International Labour Organisation endorses independent contractors

Report by Independent Contractors of Australia

18 June 2005

ILO Recommendation Created
At around mid-day, Geneva time, on Thursday 15 June 2006, the International Labour Organisation Conference voted to adopt an 'international instrument' on the 'Employment Relationship'. The 'Recommendation' effectively endorses the status of independent contractors by declaring that employment law should not interfere in the commercial relationship.

Independent Contractors of Australia welcomes the decision. ICA has put considerable resources into contributing to the debate at the ILO over many years. We are very pleased with the outcome.

This report gives an overview of the Recommendation and its history. We highlight the positive aspects of the Recommendation and also point to some clauses which need to be treated with care.

The Recommendation consists of some 40 paragraphs and clauses. When an electronic version becomes available, we will supply a link to it.

Background on the ILO
The International Labour Organisation is an arm of the United Nations and functions in a similar manner to the UN. It pre-dates the UN, having been formed shortly after WW1.

It operates on a 'tripartite', allegedly consensus, process. Unions and employers each have 25 per cent of the votes and governments have 50 per cent of votes. There is, however, a fourth player—the ILO office—which wields major influence.

Significantly, there is no institutional representation or vote for independent contractors. Yet the topic under consideration at Geneva cut to the core of the rights of independent contractors. ICA attended the debate with observer status only. All lobbying activities had to be conducted in a 'behind the scenes' process.

It is unfortunate that the ILO is largely an institution caught in an historical and ideological time-warp which presumes that working relationships are always class-conflict based. This institutional flaw creates a dominant culture and mindset that fails fully to understand commercial activity or the new world of work represented by independent contractors. The ILO is an institution that struggles to adapt to a changing world. However, it accurately reflects and influences the prevailing orthodoxies of labour regulators worldwide.

It is highly significant, then, that the ILO has started on an important journey towards understanding and appreciating the new and emerging worlds of work. To date, the ILO has seen independent contractors as a threat to the entrenched structures of labour regulation across the globe. The Recommendation just passed is a milestone in a new understanding. It positions the ILO for new relevance in the Twenty-first Century.

ICA hopes that the ILO will consider the Recommendation as a starting point for developing a deeper understanding of independent contractors over time. Independent contractors are an important part of varied and mixed economies. Regulators worldwide need to learn to embrace independent contractors within their regulations, and to do so in ways which are consistent with the commercial status of independent contractors. This does not mean that independent contractors are, or should be, denied ‘protections’, but rather that protections and regulations are applied in different ways from those that pertain to employees.

History of the issue

Since 1996, the ILO has been attempting to create an ‘international instrument’ that would effectively enable labour regulators around the globe to (a) declare a commercial contract to be an employment contract; and (b) declare independent contractors to be employees. The approach was an attempt to legally destroy the capacity of independent contractors to exist.

If such an outcome were to have occurred, this would have created international endorsement for the likes of Section 275 in the Queensland IR Act and other related aggressive IR actions against independent contractors that we have witnessed in Australia, for example.

The ILO debate began in 1996, occurred again in 1998, had a committee of ‘experts’ report in 2000, and arrived at a major ‘Conclusion’ in 2003. This 2006 debate targeted the achievement of a ‘Recommendation’. This finalizes the issue for at least a decade, if not longer.

The 2003 ILO Conclusion contained a statement that independent contractors are legitimate. This was an historic occurrence and a first in the ILO debate.

During 2003, ICA was able to engage in dialogue with senior ILO officials on the issue. From 2003 to 2005 we were able to maintain a continuous flow of information and positions on the issue. We believe that all material from ICA has been closely monitored and studied at the ILO.

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. ICA produced a detailed commentary on the 2005 ILO paper.

Understanding ILO ‘instruments’

ILO instruments are as follows:

1) Convention: This is the highest instrument. When nations sign a Convention, they are effectively binding their national laws to the Convention clauses.
2) Recommendation: Recommendations are not binding on nations, although nations are expected to report yearly on compliance. A Recommendation, however, carries significant moral force and raises expectations that national laws will comply.
3) Conclusion: Conclusions are effectively statements of position or belief which are stepping stones toward Conventions and Recommendations.

The 2006 Recommendation Result
The Recommendation, as passed, has significant and important positives for independent contractors.

The key positive statement is *clause 8* which reads:

> *'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'*

Given that the defining point of being an independent contractor is that individuals earn their livings through the commercial contract, this statement is most important. For the purposes of protecting independent contractors, all other clauses in the Recommendation are predicated on this statement. This clause is a significant positive for all independent contractors across the globe.

The Recommendation is also significant for what it does not say. Removed from the text are all and any references to the terms '*dependent contractor*' and '*triangular relationships*'. Both of these terms have long histories going back to 1996, which formed the principal intellectual concepts upon which unions and some academics constructed attacks against independent contractors.

For example:

- The term 'dependent contractor' has long been used in Australia and internationally to argue that even if a person is an independent contractor, if they have only one client, they are 'dependent'. Hence, they should be treated as if they are employees. This was the academic argument that justified Section 275 in the Qld IR Act, and which underpins the unfair contracts provisions in NSW. It was also used in the attempts to outlaw independent contractors in Victoria, SA and NSW.
- The term the 'problem of the triangular relationship' was the key term used in the 2006 debate in a backdoor attempt to redefine independent contractors as employees. It's a concept that goes much further, however, as it would effectively outlaw franchising, labour hire and contracting-out. 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 were accepted by the ILO. The complete removal of the term 'triangular relationship' from the text of the Recommendation is highly significant. Its removal from the Recommendation is a recognition that the idea of a 'triangular relationship' as a negative in industrial relations or other contexts is not accurate and now not in accord with ILO instruments.

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

<u>Difficulties</u>
The draft text has some difficulties, however.

- *Clause 13* seeks to provide criteria for determining an employment relationship.
- *Clause 11* suggests that it is permissible for governments to provide for ‘presumption’ of an employment relationship in given circumstances.
- *Clause 11* suggests that deeming of employment or self-employment is permissible.

However clauses 11 and 13 are predicated on the statement that nations should only *‘consider the possibility of’* incorporating these in law. Further, presumption and deeming should only be considered within the context of ‘not interfering in the civil and commercial relationship’ as determined in clause 8. Within the Australian common-law context, it would seem that these negative clauses could NOT have application. Clause 8 would constantly override these negative clauses on the grounds that the negative clauses are inconsistent with how common law defines and finds the difference between an employment contract and a commercial contract.

There are about 15 suggested criteria items in clause 13 for determining an employment relationship. They are primarily consistent with common law (which itself has in excess of 20 integrated criteria) and should not provide any real concerns within the Australian context.

Clause 18 is a worrying clause. It calls on nations to:

> *‘… promote the role of collective bargaining … as a means … of finding solutions to questions related to the scope of the employment relationship …’*

The problem with this clause is that it allows for collective bargaining in the process for discovering whether a contract is employment or commercial in nature. But collective bargaining has never had this role. Collective bargaining has only ever applied *after* the employment contract has been determined. To apply collective bargaining during the process of determining the status of a contract is illogical and likely to cause tension with superior courts. It will cause significant commercial and employment law confusion.

It helps to understand the Recommendation and its negative clauses within the context of certain aspects of the debate.

Up until clause 11, the ILO debate was hard-argued but constructive. However, when it came to items 11, 13 and 18, the debate descended into farce. Unions would not budge. The ILO office pushed the union line and its own suggested text. Governments were inert to representations from employers. The key concern of the employer group was that, even though clauses 11 and 13 only recommended that governments ‘consider the possibility’, in effect, the ILO was endorsing government action in these areas (that is, presumption and deeming).

The implications for Australia are minimal, as discussed above. However, for developing economies in particular, laws creating presumption and deeming would severely distort economic activity and job creation. It was on this basis that the employers withdrew from the debate on these items and registered their strong disapproval.

This dispute occurred very late in the debate when the ILO office was under pressure to finalize the Recommendation. Clauses 11 to 18 were consequently pushed through with haste in a near panic in order to finalize the issue. In this respect, the ILO’s institutional processes

failed to take account of the significant and legitimate warnings of the employer group. The treasured ILO consensus collapsed. The Recommendation passed, but with a 'no' vote from the employer group. Unfortunately, the ILO failed to grasp the opportunity to create a truly first-class, consensus outcome on the issue. It's a great shame.

For economies with existing, highly developed processes for distinguishing employment from commercial contracts, clause 8 is a great positive which should override the negativities of clauses 11, 13 and 18. The EU, however, is faced with special threats (see below).

But for developing economies the risk is high indeed. It is probable that unions and the ILO office will push governments in developing economies down the presumption and deeming routes. This will create significant distortions to economic activity and constrain economic growth—in particular, it will constrain foreign investment. Through bad policy made in haste, the ILO has set the circumstances in which it risks becoming an instrument for the prevention of jobs growth in the most needy of nations.

Implications for Australia

The implications for Australia can be summarized as follows:

a) The key statement (clause 8) effectively provides international legitimacy for independent contractors. Clause 8 should also be considered in conjunction with the strong pro-independent contractors statements made in the 2003 ILO Conclusion.
b) Threats to labour hire (on-hire), franchising and contracting-out have been significantly reduced as a consequence of the Recommendation. This is appropriate and most important. It will encourage economic activity.
c) Supporters of the proposed Independent Contractors Act will legitimately be able to argue that the proposed Act is consistent with and has endorsement from the ILO. [This is, however, predicated on owner-drivers *not* being excluded from the Act, as is currently proposed.]
d) Unions, all Australian political parties and labour academics now have no option but to accept that independent contractors have clear international legitimacy.

Longer term threats for Australia

As strong as the Recommendation is for independent contractors, this Recommendation should not be considered the end of the matter. The international situation needs to be monitored—most specifically for events that occur in the EU.

EU bureaucrats have been attempting for some time to create EU directives on the criteria for defining the employment relationship. Thus far, they have failed to do so. They voted as a disciplined block at the ILO in this session and were principally responsible for the list of defining criteria contained in the Recommendation. The EU bureaucrats are looking to use the ILO criteria as a basis to construct EU directives. The EU employers are battling to prevent these EU directives, but the Recommendation will work heavily against them. If the EU criteria directives are created, there could be feedback from that debate into Australia in the long term.

Further, ICA should continue all efforts to work with labour and non-labour regulators to ensure that independent contractors are regulated and 'protected' in ways consistent with their status under commercial law. The ILO Recommendation does nothing to assist nations to understand how to regulate independent contractors appropriately. The Australian outcomes

achieved with federal taxation reforms are a prime example, along with OHS reforms in Victoria, about how to proceed in positive ways.

In this context, it is unfortunate that the proposed *Independent Contractors Act* will prove to be inconsistent with the ILO Recommendation in relation to NSW and Victorian owner-drivers. Political deal-making combined with representations from vested and entrenched commercial interests have corrupted policy. But we will need to use the opportunities presented in the foreshadowed owner-driver review process to strive for longer term policy consistency. There is a suspicion, however, that continuing political and commercially vested interests in NSW have created a predetermined outcome for the review, and that the review may prove to be a sham.

Thanks

The voice of Australian independent contractors has been heard by the international community and has proved a significant influence in the debate from 2003 through to this 2006 result. ICA wishes to thank (a) the Australian government for facilitating ICA's observer status at the ILO; (b) The Australian Chamber of Commerce and Industry for their constant administrative assistance and support; (c) ICA supporters and members who made attendance at the debates financially possible; and (d) the unions, governments and ILO secretariat who always listened to ICA's representations in Geneva during our lobbying.

Nothing, however, could have been achieved without the superb work of the employer office at the ILO. Special note should be made of the key and pivotal person who led the employer team in the debate, Mr Andrew Finlay of Canada. Mr Finlay and the employer groups displayed high understanding of the commercial contract issues that are at the core of protecting the rights of independent contractors.

Conclusion

The ILO Recommendation is a strong positive for independent contractors. This is an important international step that must be built upon. ICA will maintain its efforts in that direction.