Submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation
Inquiry into Independent Contracting

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Submission to the Standing Committee on Employment, Workplace Relations and Workforce Participation
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Summary:

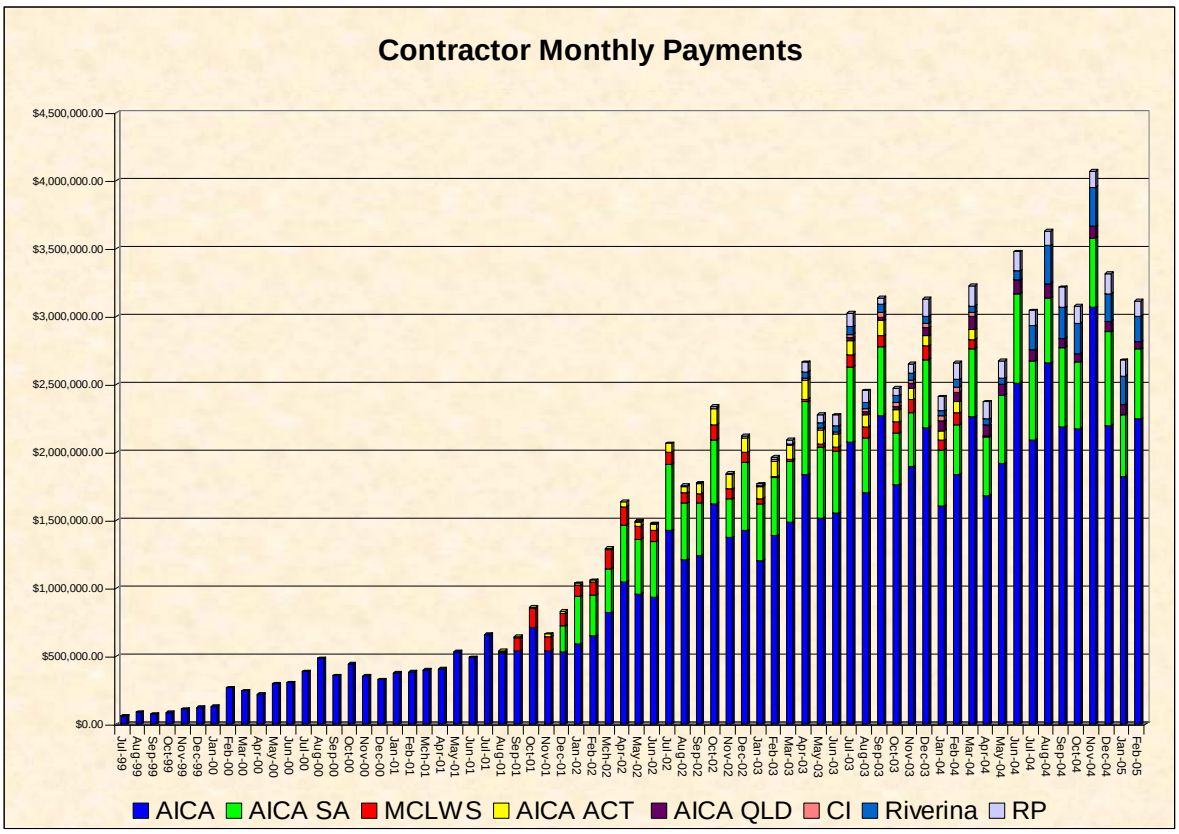
Australian Independent Contractors Agency (AICA) has prepared this submission in order to discuss and highlight the many benefits associated with independent contracting as an emerging form of engagement. The paper seeks to broaden traditional viewpoints in an attempt to dispel many of the misconceptions traditionally associated with the use of independent contractors. The paper will focus solely on independent contracting and in particular Odco style independent contracting and in particular Odco® style independent contracting. Traditional labour hire arrangements will not be discussed.

Discussion:

1. Australian Independent Contractors Agency (AICA) Background:

AICA supplies a wide range of blue and white collar industries throughout NSW. Its turnover is approximately $50 Million per annum. AICA acts as an intermediary between contractors and clients and establishes all relationships pursuant to contracts for services.

As mentioned, Australian Independent Contractors Agency Pty Ltd (and its co-companies) is the largest nationally based provider of Odco® independent contractors in Australia. Its growth since early 1999 has been sustained. The graph below traces the growth of contractor monthly payments since inception (spikes on the graphs represent variations of pay periods within the month). This very solid growth curve represents both the effective management team at AICA and the growing popularity of independent contracting.

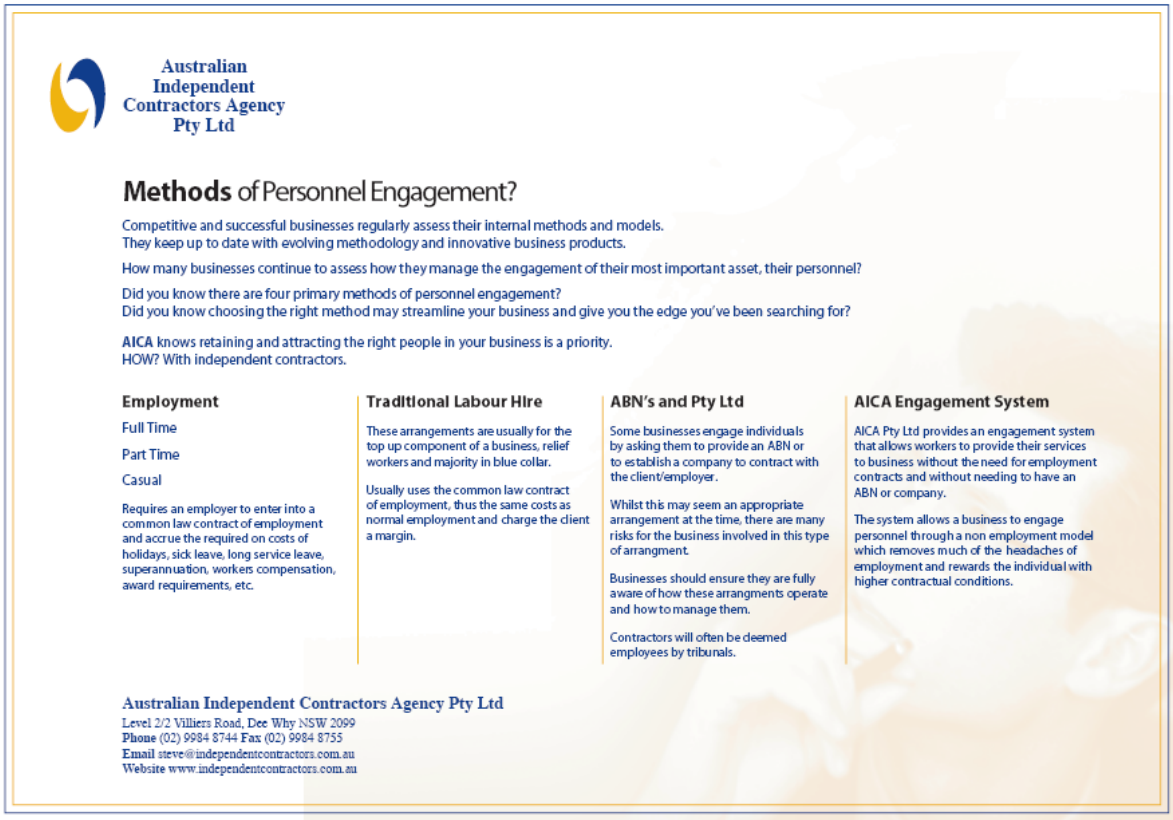


AICA's Managing Director is Stephen Harrison BA.LLB. Stephen has extensive experience in employee relations and is currently a Director of TAFE (NSW), a National Executive member of the Independent Contractors Association of Australia, and a Director of the PSI Financial Services group of companies ($400 million funds under management). Stephen has also run a significant consultancy company including clients such as Commonwealth Bank, Allen Allen and Hemsley, Southcorp, ANZ Funds Management, Orica, Smorgns.

AICA's head office is located on the Northern Beaches of Sydney and processes contractor payments there, as well as in Victoria, Adelaide and the Riverina.
AICA is a licensee of Labor Force Australia Pty Ltd, the company that licences the Odco® contracting system and supplies a support role to licensees as well as auditing their activities.

2. AICA's ODCO® Method of Engagement

Below is a brochure setting out the alternative methods of engagement which are available to have work undertaken. These are traditionally direct employment, engagement of staff through a labour hire company or the utilisation of traditional, trade based contractors. As can be seen, the brochure also canvasses the technicalities of the growing sector that is Odco® contracting:



Australian Independent Contractors Agency Pty Ltd

Methods of Personnel Engagement?

Competitive and successful businesses regularly assess their internal methods and models.
They keep up to date with evolving methodology and innovative business products.

How many businesses continue to assess how they manage the engagement of their most important asset, their personnel?

Did you know there are four primary methods of personnel engagement?
Did you know choosing the right method may streamline your business and give you the edge you've been searching for?

AICA knows retaining and attracting the right people in your business is a priority.
HOW? With independent contractors.

Employment

Full Time

Part Time

Casual

Requires an employer to enter into a common law contract of employment and accrue the required on costs of holidays, sick leave, long service leave, superannuation, workers compensation, award requirements, etc.

Traditional Labour Hire

These arrangements are usually for the top up component of a business, relief workers and majority in blue collar.

Usually uses the common law contract of employment, thus the same costs as normal employment and charge the client a margin.

ABN's and Pty Ltd

Some businesses engage individuals by asking them to provide an ABN or to establish a company to contract with the client/employer.

Whilst this may seem an appropriate arrangement at the time, there are many risks for the business involved in this type of arrangment.

Businesses should ensure they are fully aware of how these arrangments operate and how to manage them.

Contractors will often be deemed employees by tribunals.

AICA Engagement System

AICA Pty Ltd provides an engagement system that allows workers to provide their services to business without the need for employment contracts and without needing to have an ABN or company.

The system allows a business to engage personnel through a non employment model which removes much of the headaches of employment and rewards the individual with higher contractual conditions.

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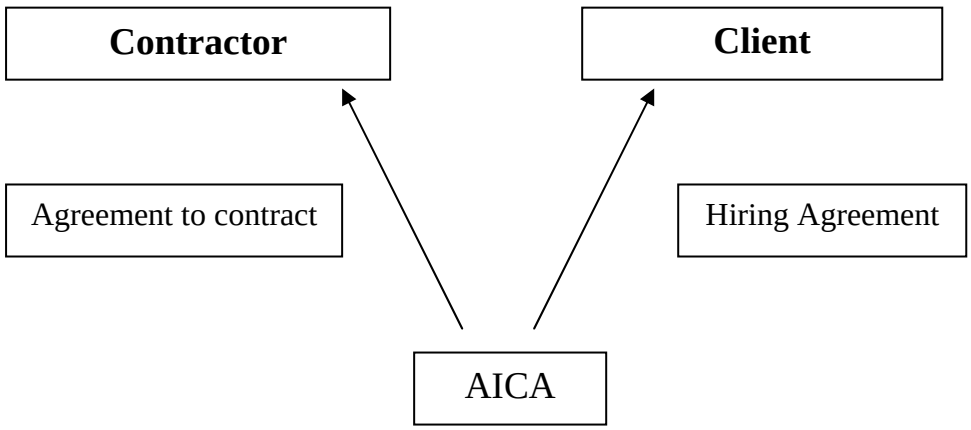
It is envisaged that the more modern and progressive system of Odco ® independent contracting will have an increasingly important role to play in the future of Industrial Relations and economic flexibility generally.

In simple terms the method of engagement looks as follows:



The two critical legal points are that both contracts are

(i) Commercial contracts (contracts for service) rather than employment contracts, and;
(ii) There is no relationship between the client and the contractor. This effectively prevents the contractors being deemed employees of the client.

This is the fundamental result of the High Court's decision in *Odco vs. BWIU*[1].This decision has been upheld in numerous cases since then, as set out in **Attachment 1**, including white collar professions (*Advanced Workplace Solutions Pty Ltd v Kangan Batman TAFE*[2]). Concurrently the federal government is preparing Commonwealth Legislation to protect the rights of workers who choose to undertake their work as independent contractors.

The consequence of this application is that the Award/EBA and most related industrial laws have no application. The rules can be totally re-written to the advantage of **all parties.**

3. New Forms of Independent Contracting:

AICA's submission will heavily emphasise the social and structural basis of Odco® contracting so that when the policy formation process in undertaken it is done so with a working knowledge of Odco®. AICA intends to demonstrate that Odco® contracting is new and modern (which is why it is not well understood), structurally beneficial to workers in all key facets and in fact, in a public policy sense, provides beneficial opportunities for many who are disadvantaged in terms of access to jobs.

Odco® independent contracting commenced as a result of the Federal Court case *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 99 ALR 735. This decision was subsequently appealed to the High Court who let the original decision stand by refusing to grant the *BWIU* leave to appeal from the Federal Court ruling finding no error of law in the principles laid down.

These judicial affirmations have been supplemented by a raft of judgements which have entrenched the Odco® engagement model as a legitimate alternative to traditional forms of engagement. As a result it fulfils a niche market (approximately 2000 workers in NSW) providing, in particular, opportunities for non-trade workers to use their skills, knowledge and experience to improve their position in life.

It should be noted workers electing to establish themselves as Odco® independent contractors do so voluntarily, exercising a deliberate and free choice and in most cases after seeking detailed external advice from accountants, lawyers and other professions. There are many sites supplied to by AICA where some workers have elected to remain as employees, or where subsequent workers have been hired as employees. The evidence by the Meat Workers Union witnesses in the recent

[1] [1991] AILR 239
[2] AIRC 25/10/1999 (unreported)

'Sunnybrand case' (*Australasian Meat Industry Employees' Union Newcastle & Northern Branch v Australian Independent Contractors and* Anor [2004] NSW IR Comm 238) confirmed this fact.

4. Historical Perspective:

Historically independent contractors have been associated with indentured trades which were the progeny of the old guild system. It widened over the 20th century, as economic changes and the growth of a middle class expanded its usage.

Persons working in this category usually were in an advantageous socio-economic position (by dent of their trade), and possessed the capacity to earn more than wages which flows from being outside of a regulated wages system. This is also further augmented by having total control of acceptance and rejection of work (with its concomitant capacity to negotiate the rate of remuneration), hours worked, control of monies earned and ability to access areas such as pensions (now superannuation), investments and more lately insurances.

Post Second World War, tradesmen supplied the enhanced efficiency and benefits of a flexible and mobile workforce which could adapt rapidly to suit the emerging 'needs based markets'. This has been well understood in industries such as Housing, Transport and I.T.

These opportunities were gradually supplemented at the edges by workers who had not had the advantage of a trade, but this was fairly limited. Early educational opportunity remained the core barrier, locking the non-trades, non-university graduates into a master-servant employment relationship. For those who might wish to, there was very little opportunity to break these barriers.

Deregulation, lower tariffs, just in time production, computerisation, advances in information technology and communications have all led to unprecedented changes within the Australian economy, (as elsewhere in the developed world).

The average number of people working at a business has shrunk markedly over the last 30 years. Today around two thirds of the workforce are engaged in businesses with less than 20 employees. Furthermore, around one third of the workforce is engaged in businesses with less than 15 employees. The need for flexibility within a business has never been more pressing for business to remain competitive through traditional business cycles of peaks and troughs, which tend to be more recurrent and more accentuated.

Concurrent with these economic pressures has been an accelerating shift in the workforce. Non trades (as well as trades and other educated groups) have now the opportunity to trade their skills, knowledge and flexibility to improve their position. Many fit into the category of the 'aspirational worker' talked about during the recent federal election. This shift has effectively rendered many of the traditional tests applied at Common Law ineffective, particularly in the much emphasised test of whether the contractors supply their tools. The focus on the type and number of tools supplied in determining the status of worker has a very limited role to play as the

contractor of the early 21st Century has begun to trade on the basis of their own skills, experiences and technical abilities. Essentially, the 'hard skills' of traditional trade based contractors are giving way to the emergent 'soft skills' which are at the forefront of the new global economic climate. The contractors who develop these 'soft' skills and abilities through training ingenuity and experience should not be continually categorised as employees due to a lack of physical tools and equipment.

Such Independent contractors seek to work in a less regulated environment where they can make the key decisions affecting their well-being and lifestyles- rate of remuneration, acceptance of work, hours of work, insurances taken and more strategic use of monies earned.

Over a million workers now voluntarily choose to work as independent contractors compared to traditional employees in the Australian economy. The numbers involved are increasing substantially both in Australia and overseas as a result of increasing educational levels, mobility in workforces generally and especially generational changes away from working with one permanent placement for a lifetime. Most young people expect to change jobs at least three times during a lifetime on average, and in many cases prefer a different spread of working hours, shared jobs or casual work to fit in with their lifestyles.

5. The Role of ODCO® Contracting

Odco® independent contracting has grown from its original legal foundations 15 years ago to provide a mechanism for a range of especially non-trade workers, the freedom of choice to voluntarily elect to become independent contractors. They form a small but growing niche amongst those choosing to become independent contractors.

As well as opening the door for those previously excluded by their educational opportunities, the Odco® contracting has also become increasingly popular amongst more traditional independent contractors because it relieves them of the administrative complications of running their own business. Very competitive group insurances are organised, and the agency develops contracts with a multitude of clients thus increasing the scope and variety of work available. Furthermore, tax, and related payments are all made on an ongoing basis. The contractors outlay financial resources in registering as sole traders, acquiring tools (where relevant), taking out insurances and paying for appropriate accounting/legal advice, and clearly do so expecting to be in an advantageous position compared to direct employment. Use of Odco® contracting also relieves the contractor of the need for an ABN, registration for GST and submission of BAS returns.

Similarly, contractors are afforded the opportunity to spread their abilities across a range of fields for a number of different clients thus aiding their professional development in their respective trade or skill, without the need to advertise and audition for new work.

The fundamentals of Odco® contracting are that workers must freely choose to become independent contractors because they see advantages (AICA has many sites where some have elected to become independent contractors and others to remain in an employment relationship). Workers choose to become independent contractors for advantage and their rate of remuneration always reflects greater than the sum of the direct and indirect benefits of employment. Otherwise, they would simply elect to remain employees. I also attach a copy of a page setting out advantages and disadvantages of being an 'Odco®' independent contractor which is given to all prospective contractors which assists them in making an informed decision.

AUSTRALIAN INDEPENDENT CONTRACTORS AGENCY

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Mobile: 0407 759 216

ABN: 64 081 116 298 ML: 408326952

Advantages to an Employee transferring to Agency contracting:

- The Agency Sickness and Accident policy is generally in advance of workers compensation benefits, applying at home as well as work. The policy provides 24-hour cover, 7 days per week.
- Business costs generally are tax deductible e.g. Superannuation contributions, insurances, tools, clothing, perhaps travel etc.
- Flexible superannuation contribution rate, utilising a better performing, lower cost superannuation scheme.
- Pre-paid sick leave and other Award entitlements.
- Ability to earn more if sick leave / full annual leave entitlements etc are not taken
- Payout of accumulated benefits in some cases.
- All administration is undertaken by the agency – there is no requirements to register an ABN or for GST. Tax, superannuation payments, insurances etc all are deducted and paid by us on the contractor's behalf.
- Registration as a sole trader (cost $129 for 3 years registration and is portable).
- There is no cost involved to the contractor other than business registration fee of $129.
- Tax can be set at a flat rate of 20% allowing a contractor to set the amount of tax to a level appropriate for the final taxation owed.
- Ability to access productivity / incentive payments over and above traditional pay rates where applicable

Disadvantages

- Security of Employment - Unfair dismissal
  - Redundancy issues

*These disadvantages are offset because under our Agency system, contractors are offered continuity of work (i.e. with different clients), as opposed to security with a single client. That is, if work is not progressing satisfactorily at a given site, we will look at placing you elsewhere with other clients.

The evidence from the contractors in the recent 'Sunnybrand case'[3] supported all the above fundamentals and were at the basis of Deputy President Harrison of the NSW Industrial Commission's upholding that "the arrangement entered into by these workers does not in any way threaten the integrity of the award system".

A further feature of Odco® contracting is that it also enables many prospective workers who otherwise find it very difficult to gain employment to be given a go. Because there is no ongoing employment relationship, a client will more readily accept as an independent contractor, workers who may not be their first choice as employees (e.g. people with disabilities, older workers, persons with a criminal record.

6 Strategies to Ensure Independent Contractor Arrangements are Legitimate.

AICA subscribes very strongly to the view that independent contracting must operate to economically advance the position of a contractor as opposed to that of an employee, and must not be a means to cheapen Australian labour. The corollary also applies that the client users are entitled to expect greater productivity and flexibility when they pay a premium for contractors. Generally provisions exist within the Industrial powers of the States and Territories allowing contracts deemed to be 'unfair' to be set aside. These provisions provide the necessary protection which insures that workers rights are not contracted away to an unreasonable level.

In the event of the introduction of a Federal "Independent Contractors Act", AICA believes it is imperative to maintain a low cost procedure for testing unfair contracts so as to prevent unscrupulous operators.

7. Various Issues Arising from Non- Consistency of State and Federal Jurisdictions:

Compliance with up to nine separate pieces of legislation (6 states and 2 territories and the Federal system) in the areas of Industrial Relations legislations, Workers Compensation, Occupational Health and Safety, Payroll Tax, Training and Licensing to name a few, is an administrative hindrance to businesses operating across various jurisdictions who invariably spend a great deal of resources ensuring they comply with the systems in place. This effectively operates as a barrier which restricts many small to medium sized businesses from tapping larger markets and offering competition in various markets.

It is clear that compliance is extraordinarily complex and costly (for no perceived advantage to anyone) and the complexity itself almost invites unintended breaches. This is greatly exacerbated where contractors cross state and territory borders. In these areas there should be one set of rules.

[3] *Australasian Meat Industry Employees' Union Newcastle & Northern Branch v Australian Independent Contractors and* Anor [2004] NSWIRComm 238

8. Relationship of Independent Contractors to Respective Pieces of Legislation

State governments in particular, have not come to grips with the growth of independent contracting and tend to view such people as 'employees in disguise', a legal device to avoid current labour market regulation of employment. This view is often accompanied by the presumption that people are being forced into these arrangements. This is despite overwhelming evidence in the case law that these people are exercising a deliberate decision under no duress with the incentives of advantageous working conditions. They are deliberately choosing to set up personal businesses as independent contractors rather than be limited to an employment relationship.

Specific Legislative Problems:

1. Payroll tax

Summary of the Problem:

The issue of whether payroll tax is an appropriate tax is not addressed in this submission. It is the application of payroll tax provisions currently operating in every state and territory (excluding NSW) which unfairly discriminates against small businesses utilising flexibilities in their operations by taking advantage of labour hire to supplement their workforce requirements. The provisions also hinder labour hire firms (LHF) ability to provide their services to small to medium sized enterprises (SME's[4]) at a cost effective level.

Further discussion of the problem:

The problem arises because a labour hire firm is liable for payroll tax on its internal staff and on all workers (subject to defined exemptions) it supplies to end user businesses. It uses the payroll tax threshold in calculating its payroll tax liability. Let us consider three examples:

Scenario 1: A Labour Hire Firm (LHF) which operates solely in a state or territory (excluding NSW) provides workers to various businesses within that state/territory:

The LHF calculates its payroll tax liability on all workers regardless of the size of the end-user business. The LHF must include a component for payroll tax in its charge rate to the end-user businesses. This places an unfair (and unintentional) cost burden of SME's which would ordinarily not be subject to payroll tax.

Scenario 2: A Labour Hire Firm which operates in more than one state or territory.

[4] (Please note that references to SME's in this submission means a business that ordinarily falls below the payroll tax threshold when its total remuneration and benefits, including external labour costs, are aggregated for assessable taxable wages.)

Most would supply to a range of clients and the threshold is subject to 'Total Australian wages'; and may already be exhausted before any calculation for state payroll tax liability. The LHF must include a component for payroll tax in its charge rate to the end-user businesses. Again this unfairly penalises SME's.

Effect:

The effect is that if the labour hire firm supplies workers to a large client (ordinarily above the threshold), the payroll tax applicable to those workers is essentially the same whether the worker had been employed directly by the client or was directly supplied by the labour hire firm.

If however, the client is smaller and not required to be registered for payroll tax, (i.e. assessable figures totalling less than the applicable threshold in the respective state/territory), the payroll tax would have to be paid if the worker was supplied by the labour hire firm (but not if engaged directly by the small client firm).

The consequence of this application is that labour hire firms are precluded from substantially offering their services in the small business market as it is not cost effective. Equally small business is precluded from taking advantage or acquiring their additional staffing requirements (short-term or long-term) through labour hire, as they generally can't accommodate the consequential mark-up of the wages component of their cost structure.

Discrimination for SME's:

The application of the payroll tax in this regard to labour hire firms financially discriminates against the very sector which arguably most needs access to the flexibilities offered by labour hire arrangements. The business is by definition smaller, and less able to spread the overhead costs of hiring additional employees over its existing wage costs. Equally, if the job can't be sustained in the long term, it places the small business in the position of being potentially penalised by virtue of unfair dismissal/severance/redundancy\notice of termination issues for actually attempting to grow employment.

A measure to address this issue by the state governments would have a negligible impact on revenue because small business rarely can afford to utilise the option of labour hire. It would equally provide significant flexibilities to small business wishing to grow their operations, or even utilise labour hire options to help handle cyclical peaks and troughs of their operations.

Proposed Solution:

The state/territory governments should introduce an end-user test for labour hire firms whereby contractor supplied to private sector clients, whose taxable wages and contractor wage costs are below the appropriate threshold, do not attract payroll tax. The end-user client is able to access its own threshold, and once it passes that

threshold, becomes liable for payroll tax. The result of this is that small businesses are not disadvantaged, and larger businesses do pay payroll tax where they would ordinarily be required to do so.

Such an amendment would in out view rectify what is an unintended consequence for small business. Our proposed variation enables the original intent to apply without affecting those (i.e. small businesses) who would otherwise not be affected.

Such an amendment would be revenue neutral for the state/territory governments, and place the liability for payroll tax on the user of the labour.

The sector most disadvantaged by the prevailing payroll tax provisions is small-medium sized businesses utilising the flexibility of labour hire arrangements. The end result is often reduced efficiency and the creation of additional barriers to growth. Essentially this translates into an unfair advantage for larger firms and the loss of competitive practices within the market.

2. IR Deeming Provisions:

In simplistic terms, unions and some associated professionals in academic circles in particular argue that independent contractors working for a single client are really 'dependent contractors'. There are two aspects not understood by those making these suggestions. First and foremost it does not take into account the structural changes that have occurred in the economy giving rise to opportunities for people previously excluded from independent contracting to now do so.

In the second area, it misunderstands the role of agencies such as AICA which perform a major and cost effective role in providing all the administrative services to enable people to become contractors.

AICA invoices the client, arranges insurances at substantially reduced rates, registration as a sole trader, has organised agreements with the Australian Taxation Office to remit PAYG tax on their behalf (either in the form of the 'scaled' rate or in the form of ATO's class variation establishing a 20% rate, deduct superannuation payments as instructed etc, as well sourcing independent contracting opportunities as their primary work.

This enables many individuals to take up independent contracting even if they were concerned that they may not handle the administrative requirements satisfactorily.

The fundamental test of whether the person is a genuine independent contractor should be at its essence whether the person exercised free choice. This has been at the core of the Upper Houses in NSW, Victoria and South Australia rejecting provisions proposed by their respective Lower Houses which provided a mechanism to allow independent contractors to be deemed employees (against their wishes). In the only state to pass such legislation (QLD), the president of the Industrial Commission has twice given speeches declaring the provisions to be unworkable.

AICA believes that independent contracting appropriately belongs in commercial law (as it is a business) rather than being regulated under industrial law (which is based on a master-servant relationship and an absence of free choice).

3. OH&S

The following chart spells out AICA's assessment of the legal obligation of parties utilising different forms of engagement in the core areas pertinent to this review.

Work Conducted on Site of "ABC PTY LTD"

	Employment Arrangements		Independent Contracting Arrangements	
	Employee	Traditional Labour Hire Arrangement	Traditional Contractor e.g a plumber or builder	Odco Arrangements
Direction to do Job	ABC	XYZ	Contractor	Odco Contractor
Responsibility for Performing Job	ABC	XYZ	Contractor	Odco Contractor
OH&S Site Responsibility	ABC	XYZ/ABC	ABC	ABC
OH&S Control Re:Work Done	ABC	XYZ	Contractor	Odco Contractor
Responsibility to ensure that site has an appropriate OH&S system	ABC	XYZ	Contractor	Odco Agency

State governments find it extremely difficult to appreciate the above table as they find it difficult to come to terms with the concept of independent contractors. Consequently they often misconceive where their legislation in this area should impact to maximise work safety.

I refer to the respective key ingredients in the table to identify the differences

Issue 1- "Direction to do the Job and Responsibility for Performing the Job":

Under direct employment (whether under a traditional employer or through a labour hire firm) the direction to do the job and the performance of the job is unquestionably the employer. Consequently, liability issues for Workcover and OH&S issues are clear cut and squarely on the employer.

For the independent contractors (whether in the traditional sense or the Odco® sense), it is totally the reverse. The independent contractor has, legally intrinsic to his/her status, already the skills and experience to do the job unsupervised otherwise they can't be an independent contractor.

To deem AICA, or any other Odco® Agency is unquestionably inequitable and unjust. AICA does not control the work, nor supervise the work. It has no control over the method by which the contractor chooses to do the work, no say in regards to the tools or equipment provided- these issues are inherent in independent contracting.

In fact, a fundamental issue of Odco® based agencies is that the Hiring Agreements specifically carry the term; "The personnel we supply to you are yours to direct and the onus of inspection and satisfaction is yours". This term was directly dealt with by the Federal Court in the Odco® decision and underpins the Odco® independent contracting system.

Issue 2: Supervision and OH&S On-Site Responsibility:

In all cases, the primary responsibility is the end user, "ABC Pty Ltd". It is shared to varying degrees in the case of the labour-hire company employing contractors because they retain control and direction over the job.

With Odco® contractors, the site responsibility lies with the end user company. In the event of an injury, the contractor claims under their income protection policy and in serious cases sues the end-user client pursuant to common law principles where a duty of care toward the contractor is breached. This was the end result of the decisions in *Taupo v Rockdale Beef* (2000) NSWDC (unreported) and *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132 wherein the negligence of the client organisation in protecting the worker led to an attraction of liability for injuries sustained.

AICA would consequently submit that the most equitable outcome is to enable the contractor to freely choose between paying a Workcover premium or electing to retain income protection insurance.

Issue 3: OH&S Control Regarding the Work Undertaken:

There is a clear distinction where for workers employed, the responsibility is with the employer whereas for independent contractors it is with the independent contractor. The logic is identical to that outlined above under Issue 1.

1. AICA, when it is explaining the system to prospective independent contractors provides them with briefing notes on occupational health and safety and reinforces these issues.

Issue 4: Responsibility to ensure that the site has an appropriate OH&S system:

This is the only area where AICA believes it has a responsibility different to that of the traditional independent contractor. It seems commonsense that it should be incumbent on the person procuring the work opportunity to ensure that the site has an appropriate OH&S system.

AICA takes this role very seriously and has for a period of time been involved in ensuring clients have such complying policies. We have worked collaboratively with Workcover inspectors on sites dealing with these issues and in a recent case withdrew the independent contractors from a site pending some remedial work being undertaken thus placing the responsibility on the client and/or individual because that is where control, direction and supply of equipment (both operational and safety) rests. Essentially this ensures that the Workers Compensation responsibility is synchronised with the causes and sources of potential accident risks.

Lastly, a very significant issue arises as a result of the fact that many independent contractors work other than through AICA . Although many find it useful to have AICA source their primary work, they are free to source other work and regularly do so. Consequently deeming independent contractors into Workers Compensation would create significant confusion (independent contractors would be deemed as 'workers' during their work through AICA and consequently under workers compensation and outside of workers compensation for their other work). Further this would be extremely expensive for them, as they would still wish to retain income protection coverage for their non-agency income protection. AICA estimates that at least 30-40% of our independent contractors sourcing contracting opportunities through the agency also carry on direct contracting.

4. Workers Compensation

Some of the issues are canvassed under the OH&S heading. In essence, the Workcover provisions as they apply to Odco® contractors vary from state to state. For example, in NSW, the traditional approach adopted by AICA (and indeed most other Odco® agencies within NSW) has focussed on the need to bring our contractors within the ambit of high quality Sickness and Accident policies to ensure they are adequately protected. This approach emanated from the belief that these independent contractors were not guaranteed protection under the *Workers Compensation Act 1987* (NSW) or the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW)) due to fact that they did not fall within the scope of a defined worker. In considering options to protect the livelihood and welfare of our contractors, we have found that they overwhelmingly prefer to be covered by our Sickness and Accident scheme where they are protected against income loss 24 hours a day 7 days a week, in and out of work. This places them in an identical position to that applying to non-Odco® independent contractors. This is concurrently under revision by the NSW government.

In South Australia, with the exception of some deemed categories, independent contractors are specifically excluded from workers compensation. However this has

not prevented Workcover in South Australia from administratively choosing to classify Odco® contractors as employees, which is concurrently subject to litigation.

AICA's proposal is that the best form of providing future certainty is that Workcover Authorities adopt the Tasmanian model embodied in Section 4B of the *Workers Rehabilitation and Compensation Act 1998* which is very simple and straightforward. Essentially, s4B(2) provides that where an contractor carries their own personal accident insurances they are not deemed to be a worker.

The result of such a provision would allow the contractor to weigh up the relative advantages and disadvantages of each type of cover and take out their protection according to their own individual needs. AICA is conscious that Workcover Authorities wants to and should be in the position that premiums are paid where claims are entitled to be made, and the converse would equally apply. Workcover Authorities are not disadvantaged under this proposal. It is envisioned that the contractor would make a declaration to the effect of their preferred choice of cover (Workers Compensation or Income Protection) which would be binding on all the parties.
This preserves a freedom of choice for those who elect to work as independent contractors to choose the coverage they believe to be the most suitable to the business they are running. It means there is total clarity for all parties in terms of their obligations. Further, responsibility for these related issues is placed equitably where it belongs putting the onus for ensuring safe working conditions on all of the parties in line with their capacity to affect the outcome.

5. Licensing Instruments as a Method to Prohibit Independent Contracting

Independent Contracting has faced significant challenges in recent years from several licensing issues. Because AICA's contractors do not fall within the ambit of an employment relationship, the various statutory and regulatory provisions associated with consumer protection and industry standards in several industries have been levied against the contractors. That is, because the contractors are independent from an employment relationship, it is naturally assumed that they operate as autonomous individual businesses as a traditional contractor would. However, Odco® contractors, whilst independent and free from the employment relationship, are contractually bound to perform work pursuant to the directives of the end user client. This effectively interposes an entity between the contractor and the end user thus making the application of licensing provisions irrelevant. Two specific examples are cited below:

a) Security Industry:

The provisions of the *Security Industry Act 1997* (NSW) were raised as a potential bar to independent contracting in 2003. The provisions of that Act require that any person supplying security personnel must be the holder of a 'Master Security License'. As a result, AICA was required to obtain a Master Security Licence' despite the fact that AICA never supervises or operates in the field with our contractors who provide their

services as security personnel. It is important to understand that independent contractors present themselves for work with the appropriate skills, and are not subject supervision. The contractors providing these services are subject to the direction of the client (as set out in the Agreement to Contract) who are always the holders of a Master Security Licence.

The requirement that obtain such a licence make little sense and is an example of the way in which independent contractors are not adequately recognised within the legislative scope. This effectively forces persons wishing to provide their services as a contractor back into an employment relationship against their will.

b) Home and Residential Building Works:

Similarly, the operation of the *Home Building Act 1989* (NSW) has served to limit the opportunities available to independent contractors operating under the Odco® system. The Act requires that all persons undertaking 'Residential Building Work' to hold formal qualifications and a contractor license as issued by the Office of Fair Trading. An exception to these requirements under the Act exists where the work is being performed pursuant to an employment relationship.

The spirit of the legislation is to ensure that unscrupulous builders and tradesman are monitored and that if their work falls below minimum standards they can have their licence revoked and effectively be stopped from providing further residential building services. However, the Act does not envisage the situation whereby the contractor is contractually bound to work solely under the direction of the end user client (who is always a qualified tradesperson and the holder of a contractor licence), and thus never provides their services directly to the consumer. As a result AICA has had to enter negotiations with the Office of Fair Trading to remedy the situation.

c) Ethical Clothing Trades Extended Responsibility Scheme:

The Ethical Clothing Trades Extended Responsibility Scheme made under Part 3 of the *Industrial Relations Act 2001* (NSW) is due to commence from July 1 2005. The scheme, developed in association with the Textile Clothing and Footwear Union of Australia (NSW Branch), will place contractors under an onerous burden to complete and retain large amounts of paperwork for 6 years relating to the arrangements under which they produce their garments for the clothing industry. Heavy fines back the scheme should clothing manufacturer's and their sub-contractors fail to take adequate account of their production practices.

Based on feedback from the industry, the scheme is set to push a number of Australian manufacturer's offshore as the scheme locks them into onerous reporting conditions, as well as into the regimented engagement structures as they exist under the relevant awards. Furthermore, AICA will once again have to defend the unique status of its contractors on the premise that the intention of legislature is not served by grouping our contractors under the scheme (which is aimed at reducing the incidence of several layers of sub-contracting and abuse of outworkers).

These examples demonstrate that the current legislative and regulatory bodies fail to adequately understand the nuances associated with independent contractors. Often the schemes catch a number of unintended groups who in no way breach the principles envisioned by the legislature at the time of drafting. The existence of an overarching Federal Independent Contractors Act would essentially help to deal with a number of the issues faced by contractors in each of the states. Furthermore, centralisation of the I.R system would significantly contribute to the operation of Industrial laws to protect and enhance the status of Independent Contractors nation wide.

6. Vocational Training

The whole area of vocational education needs to be re-examined in relation to independent contractors. This is even more pressing in view of Australia's looming skills shortage. The rapid development of modern forms of independent contracting has outstripped the outmoded structures of vocational education.

Put at its simplest, (on figures provided by the Independent Contractors Association) 25% of the Australian private sector workforce are independent contractors, *and by legislative definition excluded from apprenticeships or traineeships.* Because there is no employment relationship, there can be no access to an apprenticeship.

A quarter of Australia's private sector workforce is also legally excluded from up-skilling to fill skill shortages in the course of their work by accessing traineeships. This very significant co-hort is the very group that Australian businesses most need to participate because they are the brightest and/or most entrepreneurial because of the very fact they have chosen to back themselves to become independent contractors.

The question must be asked; why in the modern economic environment must an apprentice require a master-servant relationship? We do not require it for a university trained skills (e.g. engineering, science etc), we do not require it for teachers and nurses, yet we effectively say to prospective tradespersons that 'you are not capable of undertaking learning without the supervision of an employment relationship'.

It remains one of the last institutionalised vestiges of the 19th Century system. It also reflects in other areas of Federal regulation (e.g. employers specified for sponsoring workers with special skill, job placement allowances only apply to an employment relationship placement).

The extent of the discrimination in vocational education against independent contractors is highlighted underneath by summarising the key factors of subsidisation, fees and access to various levels of vocational training:

University Students:

University students are significantly underwritten by Federal government in the form of the HECS scheme which is repaid by the student after entering employment. Access is largely available on merit, otherwise by paying substantial fees.

Professions: (e.g. nursing, teaching, accounting).

Are substantially underwritten by the State and Federal governments. Small administrative fees are paid annually. Access is largely open, subject to attaining a level of qualification.

Apprenticeships:

These are also substantially underwritten by the State and Federal governments. Employers pay apprenticeship wage. Independent contractors are excluded under this scheme.

Non-Trades:

Traineeships are substantially underwritten by State and Federal Governments but independent contractors are also excluded under these schemes
Independent Contractors not subject to a traineeship can access the courses but must pay the fees themselves and in advance of subsequent employment
Employees are often assisted by the employers who pay the fees for the employee.

Conclusion

AICA's submission highlights that the growth of independent contracting mirrors and is fostered by the structural changes working through world economies. Independent contracting itself has changed over the last two to three decades giving opportunities to workers previously excluded.

Governments in the main have over-regulated to attempt to deal with changes they didn't fully understand. In particular, legislation has usually and erroneously been based on the presumption that it is bad.

Independent contracting is very much being embraced by workers who see significant advantages in working under less regulated structures, with a concurrent ability to improve their standard of living.

Parliaments need to address many areas where past legislation has not kept up to date with emerging workforce changes.

AICA commends its submissions to the Committee and trusts that these thoughts will assist the committee in its future policy formation.

Attachment # 1:

Legal Authorities Behind Odco® Contracting

Odco Pty Ltd v BWIU & Ors **(unreported decision of the Federal court of Australia 1989)**

On the 24th of August 1989 Justice Woodward handed down his decision in the Federal Court of Australia which effectively lent significant legal support to the *Odco* method of engagement. His honour found that the contracts were entered into freely and effectively established the workers involved as independent contractors.

The BWIU subsequently appealed to the Full Federal Court which declined to vary Justice Woodward's decision thus affirming Odco contracting as a legitimate method of engagement. The BWIU later sought leave to appeal in the High Court which was unanimously refused.

Kangan Batman TAFE v Fox **(unreported decision of the Full bench of the Australian Industrial Relations Commission dated 25 October 1999**

This was a case involving a lecturer supplied to a technical and further education ('TAFE') College who made an unfair dismissal claim pursuant to Section 170CE of the *Workplace Relations Act 1996*. She worked as a lecturer for the TAFE College, supplied by a Labour Force licensee pursuant to the system, for the whole of an academic year and carried out virtually identical duties to other lecturers who were clearly employed by the TAFE College. Towards the end of the year, she was informed by the Labour Force Licensee that she was no longer required and subsequently she brought an unfair dismissal claim.

The case reinforces the principles of the Odco decision discussed above. In particular, the Full Bench found that there were only two contracts in existence as there was no intention to create legal relations between the TAFE lecturer and the TAFE College because both understood that everything they did was already governed by the existing two separate contracts between each of them and the agency. Mcuh direct contact between the TAFE lecturer and her direct supervisor at the TAFE College in which many "employment like" conditions were discussed were seen in that light.

AWU Queensland v Hammonds Pty Ltd & Ors; **(unreported decision of the Full bench of the Queensland Industrial Relations Commission dated 15 November 2000**

This case involved the Queensland shearing industry, where a licensee supplied shearing teams to graziers in central Queensland pursuant to the system. A new section of the Queensland Industrial Relations Act allowed a Union to make application to the Queensland Commission that a certain class of workers should be "declared" to be employees. The first application was brought by the AWU Queensland against the licensee. The first question for the Commission to determine

was whether the workers supplied by the licensee were already employees at common law.

It was unanimously determined that they were **not** employees. Again, many of their working conditions could be said to be similar to that of employee shearers in the industry. It was the existence of the contractual arrangements created by Odco® Contracting and the clear intention of all parties which was the basis of that finding.

Sheehan v Australian Contracting Solutions **IRC 1782 of 2000**, another unfair dismissal case (this time in the New South Wales State Commission) brought by a meat worker working in an abattoir in Griffith, New South Wales. That worker had previously been an employee of the abattoir prior to entering into a contract arrangement by way of the system a couple of years prior to being advised by the licensed agency that his services were no longer required by the abattoir. The Commission found that all parties, and in particular the worker, understood when entering into the contractual arrangements pursuant to Odco® contracting, that those contracts created a whole new arrangement where the worker was no longer and employee and became a contractor.

Country Metropolitan Agency Contracting Services Pty Ltd v Slater and Workcover /CGU Workers Compensation Insurance (SA) Pty Ltd **[2003] SAWCT 57 (30 may 2003)**

In this case the Odco® agency (CMACS) was appealing against the initial ruling that they could be deemed an employer for Workers Compensation purposes.

The appeal court focussed on the totality of the arrangements between the contractor, the client and the agency in line with recent High Court Authorities[5]. The appellate bench re-affirmed the initial finding that the worker involved provided no skilled labour, had no ability to delegate work, and had no ability to set her own rate. The judges agreed that there is a need to apply a 'common sense evaluation' to determine whether the worker is an independent contractor.

The original *Odco* decision was recognised as having continued importance by McCusker JP, however he agreed with the other judges that the 'totality of the relationship between the parties" must be examined to arrive at a proper conclusion. He indicated that the ultimate test will always be whether a person is acting as the servant of another or on his own behalf.

The appeal was dismissed and the original ruling that the Agency could be deemed for Workers Compensation liabilities upheld.

Damevski v Giudice (2003) 202 ALR 494

[5] *Hollis v Vabu* (2001) 207 CLR 21; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323

In *Damevski* the client was deemed to be the employer of the purported contractor for the purposes of unfair dismissal. The case was framed by an unusual set of circumstances. The contractor involved was originally an employee who was transferred to the Odco® system, however he had missed the initial induction meeting and was subsequently inducted by his old employer rather than an Odco® agency representative. During the course of this induction he was told that "nothing would change". In reality little did change as the client continued to supply the contractor with significant tools such as cleaning materials, vans, mobile phones and uniforms.

At a later date the contractor was informed by the client that his services were no longer required due to poor performance. He filed for unfair dismissal. Initially his claim failed, however the full bench of the AIRC unanimously allowed an appeal finding that there was a need to look beyond the contracts at hand and examine the real nature of the relationship. They held that the question of whether a contract is one of employment or for services is always a question of law to be decided on the merits of each case. The court was able to clearly distinguish the current case from the original *Odco* decision based on the unique factual circumstances at hand.

***Australian Meat Industry Employees' Union v Australian Independent Contractors Agency and another* [2004] NSWIRComm 238 (19 August 2004)**

The most recent decision lending significant support to the Odco® system was the decision handed down on the 19th August 2004 in *AMIEU v Australian Independent Contractors Agency (AICA) and Another* also known as the 'Sunnybrand case'.

In this case, counsel for the AMIEU was forced to recognise the continued validity of the original *Odco* decisions. As a result the AMIEU challenged the system by attempting to differentiate the meat processing industry from the building industry (the subject of the original Odco decision) rather than attacking the system directly.

The union argued that the building industry is characterised by many small players wherein contractors can work for many different clients as opposed to the meat processing industry which is controlled by a few large firms. As a corollary of this, the AMIEU asserted that the workers were not true contractors because they were limited to working for one or two clients on a more or less full time basis. The union believed that this arrangement was akin to an employment relationship with the client firms having the power to dictate engagement terms to the contractors in the knowledge that similar employment was limited.

Deputy President Harrison of the NSW Industrial Relations Commission re-affirmed the importance of the original *Odco* decision and extended its reach to cover arrangements where contractors work for a single client. He affirmed that each case will be decided on its own merits.

Importantly, he was able to distinguish between this case and *Damevski* asserting that the poulterers were well aware of their new arrangement and that the employment relationship had been successfully severed to achieve contractor status. Important to this finding was the ability of the workers to choose their working arrangement rather than being 'forced' into contracting. The benefits of contracting had been explained

and accepted by the workers and this was instrumental in allowing them to choose the arrangement they preferred.

DP Harrison also found that the *Odco* system does not "in any way threaten the integrity of the award system".

Thus it is now clear that where a potential contractor is:

a) Properly informed about the contracting system; and
b) Making a free choice to enter into contracting; and
c) Exhibiting the signs of a contractor (i.e. application of skills, supply of equipment, ability to set working times etc)

Then their status as independent contractors under the *Odco* system will be upheld even where they perform work for a single client on a long term basis.