

Independent Contractors of Australia

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Submission to the Royal Commission into the Building and Construction Industry

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Independent Contractors of Australia (ICA) welcomes the opportunity to respond to the Royal Commission's 11th discussion paper *Working Arrangements -Their Effect on Workers' Entitlements and Public Revenue*. The Commission's discussion paper is principally a summation of the arguments that have been made against independent contractors over the last 20 years-or-so and which allege that independent contracting amounts to bad public policy.

In this submission, ICA defends the legitimacy of independent contractors and the right of Australians to access non-employment arrangements. Further, ICA alleges that the assaults against independent contractors are conducted by institutions that have vested interests in stopping independent contracting.

The issues that the Royal Commission's discussion paper raises are mostly generic to the battle ground of independent contracting verses employment. The commercial building sector, however, has traditionally been the industry from where the greatest assaults against independent contractors have been mounted. This ICA submission will mostly focus on the generic issues but will offer opinions as to why the commercial building sector behaves as if it wishes to crush independent contractors.

This submission

- Discusses why independent contractors are under attack.
- Looks at and rejects the 'dependent' contractor argument.
- Rejects suggestions of confusion over independent contractor definitions.
- Rejects allegations that independent contractors systemically rot tax, workers' compensation schemes or other legislative arrangements.
- Responds to some specific questions in the Commission's discussion paper.

Addendums to this submission are taken from ICA's Web-site.

Independent Contractors of Australia (ICA)

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

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

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

ICA operates through its Web-site at www.contractworld.com.au.

ICA is truly a 'virtual' organization. Through its Web-site;

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

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

A brief history: With 28 per cent of the private sector workforce now not engaged as employees and with non-employees under such sustained attack for so long it is little wonder that an organisation such as ICA has come into existence. The spur for ICA's formation, however, was the Personal Services Income (PSI) tax debate of 2000-2001. It became clear with the early PSI proposals (the so called '80% rule') that independent contractors were to be denied their legitimate entitlement to business style tax status and treatment. ICA emerged from the ensuing grass-roots political eruption against the early PSI proposals and became an important network for focusing on constructive tax system outcomes.

Content

1. What is independent contracting?
2. The Dependent Contractor argument and Independent Employees.
3. Who mount the attacks against independent contractors and why?
4. Some practical issues. Discussing the facts.
5. Why the trend to independent contracting?
6. The commercial construction industry.
7. Responding to specific questions contained in the Commission's discussion paper.

Addendum

Attached with this submission are documents taken from ICA's web site.

1. Who is an independent contractor? ICA's laypersons 'legal' understanding.
2. Tax and independent contractors. A brief history.
3. Independent contractor or employee. Brief comment on leading legal test cases.
Stevens v Brodribb.
Sammartino v Mayne Nickless Express
Odcop P/L v BWIU
Hollis v Vabu (Crisis Couriers) Pty Ltd
4. Regulating Independent Contractors. ICA submission to Trade Practices Act Review.

1. What is independent contracting?

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

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

Independent contracting comprises both attitude and a set of behaviours.

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

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

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

Consequently it is not surprising that people without specialist knowledge of employment law can be confused. This is one of the reasons that ICA came into existence. ICA's Web-site seeks to create clarity on the definition of independent contracting by describing the major sub tests (there are approximately 21 of them) that the courts use for making their determinations. ICA describes the application of these sub-tests as the 'swinging pendulum' test. It suggests that people review their behaviour in light of each test and see which way the overall pendulum swings- towards employment or towards independent contracting. If a person wishes to be an independent contractor or use independent contractors, they must first ensure that the real-life conduct exhibited in their working arrangements points strongly to independent contracting.

And, of course, in the final analysis, that sort of assessment can and should only be conducted by independent courts. On the balance of evidence, an individual will be either

an independent contractor or an employee. A person is either independent in their thoughts and actions (independent contractor) or they are subject to potential control by another (that is, they are an employee).

2. The ‘Dependent Contractor’ argument and ‘independent employees’

The Commission’s discussion paper refers frequently to “dependent contractors.” ICA submits that ‘dependent contractor’ is a notion which at law and in reality has no meaning, is illegitimate, confuses rather than clarifies issues and is an artificial creation for the purpose of lending credence to attempts to pull independent contractors inside industrial relations legislation.

The dependent contractor argument was;

- Used as the justification for Queensland’s Industrial Relations Act, section 275.
- Used as the justification for similar legislation in Victoria and New South Wales.
- The basis for arguing that ILO conventions extend the definition of employee in the Federal industrial relations act. (The legal arguments were firmly addressed through the federal courts and rejected.)
- Used in modified form to argue to bring clothing outworkers working as independent contractors into the New South Wales industrial relations act.

ICA submits that the dependent contractor argument is being used in submissions to the Royal Commission as part of an attempt to create an environment to block the use of independent contractors in the commercial construction sector. Compare this with the housing construction sector—a sector that is almost totally structured around independent contracting, where systemic corruption and stand-over tactics do not appear to be in evidence and where productivity levels appear to be much higher than those found in commercial construction. It is probable that the use of independent contracting in the housing sector is a substantial reason for the higher productivity and near non-existent corruption in comparison to the commercial construction sector.

Wherever Australian-based dependent contractor arguments arise the intellectual source most often quoted is that of HW Arthurs, a Canadian academic and his article published in *The University of Toronto Law Journal* in 1965 titled “The Dependent Contractor: A study of the legal problems of countervailing power.” Arthurs described “dependent contractors” as follows, “*they are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganised market conditions..... They are dependent economically, although legally contractors..... They are prisoners of the regime of competition.*” In demonstrating his point, Arthurs case-studied disputes around the 1950s between newspaper vendors at odds with their newspaper suppliers and fishermen working off the coast of Canada who, because of geographic considerations, could only sell their produce through one canning works. Arthurs reasoned that these “prisoners of competition” deserved the legislative protection of employment law to breach competition rules and collectively collude against their sole supplier or buyer.

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

The dependent contractor argument is fundamentally flawed. It ignores the economic and legal fact that an independent contractor has escaped the imprisonment of the employment contract and has found freedom in the regime of competition. In the Australian commercial construction sector the thug-like enforcement of the employment contract imprisons the sector in the anti-competitive corruption of employment law. This is one of the major problems afflicting the commercial construction sector and the dependent contractor argument is designed to seduce the Royal Commission into accepting the legitimacy of anti-competitive behaviour.

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

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

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

3. Who mount the attacks against independent contractors and why?

The Commission's discussion paper details the arguments against independent contractors and identifies individuals, organisations and institutions who mount those arguments. ICA believes that understanding the perspectives and motivations of the sources is critical to understanding why the anti-independent contractor arguments exist.

The arguments come from some of the most powerful and conservative Australian institutions that influence public policy. No doubt most of the positions against independent contractors are genuinely held by their proponents, although ICA submits that their arguments are mostly erroneous.

3.1 Labour academics. These are the people/institutions who have constructed the 'dependent contractor' argument. Labour academics should really be re-titled 'employment' academics, because they come from an intellectual heritage and subscribe to a paradigm in which the power inequality that is the legality and reality of the employment relationship is their entire reason for being. The idea that an individual person can have a legal and real-life relationship of equality with a business with whom he or she works is inconceivable to labour academics. From this paradigm, they quite naturally perceive independent contracting as some sort of public policy 'con' perpetrated by the powerful for the purposes of oppressing the weak.

3.2 Public Revenue Authorities. These include Federal tax agencies and State workers' compensation and payroll tax authorities. These authorities have a legitimate legislative obligation to collect public revenue and perceive independent contractors through their respective legislative prisms. Yet they suffer from an historical legislative problem in that their revenue collecting powers have by and large been legislative tied, or at least underpinned, by the existence of common-law employment. The rise of independent contractors has created a legislative challenge to these authorities and their historical response has been largely one of seeking to destroy independent contractors. This, however, corrupted the revenue-collection systems. Fortunately, this was recognised in the Federal area, and the new PAYG and PSI systems have careful legislative wordings and well-designed systems for removing the dependency on common-law employment. This problem of corruption of the revenue system has not yet been recognised or addressed by State payroll tax or workers' compensation authorities.

3.3 Employment Representative Organisations. These include unions and employer associations which both view independent contractors from the same historical and intellectual paradigm as labour academics. Both have an added incentive, to suppress independent contractors. From their point of view, independent contractors represent a threat to their legislatively privileged business positions. As independent contracting has grown, the relevance of employment regulation to the social and commercial fabric of Australia has diminished and it is natural for employer associations and unions to resist the trend. Unions wage war against independent

contractors aggressively and publicly. Employer associations suppress independent contracting by quietly discouraging its use by their business members. Both employer associations and unions, however, are having difficulty, given that independent contractors have become significant minorities in their membership bases.

3.4 Labour lawyers. These people earn their incomes through the dispute-management processes of employment law. The volumes of money at stake are immense. The rise of independent contractors operating outside employment law poses a serious threat to the number of employment disputes and therefore to employment lawyers' incomes. It is natural for labour lawyers to dispute the legitimacy of independent contractors and to discourage their use amongst their business clients.

3.5 Economic statisticians. The 'dependent contractor' argument has gained substantial apparent legitimacy on the back of adoption of the term by labour economic statisticians over the last 10 to 15 years. Some careers have been enhanced as a result. This means that any reassessment of the appropriateness of the use of the statistic has become difficult.

3.6 Employment structured companies. Employment law and regulation is all about the legitimisation of the managerial right of businesses to limit the freedom of natural persons. From the business perspective, employment regulation, for all its annoyances, delivers them subservient individuals. This enhances the firm's ability to seek hegemony over the market in which they are involved. The rise of independent contractors threatens this 'employment' dependent business paradigm. Independent contractors invite a deep penetration of competition and trade practices law to the inner workings of business. Every individual contractor is, conceptually at least, an external competitor to market share, and every independent contractor diminishes the potential pool of skilled persons from whom the 'employment' firm can select its 'controllable' workers. For the traditional firm, structured around employment independent contractors present an attitudinal threat. This business psyche is particularly evident in the Australian commercial construction industry, which explains why the war against independent contractors is waged so hard in the construction sector.

With the range, power, influence and institutional force of these understandably self-interested parties pushing against independent contractors, the huge increase in the incidence of independent contractors over the last few decades is surprising and indicates that some other, exceedingly powerfully social force is at play.

4. Some practical issues. Discussing the facts.

If the issues relating to independent contracting are to be properly understood, clarity on definitions is critical. Definitional clarity forces clarity of legislative intent. Independent contracting is simply the reverse of employment. Confusion has, however, been created in the minds of some because of an historically developed lazy use of the word 'employment'.

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

As a swing away from employment began to emerge, perhaps around the 1970s, this created challenges to the near-universal reach of these government-created regimes. The challenge increased as the percentage of employees decreased.

4.1 Workers compensation and payroll tax authorities responded by legislatively increasing the reach of their regimes through legislative amendments that described other forms of contracts, or specific professions, so that they were caught within the legislation. Foolishly, the term 'deemed employment' was adopted as a generic description of these broadened forms of legislation. The 'deeming' of employment, however, is a misnomer, because the legislation of the different States does not change the nature of the common-law non-employment contracts being described, they simply describe them as within the legislation. This is why, in the ground breaking *Odco v BWIU* case the High Court accepted that there was no common-law employment even though the arrangements fell within the Victorian Workers Compensation Act.

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

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

4.4 The Australian Tax Office (ATO) was challenged on two fronts with the shift to independent contracting, one affecting withholding payments (PAYE); the other impacting on individuals' entitlements to deductible items. Withholding was the greatest of worries and the ATO responded to the challenge by arguing that the Tax Act

legislative wording under PAYE (where if referred to “wholly or principally for labour”) extended the definition beyond common-law employment. On some ten occasions over ten years during the 1980s and 1990s, however, the High Court rejected this view, stating repeatedly that the withholding legislative powers under the Tax Act were restricted to common-law employment. After a decade of administratively trying to fix the tax collection issue through PPS, the entire system was reorganised in 2000 under PAYG. Now the withholding powers of the ATO are legislatively clear and robust and there is no attempt or need to ‘deem employment’. Rather, the contractual models that the government wants captured-, are individually and specifically described with the appropriate administrative withholding arrangements. These are all detailed within the encompassing PAYG system. The remaining issue of deductibility entitlement was resolved in 2001 under PSI, in as probably a satisfactory manner as could be expected.

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

Labour regulation under Australian industrial relations law derives its moral and legal justification from the implied inequality and suspension of rights contained in the modified master-and-servant contract that is employment. This concept of ‘employment’ continues to be the dominant managerial concept that is perceived to hold ‘the firm’ together.

Even though this definition of ‘employment’ has remained as the foundation of Australian industrial regimes, the rise of independent contractors, particularly in the 1990s, has lessened the influence of industrial relations law as a socially organising instrument. It is here that the attitudes of labour (employment) lawyers, unions and employer associations against independent contracting can be understood. These groups come from a 100 year tradition of ‘managing’ the inequality of the ‘rights suspension’ contract that is employment. They cannot comprehend that the commercial ‘contract *for services*’ that is the governing contract of independent contractors does not entail any ‘rights suspension’. In fact, the contract for services is a deliverer of rights, principally the right of the independent contractor to have control of his or her contract. This contract

comes under the regulating regimes of common law, and *The Trade Practices Act* and State Fair Trading Acts. [See accompanying ICA submission to Trade Practices Review]. But even if the attitudes can be understood, that does not mean that the attempts by these same groups to extend their reach beyond common-law ‘employment’ is justified or socially acceptable. Yet they have robustly and aggressively pursued their powers reach and sometimes with success.

- 4.5.1 In the early 1990s, industrial relations legislation across Australia adopted ‘unfair contracts’ legislation that extends the reach of industrial relations ‘contracts for services’. During the late 1990s, activist lawyers mounted arguments in the courts which suggested that obligations under International Labor Organisation treaties extended the definition of ‘employment’ under the Federal Industrial Relations Act beyond that of common law. The judicial debate spanned several cases, but the extension argument was ultimately and firmly rejected by the courts.
- 4.5.2 In 1999 Queensland introduced industrial relations legislation which, for the first time, could truly be called ‘deeming’ legislation. Section 275 of the Queensland *Industrial Relations Act* gives the Queensland Industrial Relations Commission the power to declare persons working under a ‘contract for services’ to be employees. The nature of this legislation is unprecedented because it accepts that a contract for equality exists (contract for services) but legislatively seeks to regulate it as if it were a contract of inequality (employment). In doing so, it strips independent contractors of rights they would otherwise have. The Queensland Industrial Relations Commission referred to section 275 as “a legislative provision which deems relationships to be that which they are not.” (ALHMWU and Bark Australia Pty Ltd)
- 4.5.3 Following the introduction of this Queensland legislation declaring contractual relationships to be that which they are not, New South Wales and Victoria both introduced legislation in 2000 modelled around the Queensland Act. The Victorian Bill failed to pass the Upper House and the New South Wales Bill was withdrawn. The Queensland model is floated in the Royal Commission’s discussion paper as a potential resolution to the ‘dependent’ contractor ‘problem’ but is an idea firmly reject by ICA.

It can be seen then that the alleged ‘confusion’ over the definition of “employee” (and in turn ‘independent contractor’) has been created by policy makers. To fix this created confusion the way forward is to do as has occurred with the Federal tax reforms and to accept that the definition of ‘employment’ is only that as described under common-law, and that if other contractual types need to be included, then embrace those. Embracing contractual types other than employment, however, needs to be done with a firm eye on the specific objectives of each policy.

Within this context, ICA rejects suggestions that a ‘common universal’ definition of employment is needed because one already exists, namely, that supplied by common law.

To try to create some other definition inevitably creates confusion and has the potential to corrupt policy objectives. Instead ICA urges;

- 4.6 *Tax*: Legislation designed to collect tax must focus on the specific integrity measures to suit the purposes and intent of the tax regime. The new PAYG system has provided one model for how this can be achieved.
- 4.7 *Workers Compensation*: Most workers' compensation is caught in a dilemma. The schemes are alleged insurance schemes, but are predicated on an actuarial assumption that the 'employer' is always to blame for injuries. Compare this with road accident insurance, where actuarial blame is not apportioned but instead blame is subject to separate criminal considerations. Further, workers' compensation schemes specifically prevent individual self-employed, natural persons from registering. Presumably this is in the belief that this would turn workers' compensation into a universal form of medical insurance with potential uncontrollable cost blow-out. As more people have become self-employed, independent contractors, the assumptions underpinning the schemes have come under stress. Each State and Territory has responded differently to the stress. But the stress is not that of independent contracting, but rather the problems of a fault-driven 'insurance' concept interfacing with a changing world.
- 4.8 *Industrial Relations*. In this arena, ICA totally rejects all attempts to bring independent contractors and other non-employees into industrial relations-type regulation. Industrial relations regulates relationships of inequality, and people have a right to freely choose to escape those relationships and enter contractual relationships of equality in the work environment. Attempts to pull independent contractors into employment regulation are, in effect, attempts to impose on Australians working contracts of inequality. This is a denial of the freedom from contract imposition. When this occurs, the industrial relations systems and the players in them themselves become the instruments of exploitation and inequality, thereby debasing and corrupting their own oft-stated objective, the creation of equality and fairness.

5. Why the trend to independent contracting?

Given that Australia's traditional institutional arrangements are so heavily employment-focused, why have people moved to become independent contractors? Is it –as its detractors claim,- nothing more than a massive orchestrated sham and 'con' for the purposes of imposing exploitation and the avoidance of obligations in the Australian workplace?

ICA submits that the rise of independent contractors is a direct and growing part of a phenomenal social movement reflected in other areas, such as the movements for equal rights for women and the disabled, the rise in the demand for justice and the peace movements, and the splintering of politics from a two-polar to multiply-polar system. A

major single thread exists in each of these movements, namely, the very desire of humans to control their own lives, to not have others tell them what to do or when, whether that be to go to war, to cook and clean, or how to vote, or how to work.

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

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

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

6. The Commercial Construction Industry

The Australian commercial construction industry is like any market. It is structured around cascading commercial contracts, in which regulation is meant to ensure that the rules of free competition govern relationships between the entities that are party to the contracts. However the commercial construction sector has highly developed processes that contort and destroy competition thus making corruptive, commercial collusion, systemic.

Suggestions to the Commission that there is something wrong with independent contracting, is a mask to protect this systemic corruption of competition. The use of independent contractors in the commercial construction sector would introduce a final step to the contract chain that would systemically encourage competition. For this reason, parties involved in the rorting of competition oppose independent contractors.

7. Responding to specific questions contained in the Commission's discussion paper.

7.1 Should subcontracting in the building and construction industry be further regulated to avoid illegitimate practices?

Yes and No! A principal problem afflicting the commercial construction sector is the existence of sophisticated and advanced systems that prevent or limit the application of competition law. Many problems result from a failure to apply existing competition regulation and from an overreach of employment regulation, rather than a lack of regulation.

7.2 Should workers obtaining work through labour hire firms be treated as employees of that firm?

In the section on labour hire in the Commission's discussion paper, a simple and vital fact has been omitted. Labour hire has two forms;

- There is labour hire in which the person on-hired would normally be found to be a common law employee of the labour hire company. [refer *Deutz Australia Pty Ltd v Skilled Engineering Ltd and Anor* 2001 VSC 194 925 June 2001)] In these instances, the obligations that apply to an employer apply to the labour hire company.
- The second form is where the on-hired person is an independent contractor and neither an employee of the labour hire firm or of the end user. This is the form described in the Commission's discussion paper under the Odco-style arrangements and specifically described under the labour hire definitions used under PAYG. Under these arrangements the normal obligations that apply under common law and the *Trades Practices Act* and other legislation would apply to the parties.

ICA submits that there has not been a demonstrated need to invent new law in relation to labour hire. What is needed in the first instance is to ensure the correct application of existing law.

7.3 Whether the ATO strategies to address tax evasion in the building and construction industry are effective or whether alternate strategies are needed?

The new PAYG and PSI arrangements have created legislative clarity for the ATO and the community in the collection of tax and the application of tax law. In principle, ICA supports efforts to ensure that the ATO can effectively apply PAYG and PSI legislation.

7.4 What effect will the new taxation legislation have on problems of taxation avoidance in the building and construction industry?

ICA submits that the new PAYG and PSI arrangements are a great improvement on the legislative and administrative confusion that was PAYE and PPS in the building industry. Clarity in tax law and clear rules by which everyone must comply enhance the capacity for voluntary compliance.

7.5 The extent to which standardising the definition of employee would assist in reducing non-compliance with payroll tax obligations.

Payroll tax has a direct impact on the competitive differences that States and Territories may have to offer. Standard definitions could be developed but may run into difficulties where States and Territories seek competitive differences. ICA has no developed view at this time.

7.6 Who should be covered under workers' compensations schemes for the purposes of the building and construction industry?

Workers compensation schemes have significantly different objectives to tax collection regimes and should not be legislatively treated like tax collection. In a changing work environment workers compensation schemes seem to lack specific clarity in their objectives and seem to lurch from plugging one financial crisis to another. The problems are not specific to commercial construction and the issues of compliance difficulties described in the discussion paper are generic to the schemes, not to any industry. For example, the issue of under-declaration of 'wages' happens in every industry. These issues are not independent contractor-related but apply also and possibly even more so to employment.

7.7 The extent of the problem of underpayment of employee entitlements

This is a problem of employment, not of independent contracting. The discussion paper overlooks a simple issue; employee entitlements are, in fact, employees' money withheld by employers from employees. Independent contractors do not have money withheld from them but receive their 'employee-like entitlements' as an "all in payment" every time they are paid. The withholding of employee money is a significant employee disadvantage and one reason why independent contracting is often so attractive.

7.8 Should the provisions for review of unfair or harsh contracts entered into by independent contractors be introduced nationally based on the Queensland model?

No. Industrial relations legislation should only have jurisdiction over employment contracts. Independent contractors should be offered protections under commercial contract regulations such as the Trade Practices Act and Fair Trading Acts of each State. Refer to attached ICA submission to the Review of the Trade Practices Act.

7.9 Should the power to declare workers to be employees be introduced nationally?

No. As outlined in this submission these legislative declarations are a denial of workers rights to access the freedom of the contract for services and to escape the imprisonment of employment.

7.10 Should there be a uniform definition of employer and employee?

As outlined in this submission a uniform definition already exists, namely that of common law and the pretence that it does not exist should stop because such pretence corrupts public policy debate and community understandings of rights and responsibilities.