such processes have been developed, for example, in the motor trades, real estate and financial sectors. The processes generally have, for example, required contract compliance to ensure:

- Plain English expression in contracts.
- Rates and prices under a contract are properly and clearly explained.
- Cooling-off periods.

The owner-driver issues raised by unions could possibly be addressed by following these examples, tailoring them to suit the transport sector. They could, for example, include:

- A stipulation that if goodwill is to be guaranteed by the principal contractor, then this should be incorporated in a contract at the time of entering it.
- A requirement that if a principal contractor is to withhold money for insurance or other services, that proof of the service must be supplied to the owner-driver and the owner-driver must have the option of obtaining the service from another source. This is a positive provision of the 2005 Victorian owner-drivers legislation mentioned above.
- Information on the commercial realities of running an owner-driver, small business must be given to owner-drivers by principal contractors at the time of engagement. This is also a positive aspect of the Victorian owner-driver legislation.
- Outlawing contract terms that require an owner-driver to paint his or her vehicle with advertising logos of the principal contractor as part of the engagement. Such advertising could be allowed, for example, on an offer and acceptance of contract basis, for a separate fee.
- Clear terms be expressed covering contract termination and agreed at the time of entering a contract. This would ensure that owner-drivers could adequately assess their long-term commercial risk when entering a contract. Termination disputes would then be settled exclusively according to the terms of the agreed contract.

4. Why the Bill is necessary

For over a decade, State governments have conducted aggressive attacks against the right of Australians to be their own boss—that is, to be self-employed, to be an independent contractor. The capacity to be your own boss is a human rights issue. Government should secure and respect this right. Government should not deny this right.

The principal offenders are New South Wales and Queensland through their legislative provisions which declare independent contractors to be employees for the purposes of industrial relations laws. The ACT has a Bill pending that would have this effect. Victoria and South Australia attempted to head in this direction but both States dropped their attempts after failing to win parliamentary and community support. So far, Western Australia, Tasmania and the Northern Territory have respected the status of independent contractors.

Why declaring independent contractors to be employees is bad

It is universally accepted that the defining point of being an independent contractor occurs when an individual earns his or her living through the commercial contract instead of the employment contract. The difference between the two forms of contract is clearly identified under the common-law process in Australia. There is no confusion on this point.

Whether an employment or a commercial contract exists when transactions occur has important public policy implications that cut to the very core of how an economy functions.

- Commercial law and associated regulations have as their central objective the prevention of collusive activity that controls markets and creates price manipulation.
- Employment law and associated regulations have as their central objective the facilitation of collusive activity in a defined area that enables price manipulation to occur (wages).

The two forms of regulation operate in direct opposition to one another.

In order to declare an independent contractor to be an employee, legislatures must by necessity declare or treat a commercial contract as an employment contract and subject it to employment-type regulation. It is illogical and nonsensical, but it means that:

- Commercial law and regulation has to be corrupted to enable collusion and price-fixing to be applied to a commercial contract.

This constitutes a formidable assault upon the very fabric of economic life in a modern free economy. It attacks the right of individuals to be their own boss and it threatens the economic stability and wealth of every Australian. But it has been done (or attempted) by the States by stealth. The States' offensive has produced the following outcomes:

- The Victorian and NSW Governments have effectively destroyed the commercial functioning of a struggling domestic clothing industry.

- The NSW Government has imposed price controls on the transport sector that have facilitated collusion among a few major players which, in turn, has limited the ability of small players to compete.
- The Victorian Government has established transport legislation that will create the circumstances for price-fixing and collusion in road transport.
- The NSW Government has an unfair contracts regime that enables the industrial relations system to retrospectively re-price and re-write the terms of almost any commercial contract in the State and denies rights of appeal in the process.
- The Queensland Government has industrial relations employment 'deeming' laws which directly deny self-employment status to persons who declare their desire to be self-employed. The laws have been condemned by one President of the Queensland IRC as 'illogical'. The IRC was required by these 'deeming' laws to declare a corporation to be an employee. This is Alice in Wonderland law.

This stealth-like destruction of the right of Australians to be their own boss and the consequent damage to the Australian economy is why the Independent Contractors Act is needed.

If properly constituted, the Act will:
- Restore the right of Australians to be their own boss.
- Protect the economy from the insidious development of price-fixing and collusion.

If State governments had, over the last decade, respected the status of independent contractors and the commercial contract, the Independent Contractors Act would never have been necessary. The actions of some States have forced the Commonwealth to protect the right of Australians to be their own boss and to protect the economy from attacks upon the integrity of commercial transactions.

The passage of a well-constituted Independent Contractors Act will lead to increased
- confidence in commercial transactions;
- legal capacity to be self-employed;
- economic activity; and
- work, particularly for the most vulnerable in our community.

It is a great shame that the Bill has prevented outworkers and NSW and Victorian owner-drivers from being offered the protections to which they should be entitled in the face of these flawed State laws. In this respect the Bill is compromised.

5. How many independent contractors? How many are affected by the Bill?

There is some debate over how many independent contractors there are in Australia. The Explanatory Memorandum to the Independent Contractors Bill provides a very good discussion of the debate. In particular, it compares the analysis of Independent Contractors of Australia (which estimates the figure at 1.9 million) with the Productivity Commission's analysis (which suggests a figure of 800,000). Both figures are drawn from the same ABS data. The difference relates to definitions. The Productivity Commission argues that owner-managers who employ others should not be defined as independent contractors. ICA includes these people in its definition.

ICA takes the larger figure for several reasons:

- In ICA's experience, self-employed people who employ others, particularly in small business, see themselves in the independent contractor category.
- People who are 'employer managers' in larger businesses are usually employees themselves and categorized as such.
- If the Productivity Commission's figure is used, this would mean that there are categories of people who are employees, others who are independent contractors and others still who are of unknown categorization. This is unhelpful and confusing for public policy purposes.

The main reason for ICA taking the larger figure relates to the difference between the commercial contract and the employment contract. For public policy purposes the definition for who is an independent contractor is tied to the existence of a commercial contract. This is used internationally and by the Independent Contractors Bill. Consequently, to identify numbers it is necessary to identify the commercial contract. Under the ABS figures, the number of people who use a commercial contract in their working transactions is clearly the higher figure of 1.9 million. The Productivity Commission analysis only focuses on a subset of people who use the commercial contract.

The Independent Contractors Bill will not have constitutional reach to transactions between:

- Individuals/partnerships and individuals;
- Partnerships and partnerships;
- Individuals/partnerships and trusts;
- Individuals/partnerships and State government (non-corporate) bodies.

The constitutional limitation is likely to exclude many independent contractor transactions in the farming sector because many rural businesses are constituted as trusts. State governments mostly use employees and so the non-application in this area is considered marginal—except perhaps in the IT sector.

However, it's highly probable that most individuals/partnerships undertaking work in the foregoing categories will undertake some work with corporations at some time in any given period. It is for this reason that ICA considers the IC Act will touch the bulk of independent contractors, if not all of them, in some way. It will set standards that will apply nationally.

6. About Independent Contractors of Australia

Independent Contractors of Australia is an association that was formed to protect the rights of independent contractors. Independent contractors are small business people. ICA operates through its Website at www.contractworld.com.au. Full details of ICA's incorporation and operation are available on the Website.

With the dramatic changes in the nature of work and workforce engagement systems over the last 20 years or more, it is important that government regulatory regimes understand and respond to the new environments in positive and constructive ways. ICA was formed to assist that understanding.

Amongst its activities, ICA has made submissions to:

- The Personal Services Income tax legislation reviews;
- The Cole Commission Inquiry into the construction industry 2002;
- The Dawson Review of the *Trade Practices Act 2002*;
- The South Australian Review of Workers' Compensation 2002;
- The South Australian Review of Industrial Relations 2002;
- The Senate Inquiry into Insolvency laws 2003;
- The Victorian Occupational Health and Safety Inquiry 2003;
- The Tasmanian Inquiry into Industrial Relations, 2004;
- The Maxwell Report Victorian OHS 2004;
- The Victorian Owner Drivers Inquiry (2 submissions) 2004;
- The NSW Review into OHS August 2005;
- Victorian Small Business Inquiry 2005.

ICA is a member of the Australian Taxation Office Home-Based Businesses community advisory committee.

In addition, ICA has been active on independent contractor issues at the international level. ICA was appointed an observer to, and attended, the International Labour Organisation's

- 2003 June debate on the 'Scope of Employment'.
- 2006 June debate on the 'Employment Relationship' which culminated in a new ILO Recommendation.

There is a consistent logic applied to all of ICA's representations, namely that:

- Employees are individuals who work through the employment contract.
- Independent contractors are persons who work through the commercial contract.

This distinction determines the parameters of public policy in relation to each, such that:

- Employees are appropriately regulated under employment law.
- Independent contractors are appropriately regulated under commercial law.

Because independent contractors are and should be regulated under commercial law, the public policy principles that apply are common to all commercial regulation.