The Employment Relations Act and Dependent Contractors: A Real Relationship?

Stephanie Hill*

I: Introduction

> Employee or independent contractor? This question has been perplexing courts, scholars, employers, and workers all over the world throughout the last century. Variations of the same question go back at least half a millennium. It is a basic problem, often described as the 'cornerstone' of labour and employment law. Satisfactory solutions, however, are yet to be found .... Dramatic changes in the organization of work have seriously exacerbated the problem, creating some urgency in the need to address it. The same changes also provide an opportunity to reflect on basic ideas and rethink some age-old concepts and tests.[1]

Workers in New Zealand have traditionally been divided into two distinct groups: independent contractors and employees. Employees are protected by minimum statutory entitlements – in the main, the Employment Relations Act 2000 ("the Employment Relations Act") – and can pursue these entitlements through various employment law institutions. Conversely, independent contractors can only rely on the protections afforded by the law of contract.

One of the principal changes made by the Employment Relations Act is an extension of the definition of "employee". When considering whether a worker is an employee or an independent contractor, the Employment Relations Authority and the Employment Court ("the Employment Institutions") are now required to consider the *real nature* of the relationship between the parties. In making this determination, the Employment Institutions employ established legal tests, rather than merely accepting the label given to the relationship by the parties:[2]

> Any decision must be based on the true nature or reality of the relationship, rather than any label which has been applied to it. This means that the parties will not be able to escape their obligations simply by saying that an employee is in fact a contractor.

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1 Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002) 52 UTLJ 357, 358.

2 New Zealand Government – Employment Relations Law, "It's Our Business to Keep Your Business Informed" Beehive Publication <http://www.executive.govt.nz/era/erl_over.htm#3> (at 14 November 2003).

The draft Employment Relations Bill emphasized the "control" and "integration" tests:[3]

> [U]nder cl 6 of the ER Bill as originally introduced, in deciding whether a person was an employee as opposed to an independent contractor, a primary consideration was to be the extent to which that person's work was subject to the control and direction of the "employer" and integrated into the "employer's" business.

Clause 6 was re-worded after employer groups and some contractors argued that its effect would be to reclassify "the contractual relationship of some who wished to be contractors, against the will of those concerned".[4] This has had precisely the effect these groups wished to avoid. In many cases, principals who have entered into contracts for services with independent contractors have found that the "real nature of the relationship" is in fact one of a contract of service.[5] Furthermore, in a deregulated labour market, "borderline" cases have become more common.[6] In these cases, a worker is neither an employee nor an independent contractor, but occupies a place somewhere between the two concepts. According to Collins:[7]

> [This strict division] attempts to force into neat compartments what in fact comprises a myriad of patterns of the allocation of contractual risk, and the degrees and ranges of bureaucratic controls. Furthermore, for the courts to focus upon one of these techniques for efficient acquisition of labour power, such as a particular allocation of risk or the presence of bureaucratic control, seems bound to lead them into errors of classification, since these techniques may prove unrelated to the real concerns of employment protection laws for relief of workers from economic dependence and social subordination.

This distinction is somewhat artificial when one considers situations where self-employed workers are economically dependent on and subordinate to their 'employer'. Here, theirs is "more akin to employment status than that of the swashbuckling entrepreneur."[8]

The Employment Relations Act aimed to alter the nature of the inquiry into whether a worker is an employee or an independent contractor. The Employment Institutions must inquire into the real nature of the relationship. Yet the Act itself still delineates between employees and independent contractors. This article will examine the group of workers caught between the notions of employees and

3 Agnew (ed), *Employment Law Guide* (6th ed, 2002) 113.
4 Ibid.
5 See eg *Bryson v Three Foot Six Ltd* 7 NZELC 97, 317; *Excell Corporation v Carmichael* (2003) 7 NZELC 97, 183; *JB's Contractors v Hook* ((2001) 6 NZELC 96, 207.
6 Agnew, supra note 3, 114.
7 Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10 OJLS 353, 368-369.
8 Carter et al, *Labour Law in Canada* (5 ed, 2002) [162].

independent contractors – the *dependent* contractors – and ask: is the *real nature* of such employment relationships truly recognized?

II: Employees and Independent Contractors: The Distinction

1. Employees

Section 6 of the Employment Relations Act defines "employee" in the employment law context:

> **6 Meaning of employee**
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> (1) In this Act, unless the context otherwise requires, employee –
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> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of services;
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> ...
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the Court or the Authority –
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
>
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

The Employment Court considered this section in *Koia v Carlyon Holdings Limited:*[9] "The definition of "*employee*" in the Employment Relations Act is comprehensive. It still depends on the existence of a contract of service."[10] It held that the central focus of this test under section 6 was:[11]

> [T]he real nature of the relationship between the parties. Section 6(3) requires the Court to consider all relevant matters, including any matters that indicate the intention of the parties. Thus, intention is still relevant but it is no longer decisive. It is only one of the relevant matters that the Court must consider. Such matters may include control of working or evidence of carrying on business on one's own account and other factors.

Employees are seen as being vulnerable and as such worthy of the protection of various statutory instruments. This attitude is reflected in section 3:

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9 [2001] ERNZ 585.
10 Ibid 594.
11 Ibid.

> **3 Object of this Act**
> The object of this Act is –
> (a) to build productive employment relationships though the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship –
> ...
> (iv) by protecting the integrity of individual choice.

2. Independent Contractors

The concept of an employee – a person who works for an employer under a contract of *service* – can be contrasted with that of an independent contractor who works for a principal under a contract *for services*. Independent contractors do enjoy some statutory protection under the Health and Safety in Employment Act 1992 and the Human Rights Act 1993.[12] However, independent contractors are generally not afforded any protection by minimum code legislation which functions to protect employees. One commentator justifies this on the grounds that:[13]

> [B]usinessmen dealing with each other at arm's length should not be responsible for each other's economic and physical security to any greater extent than provided for by their contractual agreement and the ordinary duties of care owed by all citizens to each other.

Indeed, according to Davidov:[14]

> [I]t is widely accepted that not every worker is in need of [statutory] protection ... '[I]ndependent contractors', are in a position to take care of themselves in a market environment. They are capable of achieving contracts ... that are socially acceptable.

Typically, independent contractors are seen as autonomous commercial operators. They are entrepreneurs who run their own businesses, and their bargaining positions are considered equal to that of their principals.

Independent contractors are responsible for their own tax payments and may need to be GST registered. Indeed, a typical indicium that a worker is a contractor is that he or she invoices the principal with a tax invoice, including GST, for his or her payment. In *Bryson v Three Foot Six Limited* ("*Bryson*"), the Court maintained that tax status could illustrate the parties' contractual

12 However, the Labour Government intends to extend such protection to state contractors. It will "introduce a minimum code of practice for state sector contractors to ensure observance of fair and ethical employment practices". New Zealand Labour Party, *Labour: Working for Tomorrow, Today* (2002 Manifesto) 3.

13 Collins, supra note 7, 354.

14 Davidov, supra note 1, 359.

intentions regarding the status of the relationship.[15] However, tax invoicing is not conclusive. In *Hook v JB's Contractors*[16] the Employment Relations Authority held that while tax status may indicate a relationship of employment and parties' intentions, it does not provide a definitive answer. The Authority went so far as to say:[17]

> The question of tax status follows the determination of employment status in terms of [the Employment Relations Act] and not vice versa. Tax status is not therefore a relevant matter in determining employment status.

3. Tests

The Employment Court in *Bryson* summarized the principles to be applied when determining the "real nature" of a relationship.[18] While the intention of the parties is still relevant, it is no longer decisive. The real nature of the relationship can be ascertained by analyzing the tests that have historically been applied, such as the "control", "integration", and "fundamental" tests.

(a) The Control Test[19]

This test looks at the degree of control that the employer exercises over the individual worker. The more control there is, the more likely the worker is to be an employee.[20] In assessing whether a putative employer exercises such control, the Court must consider who has "the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done".[21]

(b) The Integration or Organization Test

This test examines whether a person is employed in an integral part of the business or organization, or merely provides services accessory to it.[22] "If the individual is seen as being an integral part of the organisation, performing work that is the nature of the business, the contract will be viewed as a contract

15 (2003) 7 NZELC 97, 317.
16 (2001) 6 NZELC 96, 207 ["*Hook*"].
17 Ibid 213.
18 Ibid 320.
19 The leading case on the control test is *Challenge Realty v Commissioner of Inland Revenue* [1990] 3 NZLR 42.
20 However, in *Ashby v Corporate Cabs Ltd (Auckland)* (26 March 2001) unreported, Employment Relations Authority, Auckland AA24/01 it was held that high levels of control may be typical in the industry, but this did not mean that the contract was one of employer/employee.
21 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 1 All ER 433, 440.
22 *Bryson v Three Foot Six Ltd* 7 NZELC 97, 324.

of service (employee)."[23] The Court will consider factors such as whether the worker has been "graded, paid according to a job evaluation scheme, and required to conform to the employer's disciplinary code".[24]

(c) The Fundamental Test

This test considers the extent to which the worker is in business on his or her own account. The Court will take into account whether the worker hires staff; who provides the equipment used; whether the worker bears any financial risk in the performance of the task; whether the worker is responsible for investment and management; and the potential for the worker to profit from proficient management in performance of the task.[25] In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* MacKenna J stated:[26]

> If a man's activities have the character of a business, and if the question is whether he is carrying on that business for himself or for another, it must be relevant to consider which of the two owns the assets ... and which bears the financial risk.

4. Criticism

"None of these tests has always produced satisfactory solutions, nor have they resulted in clarifying the principle."[27] They have attracted criticism from academic commentators for several reasons. One argument is that the tests "approach the same question from different angles."[28] The tests are sometimes used together, and at other times as substitutes for one another.

According to Collins, all three tests are ambiguous. The control test does not describe what type of control is required for an employment relationship to exist, and is over inclusive.[29] The organization test is indeterminate in borderline cases. A worker may be treated as an independent contractor as far as payment and taxation is concerned, but resemble an employee in terms of "discipline, calculation of pay and grading ... The organization test offers no guidance on how to classify such a worker, unless certain badges of membership are regarded as conclusive".[30]

It is these borderline cases that are the focus of this article. That is, those cases where the contract is one for services, and where the worker may be in business in his or her own account, but where the principal exercises a substantial

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23 "Have you got a Contract of Service or a Contract for Service?" *All Canterbury Employers' Chamber of Commerce* <http://www.cecc.org.nz/Defaultasp?article=102.html> (at 19 November 2003).
24 Collins, supra note 7, 369.
25 See *Hook v JB's Contractors Ltd* (2001) 6 NZELC 96, 212.
26 [1968] 1 All ER 433, 443.
27 Szakats, *Law of Employment* (2 ed, 1981) 24.
28 Agnew, supra note 3, 114.
29 See Collins, supra note 7, 369-372.
30 Ibid 370.

degree of control over the contractor, or where the contractor is an integral part of the business. In such cases, the current tests classify such workers either as independent contractors or as employees, when such a clear distinction ought not be so easily drawn.

5. Why Does the Distinction Matter?

"The short answer is that the legal effects and consequences of the contract vary according to its proper category."[31] There are three important consequences that arise when a worker is categorized as an independent contractor or an employee.

(a) Tort: Vicarious liability[32]

Where a worker commits a tort against another party in the course of employment, the injured party will often pursue compensation from the worker's employer.[33] An employer is vicariously liable to third parties for torts committed by an employee.[34] "The essence of vicarious liability is that the fault of the servant amounts to the misconduct of the master."[35] Before such liability is imposed, there must be an employer/employee relationship between the employer/defendant and the person who actually committed the tort. Secondly, the employee must have committed the tort in the course of his or her employment.

Conversely, a principal will not usually be liable for torts committed by independent contractors. However, in *Honeywell and Stein Ltd v Larkin Bros Ltd*[36] the Court of Appeal held that where an independent contractor carries out a task that is inherently dangerous, the duty on the principal is so onerous that it cannot be delegated to any other party.

(b) Implications Relating to Government Agencies

Secondly, the employment status of a worker is important in relation to tax and superannuation arrangements. A government agency may pursue a principal for unpaid taxes, superannuation contributions or accident compensation scheme levies in relation to employees. However, such liabilities can be avoided by establishing that the worker concerned is not an employee, but an independent contractor.[37]

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31 Szakats, supra note 27, 11.

32 See *Performing Rights Society v Mitchell and Booker* [1924] 1 KB 762.

33 The employer will typically be viewed as having "deeper pockets" than the worker.

34 However, in New Zealand today under the accident compensation regime, the issue of vicarious liability of employers is less significant.

35 Szakats, supra note 28, 285.

36 [1934] 1 KB 191.

37 See *Ready Mixed Concrete v Minister of Pensions* [1968] 1 All ER 433.

This was the case in *Challenge Realty Ltd v Commissioner of Inland Revenue*.[38] The defendants objected to assessments of PAYE tax for their salesmen. They went to the High Court, and appealed to the Court of Appeal, arguing (among other things) that the salesmen were independent contractors. Both actions were unsuccessful: the High Court and Court of Appeal held that the salesmen were employees and as such their employers were liable for PAYE tax payments.

(c) Statutory and Common Law Protections

Thirdly, and most important for the purposes of this article, the distinction between employees and independent contractors matters because of the statutory instruments and common law principles that govern relationships between employers and employees. According to Davidov, these "protective labour and employment laws"[39] are:[40]

> [B]ased on the idea that – whatever other purposes they may have – they are generally based on the idea that (a) employees are in need of protection and (b) there is a corresponding employer that can and should take responsibility for them in some respects.

In this context, the distinction is an important threshold issue – neither the Employment Authority nor the Employment Court has jurisdiction over any grievances alleged by a worker who is not an employee under the Employment Relations Act. Indeed, as Collins explains:[41]

> Employment protection rights such as the right to claim unfair job dismissal or a redundancy payment typically vest only in employees whose jobs fit into the complementary paradigm form of employment in vertically integrated production: employment which is full-time, stable, and for an indefinite period.

There are many sorts of protection afforded to employees. For example, employees have access to collective bargaining under the provisions of the Employment Relations Act.[42] They are also protected against unjustifiable dismissal under s 103(1)(a) of the Act, which states that a contract of service may only be terminated for a justifiable reason in a fair manner. The common

38 [1990] 3 NZLR 42.
39 Davidov, supra note 1, 374.
40 Ibid 375.
41 Collins, supra note 7.
42 See Part 5 Employment Relations Act 2000.

law has supplemented this protection with requirements relating to procedure,[43] misconduct,[44] constructive dismissal,[45] and redundancy.[46]

The Holidays Act 1981 also provides entitlements to employees.[47] Under this Act, employees are entitled to 11 public holidays,[48] three weeks' annual holidays or six per cent pro rata for the whole year,[49] and five days' special leave,[50] all of which are paid days away from work. The Minimum Wage Act 1983 provides for a minimum hourly wage to be paid to adult employees. The Wages Protection Act 1983 provides that employers must pay employees in cash, in full, at the appointed time.

The primary mechanism by which employment problems are regulated is by mediation under the Employment Relations Act.[51] One of the primary purposes of the Act is to reduce "the need for judicial intervention"[52] so that parties may resolve their disputes by way of a more cost and time-efficient system.[53] Employees are thought to have less access to financial resources than their employers, and as such lack the ability to enforce their rights through expensive litigation.

This can be contrasted to the rights afforded to independent contractors, who are seen as "[r]elatively powerful commercial operators [who] have sufficient financial and information resources to enable access to the commercial court system".[54] Currently, independent contractors must pursue their rights through the civil courts under the terms of the contract.[55] It is argued that employment legislation should not extend to independent contractors "because untrammelled competition between entrepreneurs is the powerhouse of wealth generation from which society as a whole benefits".[56]

There is no recognition of an unequal balance of power between independent contractors and principals, as there is in the context of the employment relationship. The law assumes that each contracting party comes to the bargaining table with equal access to financial resources and knowledge. Independent contractors are able to use their commercial nous to achieve the best bargain they can, while the principal seeks to make a contract on terms that will benefit its business.

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43 See eg *Hennesey v ACC* [1982] ACJ 699 (CA), the foundation case for the judicial requirement that an employer follow a procedure akin to natural justice when dismissing an employee.

44 See eg *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659.

45 See eg *Auckland Shop Employees Union v Woolworths* [1985] 2 NZLR 372 (CA) where Cooke P outlined three possible instances of constructive dismissal: (1) Where the employee is told to resign or be fired; (2) where the employer tries to force the employee to resign; and (3) where a breach of a duty by the employer leads to the employee's resignation.

46 See eg *Coutts Cars v Baguley* [2002] 2 NZLR 533 (CA).

47 Note that the Holidays Act 2003 is due to come into force, for the most part, 1 April 2004.

48 Section 7A Holidays Act 1981.

49 Ibid s 11.

50 Ibid s 30A.

51 See s 3(a)(v) Employment Relations Act 2000.

52 Ibid s 3(a)(vi).

53 This also relates to another of the purposes of the Employment Relations Act 2000: to recognize the inequality of bargaining power in employment relationships: s 3(a)(ii).

54 Commons, "Dependent Contractors: In From the Cold" (1996) 8(1) UALR 103, 116.

55 Unless the contract provides for some form of mediation in the event of a dispute.

56 Carter, supra note 8, para 162.

III: Dependent Contractors

> Dependent contractors appear to have more in common with employees than independent contractors, inhabiting economic territory as independent contractors although the legal distinction remaining between the two is no longer easy to reconcile with workplace reality.[57]

Dependent contractors are those workers who, while seemingly in business on their own account, behave like employees in other respects. This part will examine the nature of the dependent contractor, and begin to examine ways in which their status could be dealt with under the law.

1. What is a 'Dependent Contractor'?

A dependent contractor shares characteristics with both employees and independent contractors. A dependent contractor may have contracted with a principal under a contract for services, he may supply his own tools, and invoice the principal for payment. However, this worker may also be subject to a substantial degree of control on the part of the principal, and may appear integrated into the principal's business – for example, he may perform work exclusively for the principal. According to one commentator:[58]

> The archetypal dependent contractor ... typically relies on work from one source only. The dependent contractor differs from the employee only in that the dependent contractor brings to the exchange financial capital as well as his or her own labour effort.

An example of such a worker is a courier driver: the driver may supply and maintain her own vehicle, pay for the insurance, and invoice the courier company on a mileage basis. However, she may be directed by the company as to which customers she is to service, and which routes she must cover. The company may require her to "deck out" her vehicle in company insignia and colours, and may impose a restraint of trade clause against her performing similar tasks for opposition companies. Here, it is impossible to state that the courier driver is clearly an employee or an independent contractor. She possesses characteristics of both. If a Court were to inquire into the "real nature of the relationship", it would most likely find that under the control and integrations tests the driver is an employee, but that under the fundamental test she is an independent contractor.

The absurdity of this situation is further highlighted when we consider the reason behind the statutory distinction. Independent contractors are seen as robust commercial operators who negotiate with principals from an equal bargaining

57 Commons, supra note 54, 103.
58 Ibid 103.

position, and for whom statutory employment protections are unnecessary. Yet this result seems unfair to the courier in our example. An individual courier driver operating on her own surely does not possess the same commercial bargaining ability and resources as a large mercantile courier company. On the other hand, if the worker is deemed to be an employee, this seems unfair to the company that suddenly finds itself in the position of employer vis-à-vis its workers.

A more satisfactory position, surely, is to recognize the hybrid status of some workers, and develop a separate body of rights and liabilities which adequately deals with their unique characteristics.

2. Where Are We Left?

The current Government recognizes that the present position is unsatisfactory. In her recent speech to the Industrial Relations Society of Australia National Convention, Hon Margaret Wilson (Minister of Labour) admitted:[59]

> Unfortunately the Employment Relations Act does not address the vexed question of dependent contractors who genuinely straddle the legal definitions of employee and independent contractor. My personal view is that such employees should be covered by a code of minimum employment standards. They should be treated as a distinct category from employees and independent contractors and should have specific incidents of employment standards attached to that category.

Hugh Collins shares similar concerns:[60]

> [M]any workers, who in form comprise independent contractors, but in substance function as employees [are left] in the unsatisfactory predicament that the courts may deny them the benefit of employment protection laws.

Andrew Commons seeks to establish that dependent contractors should have unimpeded access to employment law protections: "The nature of the dependent contractor warrants his or her access to the machinery of the Employment Contracts Act."[61] Some commentators have recognized this potential:[62]

> There is the possible extension of access to the rights, obligations, and protection of employment law to some "dependent contractors" under s 6. Such persons were often classified as "independent contractors" under the [Employment Contracts] Act, but were seen, in reality, to be working in situations that were identical to an employment

59 Margaret Wilson, "Challenges Associated with the Use and Regulation of Non-Standard Employment Relationships – The New Zealand Experience" (Speech delivered at the Industrial Relations Society of Australia National Convention, Adelaide, 27 – 29 March 2003) <http://www.irssa.asn.au/Wilson_M_presentation.doc> (at 30 October 2003).

60 Collins, supra note 7, 355.

61 Commons, supra note 54, 116.

62 Agnew, supra note 3, 307.

relationship, while lacking the protection of employment status. Section 6 deals with this situation by stating that the primary consideration is given to the reality of the relationship, rather than the nominal "label" given to it by the parties.

In other words, workers who fit into the dependent contractor mould will be employees if they are very dependent upon the principal/employer.

IV: Different Outcomes? Different Tests?

As we have seen, the Employment Relations Act purported to change the law in relation to the classification of employees and independent contractors. This part examines the cases decided under the new Act, and the way in which the Employment Institutions have inquired into the real nature of the relationship between parties. It will then examine the watershed case under the previous legislation, the Employment Contracts Act – *Cunningham v TNT Express Worldwide (New Zealand) Ltd* – and ask whether the law has changed at all.

1. *Koia v Carlyon Holdings Limited* [63]

The plaintiff, Mr Koia, claimed that he was an employee of the defendant, Carlyon Holdings Limited ("Carlyon"), and that he was unjustifiably dismissed. Carlyon dismissed Mr Koia on one month's notice on the ground of poor performance, which it argued it was entitled to do under its contract with Mr Koia. The written contract provided that the relationship between the parties was to be "an independent Distributor relationship".[64]

The facts supporting a contract for services were as follows. Mr Koia had bought the goodwill for the distributorship from a third party. Mr Koia supplied his own vehicle, and was responsible for associated expenses. He also leased a computer and printer from the company. He bought stock from Carlyon which he on sold to supermarkets and dairies at prices he set himself. Carlyon did not deduct tax from Mr Koia's pay cheque. He was free to work any hours and could distribute goods for other manufacturers. Mr Koia carried out business activities (such as accounting and administration) separately from Carlyon. When Carlyon terminated the contract, Mr Koia attempted to sell his distributorship.

On the other hand, Carlyon did exercise some control over Mr Koia. He was required to attend meetings, call on customers regularly, and have his vehicle approved by Carlyon. Additionally, Carlyon required that Mr Koia's vehicle be marked with sign writing, paid for by Carlyon.

63 [2001] ERNZ 585.
64 Ibid [9].

According to the Employment Court, the law under the Employment Contracts Act 1991 was that "the clearly expressed contractual intentions of the parties prevailed over all other considerations".[65] Under the new Employment Relations Act, however, "the accent is on the real nature of the relationship between the parties".[66] While the intention of the parties is still a relevant consideration, the Court must also take into account "control of working or evidence of carrying on business on one's own account and other factors".[67] For Mr Koia it was argued that the intention of the parties was to create a relationship between a principal and contractor, but that this intention was not achieved. To this, the Court replied:[68]

> The real nature of the relationship may have evolved or developed in a way that, looked at realistically, is different to the nature of the relationship at the time of its formation or at subsequent times, so the way the relationship has worked in practice may be different.

The real nature of the relationship indicated that he was in business on his own account and that he was subject to little control exercised by Carlyon. Central to this conclusion was the fact that Mr Koia had bought the distributorship from a third party, and attempted to sell it after termination of the relationship with Carlyon. As the Court pointed out: "Employees do not ordinarily do that."[69] Mr Koia was an independent contractor.

2. *Hook v JB's Contractors*[70]

This case also involved a personal grievance for unjustified dismissal against an alleged "employer". The defendant contended that Mr Hook was a subcontractor, and not an employee.

The Authority cited *Cunningham* as the precedent case for the law prior to the Employment Relations Act. The change, according to the Authority, is that now consideration must be given to the real nature of the relationship with regard to the intention of the parties and other relevant matters. The intention of the parties may be ascertained by oral statements, evidence of conduct, and "[t]he context of the commercial environment in which the contract is made".[71] Other relevant matters include the control test, the fundamental test, and the integration test. The Authority focused on the questions to be asked when exercising the control test. In particular, the Court or the Authority must consider who provides the equipment used to perform the work; whether the worker hires his or her

65 Ibid [25].
66 Ibid [27].
67 Ibid.
68 Ibid [31].
69 Ibid [43].
70 (2001) 6 NZELC 96, 207.
71 Ibid 212.

own staff; whether the worker takes any financial risk; whether the worker has the opportunity to profit from sound management in performing the task; and the worker's responsibility for management and investment.[72]

Mr Hook signed a contract headed "Terms and Conditions for Subcontractors and Employees". The Authority determined that Mr Hook consciously accepted the position as a subcontractor. Significant weight was given to the fact that the use of subcontractors in the construction industry is widespread, notwithstanding the possibility that Mr Hook was unaware of this practice. Mr Hook could "be held bound by [the construction industry's] reasonable usages even though ignorant of them".[73] Therefore the Authority considered that the intention of the parties pointed towards the contract being one for services.

The defendant exercised a substantial degree of control over Mr Hook. There was "little room for him to use his initiative in which tasks he would undertake or how he would undertake them".[74] Mr Hook also provided some of his own equipment. However, he did not hire others to help him perform the work, he had no opportunity to benefit from sound management in performing the work, and had no responsibility for management and investment. Additionally, Mr Hook took little financial risk. He was not in business on his own account. The Authority determined that real nature of the relationship was one between an employer and employee.

3. *Curlew v Harvey Norman Stores (New Zealand) Pty Ltd*[75]

Harvey Norman entered into a consulting contract with Mr Curlew. Mr Curlew was to be the proprietor of a computer department in a Harvey Norman Store. Each department in a Harvey Norman store is operated as a separate business by a private company acting in a trustee capacity. The private company contracts with Harvey Norman to provide various services, including management. In accordance with this structure, Harvey Norman arranged for the formation of a consulting company and trading trust. Mr Curlew became the sole director and shareholder of this company.

Harvey Norman attempted to transfer Mr Curlew to another Harvey Norman Store due to concerns regarding Mr Curlew's performance. A few weeks later, Harvey Norman formally terminated the consulting contract. Mr Curlew claimed he was an employee and brought a personal grievance against Harvey Norman.

72 Ibid.
73 Ibid 213.
74 Ibid.
75 [2002] 1 ERNZ 114.

The Court held that the following factors were among those that suggested a contract of service between the parties:

- Mr Curlew paid little or nothing in the formation of his business. He paid nothing for the formation of the trust, registration of the company, nor the contract. He did not purchase stock and there was no evidence that he borrowed money to set up the business, which is commonly the case with others who are self-employed.
- Harvey Norman bought the stock that the computer department sold. The trust was invoiced for stock only after it was sold.
- Mr Curlew was unable to engage in other business activities.
- Few business risks were taken.
- Mr Curlew was guaranteed a generous minimum income.
- Mr Curlew did not keep his business's books, and monthly reports and documentation were organised by Harvey Norman.

The following factors were among those the Employment Court considered indicated a contract for services:

- The parties had been in an employment relationship prior to the new arrangement, and deliberately concluded this relationship.
- Mr Curlew was free to choose the hours he worked.
- Mr Curlew was responsible for the hiring and firing of staff, and for the layout of the store and its stock. Similarly, Mr Curlew was responsible for managing stock levels.
- Harvey Norman did not required Mr Curlew to wear its uniform.
- Mr Curlew used stationery in the name of Harvey Norman, but was charged for this.
- Mr Curlew was able to substitute another individual for himself (though he had to seek Harvey Norman's consent to do so).

The Court examined the level of control exercised by Harvey Norman over Mr Curlew. In most circumstances, "Harvey Norman did not exercise the sort of control that an employer would have been entitled to have exercised, and would probably have exercised".[76] Mr Curlew's business was substantially integrated into Harvey Norman, due to the fact that Mr Curlew's business seemed to be part of Harvey Norman, and was not clearly an independent organization. However, Mr Curlew was in business on his own account, according to the Court.

The Court then considered the real nature of the relationship between the parties. It was not one between an employee and employer. A key factor was the fact that Mr Curlew was an employee of the trust rather than Harvey Norman.

76 Ibid [79].

"Harvey Norman dealt with Mr Curlew's trust and his company with which Mr Curlew had an employment relationship."[77] Mr Curlew was held not to be an employee of Harvey Norman.

The Employment Court in *Curlew* recognised that its decision in *Koia* took too simplistic a view of the law under the Employment Contracts Act. Indeed, the Court admitted that judgments did rely to some extent on consideration of all relevant factors, including intention. Intention was relevant under the Employment Contracts Act, but not decisive. Judge Colgan stated that the Employment Court in *Koia* were under a misconception as to the effect of *Cunningham.*

4. *Bryson v Three Foot Six Ltd*[78]

Mr Bryson worked as a model maker for Three Foot Six Limited. He signed a written agreement with Three Foot Six in October 2000, which used the terms "contractor" and "independent contractor". However, in August 2001 Three Foot Six 'rationalized' its workforce, and told Mr Bryson he was no longer required. Mr Bryson challenged this decision, claiming in the Employment Authority that he had been unjustifiably dismissed. The Authority found that Mr Bryson was an independent contractor, and as such it had no jurisdiction to hear his claim. Mr Bryson appealed to the Employment Court.

The Court discussed the payment arrangements between Mr Bryson and Three Foot Six, which tended to indicate a contract for services. Much of the contract suggested a contract of service, however, such as the following:

- Mr Bryson was to be paid double time or receive a day in lieu for working statutory holidays.
- Mr Bryson was required to seek the company's approval before accepting other engagements.
- Three Foot Six was to supply any protective equipment or clothing.
- Mr Bryson could be paid for sick leave where absence was notified in advance.

The Court considered the degree of control exercised over Mr Bryson. Mr Bryson would collaborate with the other technicians on the models based on instructions from the directors. While Mr Bryson supplied some his own tools, such as a cordless drill, a scalpel and a craft knife, Three Foot Six supplied the majority of tools, including sanders, clamps, saws and containers. Mr Bryson did not work on his own projects on the premises. The Court concluded that the Mr Bryson's work was "very much"[79] controlled by Three Foot Six.

77 Ibid [83].
78 (2003) 7 NZELC 97,317 ["*Bryson*"].
79 Ibid 323.

The integration test was considered. Judge Shaw held that the evidence indicated that Mr Bryson was an integral part of the company. "Mr Bryson was not in any way an adjunct to the miniatures unit but an integral part of it."[80]

The Court asked whether Mr Bryson was in business on his own account.[81] It considered Mr Bryson's tax status, but decided that this was not conclusive. Other than issues involving tax, there was no other evidence of Mr Bryson being in business on his own account. He did not tender for the position with Three Foot Six; nor could it be said that he contracted his skills to the company, as he had no relevant experience for the new position. "Mr Bryson acted solely as an individual who took work as it became available regardless of how it was characterised by the person engaging him."[82]

The Court concluded that in the individual circumstances of this case, the real nature of the relationship between Mr Bryson and Three Foot Six was that of a contract of service, and therefore that Mr Bryson was an employee.

5. Has the Law Changed?

(a) Cunningham v TNT Express Worldwide (New Zealand) Ltd[83]

Mr Cunningham was an owner/driver courier under contract to TNT. The written contract between the parties provided that TNT would direct Mr Cunningham as to the routes he was to cover and the customers he was to service. Mr Cunningham was required to provide and maintain a vehicle at his own expense, and TNT was to approve the type and colour of the vehicle. TNT terminated the contract in August 1991. Mr Cunningham claimed that this was unjustified and procedurally unfair, and brought a personal grievance against TNT. The Court summed up the factors as follows:[84]

> In short the contract gives the company very extensive control over the operations of the contractor, and ties him ... to the company. On the other hand, he ... is to provide the vehicle, the transport licence, and the insurance, and to be remunerated mainly per trip. It is ... he who employs any relief driver. The contracts of carriage are made between the company and its customers. The risk of profit or loss in the company's business falls on the company. The risk of profit or loss in the contractor's business falls on him.

Cooke P (as he then was) concluded that "on the interpretation of the contract, there can be little doubt that the owner/driver is intended to be an independent contractor providing exclusive services to the company".[85]

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80 Ibid 324.
81 That is, applied the fundamental test.
82 *Hook*, supra note 16, 325.
83 [1993] 1 ERNZ 695.
84 Ibid 699.
85 Ibid.

In *Cunningham*, the Court considered the real nature of the relationship between the parties. The real nature of the relationship conformed to the terms agreed on by the parties. Importantly, Cooke P stated:[86]

> When the terms of a contract are fully set out in writing which is not a sham (and there is no suggestion of a sham in this case) the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined ... The actions of the parties in carrying out the contract, if in accordance with the contract (and again I do not understand that there is any finding or claim of departure from the contract), may be instructive as illustrating the effect and operation of the contract.

The key factor in this case was that the contract truly reflected the relationship between the parties. There was no suggestion that the contract was a sham, or that the relationship between the parties did not accord with the terms of the contract. In that case, where the terms of the contract are clear and the parties act in accordance with those terms, the words of the contract are to guide the Court's inquiry. Indeed, Cooke P stated that where the terms of a contract are incomplete, such as where "the terms could later be varied or added to by oral agreement"[87] the analysis of the relationship will not turn solely on the rights and obligations defined in the written contract.

In *Curlew v Harvey Norman Stores (New Zealand) Pty Ltd*[88] the Employment Court recognized that its decision in Koia was "too simplistic an analysis of the individual judgments"[89] of the Court of Appeal in *Cunningham*. Indeed, Judge Colgan noted that the Court of Appeal's judgment relied "upon a consideration of all of the relevant factors of which such an expressed term was one evidencing the intention of the parties at the time the contract was entered into".[90]

Judge Colgan concluded that this misconception of *Cunningham* has had an effect on the interpretation of section 6 of the Employment Relations Act. "[I]f Parliament intended to change the law, analysis of what it was before the intended change will vitally affect the assessment of the nature and degree of the change effected."[91] The Court concluded that:[92]

> Parliament has directed the Authority and the Court to determine "the real nature of the relationship" by considering "all relevant matters" (s 6(3)(a)) including by applying "tests" such as control, integration, and what is known by the shorthand of "the fundamental test".

The new section 6 has not altered the legal position as regards determining a worker's employment status. The Courts have always examined the real nature

86 Ibid 701.
87 Ibid.
88 [2002] 1 ERNZ 114.
89 Ibid [35].
90 Ibid.
91 Ibid [43].
92 Ibid [46].

of the relationship between parties. It would be ludicrous to suggest that before the Employment Relations Act, the Employment Institutions examined the *false* nature of the relationship! Indeed, the present tests used to determine employment status are the same as those employed under the Employment Contracts Act. The few key cases that have been decided under the Employment Relations Act are likely to have been decided similarly under the Employment Contracts Act. The Employment Institutions are still averse to giving effect to contracts that do not accurately reflect the parties' intentions or the terms or the manner of the relationship itself. Such circumstances have arisen where the nature of the parties' relationship changed after the contract was first entered.[93] Where these cases have occurred, the Employment Institutions have applied the well-established control, integration and fundamental tests to establish the "real nature" of the relationship, just as the Courts did under the Employment Contracts Act in Cunningham. The problem is that the Employment Relations Act requires the Employment Institutions to look at the real nature of the relationship in terms of the employee/independent contractor division. The binary division still exists.

V: The Need for Change

> The most common criticism concerning the employee/independent contractor distinction focuses on the lack of certainty and determinacy in this field.[94]

1. Intention of the Parties

As discussed above, one of the aims of the Employment Relations Act is to recognize and address the inequality of bargaining power between employers and employees. However, the way in which section 6 operates tends to fly in the face of this objective. Clearly, it is an individual choice of a worker and business as to whether they form a contract for services or an employment agreement. But section 6 allows the Employment Institutions[95] to probe beyond the apparent intentions of the parties to examine the way in which the parties behave, and to then pigeonhole the relationship as either one between a contractor and principal, or between an employee and employer.

In *Koia v Carlyon Holdings* the Employment Court stated:[96]

> [T]he parties may intend one thing, but the question is whether they have achieved their intention. That is why the label they put on it is not to be decisive because the parties may not have taken legal advice and may be unaware that what they are in fact doing does not in law fit the label.

93 For example, *Bryson*, supra note 78, could be characterized as such a case.
94 Davidov, supra note 1, 418.
95 That is, the Employment Relations Authority or the Employment Court.
96 *Koia v Carlyon Holdings* [2001] ERNZ 585, 595.

In the later decision of *Curlew v Harvey Norman Stores*[97] the Employment Court held that intention is relevant, but not decisive. The relationship between parties constantly evolves, and should be assessed as a whole. Indeed, as already highlighted, this was the case under the law in *Cunningham*. Had the relationship between the parties in that case not reflected the terms of the contract, the Court of Appeal would have probed into its true nature.

As Commons has argued, the issue comes down to "whether the parties' intent should be honoured if the nature of the agreement has characteristics of one type of agreement but the parties wish it to be characterised as another".[98] Take the following example: a business owner instructs his solicitor to draw up a contract for services between the business and an independent contractor. It may be industry practice to treat this type of worker as a contractor – this may be for reasons of business efficacy or taxation purposes. Indeed, businesses have an imperative to reduce labour costs, and replacing employees with cheaper, contracted labour is one way to achieve this. However, the solicitor is unable to draw up a "water-tight" agreement for the parties so that the contractor remains exactly that. Someone may subsequently wish to challenge the status of the worker. In such an event, assuming the matter reaches them, the Employment Institutions will examine the "real nature of the relationship". If the nature of the relationship has subsequently changed so that it is now characterized as a relationship between an employer and employee, the initial contract between the parties will be of little significance.

In some circumstances it may be unclear whether a worker is an employee or an independent contractor. Where these circumstances exist, the Employment Institutions will decide which role the worker occupies if the relationship has ceased and the worker has chosen to challenge that cessation. This entails expense to the parties in the Employment Institutions, and in the aftermath where one party must face the consequences of the final determination of their "intentions".[99] For example, where a worker, challenging his or her contractor status, is deemed to be an independent contractor, he or she must then go to the civil courts for redress. This is expensive and could take some time to be resolved. In a borderline case, where there is no bright line showing whether the worker is an employee or an independent contractor, it is unfair that a slight tip of the scales in favour of contractor status means the worker has no access to the swift-resolution available under the Employment Relations Act.

97 [2002] 1 ERNZ 114.

98 Commons, supra note 54, 119.

99 For example, if someone hired as an independent contractor is held to be an employee, the "employer" will suddenly find itself liable for tax payments, accident compensation scheme payments, holiday pay, redundancy, and personal grievance cases.

2. Industry Standards

The Court may consider industry employment standards when determining whether a worker is an employee or an independent contractor, and when considering the intention of the parties.[100] For example, where no contrary intention is evident, the Court may assume that the parties intended to create the type of relationship which is usual in their particular industry.[101] In *Muollo v Rotaru*,[102] which was decided under the Employment Contracts Act, the Chief Judge held that the Court may consider industry practice when assessing the nature of an employment relationship, especially where a practice is well established, as an aid to establishing the intention of the parties.

In *Bryson*,[103] the Employment Court discussed in detail the implications of industry standards when determining employment status. Much was made during the case of the fact that most workers in the New Zealand film and television industry work as independent contractors, "with all the tax advantages attendant with that status".[104] The Court heard that the reason for this "is the project-based, intermittent nature of screen productions and the transferable skills of industry practitioners".[105] The periods of work in this industry are often short; thus, it is impractical to factor in issues relating to redundancy and holiday pay. The Court held that industry practice "may assist in the determination of the issue ... although this is far from determinative of the primary question".[106] Judge Shaw went on to say:[107]

> [I am] not prepared to go so far as to say that under the Employment Relations Act 2000 evidence of industry practice should be completely disregarded. It would be contrary to the common law and would mean the Court could not take account of matters which are important to the parties. The ultimate decision in a case such as this depends upon the entire factual matrix.

Thus, we can see the Courts attempting to give some certainty and allowing parties to rely on industry standards to some extent. Where it is standard practice in a given industry to employ workers as contractors, and those workers really are contractors, then that standard practice may be taken into account. The key is that the relationship actually *does* conform to those standards.

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100 See eg *Hook v JB's Contractors Ltd* (2001) 6 NZELC 96, 207.

101 Feeney, "The Employee/Independent Contractor Distinction" [2001], FindLaw Resources <http://findlaw.com/12international/countries/nz/articles/1360.html> (at 20 April 2003).

102 [1995] 2 ERNZ 414.

103 Supra note 78.

104 Smith, "Wild ruling kneecaps film biz" (2003) The National Business Review <http://www.nbr.co.nz/print/print.asp?id=7391&cid=8&cname=News> (at 24 October 2003).

105 *Hook*, supra note 16, 325.

106 Ibid 320.

107 Ibid.

3. Shams

It is necessary briefly to discuss the issue of so-called "sham" contracts. One must be careful, in giving effect to parties' intentions and observing industry standards, not to allow these reasons to give rise to sham contracts. "A 'sham' is a document resulting from a common intention between the parties not to create the legal rights and duties which the document gives the appearance of creating."[108] Indeed, according to Commons, "[t]he Courts have shown a readiness to look beyond superficial labels if they amount to attempts to circumvent responsibilities or obligations".[109]

The issue of shams arose in *Bryson*.[110] Judge Shaw pointed out that some evidence presented for Three Foot Six "could be interpreted to mean that a significant reason for the present employment arrangement is to avoid the responsibilities imposed by employment law in which case they are a sham".[111] However, if the two parties agreed that they wished to avoid the consequences of employment, and they genuinely establish in law and in reality a contract for services, then there is no sham.

Consequently, parties must have genuine commercial reasons for choosing the type of contract they make. For instance, businesses must not contract for services with their workers for the sole purpose of evading the collective bargaining provisions of the Employment Relations Act. Similarly, workers must not disguise themselves as employees to avoid paying Goods and Services Tax or accident compensation scheme levies.

4. An Unsatisfactory Position

The law relating to employment status is unsatisfactory. Where a worker's role is ambiguous, parties must utilize the mechanisms of the Employment Relations Act in order to determine that worker's employment status. It may be decided that a worker is an employee, notwithstanding the existence of a contract for services. As we have seen, this is an unsatisfactory position for business and workers. This uncertainty leaves both groups vulnerable to law-suits, and forces the parties to use the Employment Institutions to address the preliminary issue of whether a worker is an employee. There must be another way to recognize the potential vulnerabilities of dependent contractors and businesses, while at the same time providing certainty and clarity.

108 Agnew, supra note 3, 118.
109 Commons, supra note 54, 112.
110 *Bryson*, supra note 78.
111 Ibid 326.

VI: Solutions

1. Maintain the Status Quo

One option would be to maintain the dichotomy between independent contractors and employees. If businesses wish to contract with contractors, they can reduce the likelihood of their workers being classified as employees by ensuring that the nature of the relationship really does display the necessary characteristics of a contract for services. For instance, regard should be had to who supplies the equipment used to perform the work. If the principal does so, then the contractor should pay the principal for this. There should be a written agreement between the parties.[112] Both the agreement and the parties' practice ought to demonstrate that the worker is in business on his own account and is subject to little control exercised by the principal.

2. Dependent Contractors Are Employees

Another option is to treat dependent contractors as employees. However, there is a good reason why dependent contractors should not acquire the same rights as employees: because they are not employees. Treating dependent contractors as employees merely forces parties to litigate the issue of whether a borderline independent contractor is really a dependent contractor (and therefore an employee).

There have been proposals to amend section 6 of the Employment Relations Act to address properly the issue of dependent contractors. The New Zealand Council of Trade Unions proposes amending section 6 to read as follows:[113]

> (2) In deciding whether a person (person A) is employed by another person (person B) –
>
> (a) a primary consideration is the extent to which the work that person A does under the agreement, contract or arrangement and how and when person A does the work is –
>
> (i) subject to the control and direction of person B; or
>
> (ii) integrated into person B's business or affairs; or
>
> (iii) both; and
>
> (b) the Court or the Authority (as the case may be) must, among the other matters that the Court or the Authority takes into account, give less weight to anything in an agreement, contract or arrangement that, expressly or by implication, -

112 This will address any potential problems relating to uncertainty.

113 New Zealand Council of Trade Unions, *NZCTU Proposals on a Review of the Employment Relations Act 2000, 12 December 2002*, 8-9.

(i) describes person as a contractor or independent contractor: or
(ii) describes the agreement, contract, or arrangement as an agreement, contract or arrangement for service: or
(iii) provides that the relationship between person A and person B is not that of employee and employer.

There are two main problems with this proposed amendment. The first is that it is no different to those tests employed currently by the Employment Institutions, and as such will make no difference to those workers who are considered to be independent contractors. The second is that it encourages a position whereby all workers are presumed to be employees notwithstanding the terms of their contracts or even where the arrangement itself provides that the worker should be an independent contractor. This would have negative results for workers and businesses. People may choose not to bother with a written agreement. The payment of taxes would become uncertain, as would accident compensation scheme levies and any potential superannuation payments. The proposal is overly biased in favour of aggrieved workers who claim they are employees, so that business bears the burden of proof to establish that a worker is an independent contractor. Moreover, this approach ignores the contractual freedom of the parties. The law as it stands today is equipped to deal with situations where parties dishonestly contract in order to avoid their legal obligations, in that it will not give effect to sham contracts.

3. Fixed Term Contracts

Having some dependent contractors on fixed-term employment contracts would address many of the concerns raised by the defendant in *Bryson*.[114] In that case, evidence was given as to "the project-based, intermittent nature of screen productions and the transferable skills of industry practitioners".[115]

4. The Canadian Approach

The Canadian approach focuses on the ability of dependent contractors to organize and bargain collectively. The Canada Labour Code relates to collective bargaining and freedom of association.[116] The Code defines a dependent contractor as:[117]

(a) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which they are

114 See *Bryson*, supra note 78, 325-326.
115 Ibid 325.
116 See Part I Canada Labour Code, Industrial Relations Preamble.
117 Section 3 Canada Labour Code.

(i) required to provide the vehicle by means of which they perform the contract and to operate the vehicle in accordance with the contract, and

(ii) entitled to retain for their own use from time to time any sum of money that remains after the cost of their performance of the contract is deducted from the amount they are paid, in accordance with the contract, for that performance,

(b) a fisher who, pursuant to an arrangement to which the fisher is a party, is entitled to a percentage or other part of the proceeds of a joint fishing venture in which the fisher participates with other persons, and

(c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.

Similarly, in Ontario the legislature has amended the Labour Relations Act 1995, extending the definition of "employee" to cover dependent contractors. That Act defines a dependent contractor as:[118]

> [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

In *Nelson Crushed Stone* the Board stated that the purpose behind the recognition of dependent contractors:[119]

> [To address] the mischief created by persons who may very well outwardly manifest the trappings of independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-à-vis the beneficiary of his services that he ought to be extended the protection intended by the collective bargaining process.

The Board went on to say that "dependent is to be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service having regard to the industry or undertaking under review".[120] Thus, those workers who fit within the definition of "dependent contractor" in Canada have the right to form into collective associations in order to bargain with principals.

This result could be achieved in another way. This argument proceeds from the assumption that independent contractors are not in need of statutory protection

118 SO 1995, c 1, Sch A.
119 [1977] OLRB Rep Fed 104, 108.
120 Ibid 108-109.

in their relationship with principals because the two are on an equal footing. However, dependent contractors lack the commercial clout held by independent contractors and as such are in need of some protection from the law. In the Canadian context, this is achieved by allowing dependent contractors to form associations in order to be able to bargain with principals from an equal position. However, collective bargaining is at odds with the notion that contractors are in business "on their own account." A more suitable alternative would be to develop the law to allow dependent contractors to form professional associations (much in the same way as legal and medical professionals) to lobby for protection of vulnerable contractors.

5. Australia

Australia differentiates between independent contractors and employees:[121]

> [A]n employee is still to be identified primarily ... by the extent to which he or she is subject to a right to control residing in the putative employer, whereas an independent contract is one who undertakes to produce a given result, but so that the in the actual execution of the work the independent contractor is not under the order or control of the person for whom the work is being done, and may use her or his own discretion in things not specified beforehand.

However, Australia also has an unfair contracts jurisdiction under which the Court has the power to review work contracts that fall outside the scope of a contract of services:[122]

> The unfair work contracts legislation, both State and Federal, provides a legislative response to what has long been perceived as inadequacies in the common law, particularly the law of contracts. The law of contracts does not require a party to the contract to act fairly or reasonably in the exercise of a party's contractual rights. It generally assumes that parties stand on an equal footing with adequate information to make an informed decision. The unfair contracts jurisdiction illustrates that this is all too often not the case ... The jurisdiction has been exercised to achieve individual justice albeit at the expense of contractual certainty.

Sections 127A-127C of the Workplace Relations Act 1996 (Cth) allows the Court to review contracts entered into by independent contractors. The contract must be one for services, it must be binding on the independent contractor, and it must relate to work to be performed by the independent contractor.[123] The Workplace Relations Act also covers "any condition or collateral arrangement relating to such a contract".[124] Those who may apply for a review under the

121 Macken et al, *Macken, McCarry & Sappideen's The Law of Employment* (4 ed, 1997) 48.
122 Ibid 559-560.
123 Workplace Relations Act 1996, s 127A(1)(a).
124 Ibid s 127A(1)(b).

Workplace Relations Act are the parties to the contract, or an organization or association of which the independent contractor or the principal is a member.[125] These parties can apply to the Court to review a contract on the grounds that it is unfair or harsh.[126]

In reviewing a work contract under the Workplace Relations Act, the Court may consider:[127]

> (a) the relative strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and
> (b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and
> (c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
> (d) any other matter that the Court thinks relevant.

The Court may then make an order under section 127B varying the unfair work contract or setting it aside.[128] At present, however, the Workplace Relations Act applies only to government-related contracts, such as contracts relating to constitutional companies,[129] and contracts to which the Commonwealth is a party.[130]

It is necessary to examine what amounts to an unfair work contract:[131]

> [T]he Commission has been prepared to hold that a contract may be unfair for a wide variety of reasons including issues relating to adequate notice for termination, entitlements to superannuation and redundancy payments.

However, the Courts do not apply a standard test in order to determine whether a given contract is unfair:[132]

> It will depend upon contemporary understandings of what is fair .... The broad conception of fairness will extend to substantive and procedural unfairness and unconscionability. Consequently, the relationship between the parties and whether there is unequal bargaining power are relevant.

Importantly, this accords with the objects of New Zealand's Employment Relations Act – that is, recognition of "the inherent inequality in bargaining power in employment relationships" and acknowledgement of the importance of "good faith" in employment relationships.[133]

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125 Ibid s 127A(3)(b) & (c).
126 Ibid s 127A(2)(a) & (b).
127 Ibid s 127A(4)(a) – (e).
128 Ibid s 127B(1)(a) & (b).
129 Section 127C(1)(a).
130 Section 127(1)(f).
131 Macken, supra note 121, 508.
132 Ibid 523.
133 See s 3 Employment Relations Act 2000.

There is debate as to whether procedural fairness itself is a ground upon which a contract could be varied or set aside. The Federal Court has held that parties' conduct after entering into a contract is relevant when considering unfairness.[134] Special circumstances may exist "including non-contractual representations relating to termination and continuance of the relationship which could be subject to scrutiny under the unfair contracts provisions".[135] For example, it may be "unfair" where no notice or minimal notice of termination is given, or where little or no compensation is paid:[136]

> This is particularly the case where contractors such as lorry drivers are reasonably entitled to assume that they have security of tenure and exclusive access to the respondent's work and that if their services are to be terminated they would be compensated for the loss of goodwill.

6. Judicial Development

> The lack of a floor of rights for dependent contractors may therefore be mitigated by the incremental extension of remedies .... Courts seem disposed towards incorporating ideas commonly found in the employment jurisdiction.[137]

Another option is to allow the Courts to develop common law protections in favour of vulnerable dependent contractors. The Courts could develop implied terms such as duties of fairness and good faith in respect of termination of contracts, as they have done in the context of redundancy.[138] Indeed, this approach is hinted at in *Cunningham v TNT Express Worldwide (New Zealand) Limited*, where Cooke P commented on Collins' article: "In my opinion the Courts should not shrink away from such a development should a reconsideration of common law decisions show them to be untenable or unsatisfactory in principle."[139]

(a) Andrews v Parceline Express Ltd[140]

This case is one example of the Court of Appeal taking this approach. Mr Andrews contracted his services as an owner/driver to Parceline Express Limited ("Parceline"). The written contract between Mr Andrews and Parceline provided that Mr Andrews could terminate the agreement with three months' notice. Mr Andrews argued that it was an implied term of the agreement that the company would exercise the power to terminate reasonably.

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134 See Macken, supra note 121, 520 – 521.
135 Ibid 526.
136 Ibid 526-527.
137 Commons, supra note 54, 121.
138 See for example *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 (CA); *Hennessey v ACC* [1982] ACJ 699 (CA).
139 [1993] 1 ERNZ 695, 703.
140 [1994] 2 ERNZ 385.

The Court examined the common law principle that damages cannot be awarded for breach of contract resulting in a disappointment. However, there is an exception to this rule "where the object of the contract is to produce enjoyment and relaxation or to avoid distress and anxiety".[141] The Court held that the contract between the parties was "analogous to one providing expressly or by necessary implication for freedom from anxiety".[142] The Court implied a promised benefit into the contract "for 6 months notice of termination".[143] Mr Andrews had received only one month's notice, so was therefore entitled to compensation for loss of income for five months.

The Court of Appeal made much of the fact that employment legislation contained "the concept of damages for humiliation, loss of dignity and injury to the feelings of the employee: see s 40 of the Employment Contracts Act 1991".[144] While the relationship between Mr Andrews and Parceline was not one of employment, the Court held that:[145]

> [The relationship] was similar to an employment contract ... The common law is entitled to develop it principles and its approach to contemporary problems bearing in mind, and by analogy with, the way the legislature has dealt with allied subjects.

According to Commons, this approach "indicates a de facto acknowledgement for the hiatus. The lack of a floor of rights for dependent contractors may therefore be mitigated by the incremental extension of remedies".[146] Commons suggests that the Courts may increasingly incorporate notions from the employment jurisdiction when deciding commercial cases involving independent contractors. Indeed, the *Andrews* decision demonstrates the Courts moving towards providing contractors with some of the protections afforded to employees. Yet allowing the Courts to develop a body of case law as one solution to the dependent contractor issue could prove costly, in terms of both time and money.

(b) Paul v Mobil Oil New Zealand Ltd[147]

Mr Paul was an independent contractor under an owner-driver contract with the defendant. The contract provided that the company would terminate the agreement by 24 hours' written notice if Mr Paul were convicted of an offence concerning drunkenness. Mr Paul was charged and convicted of drunken driving in his private car, and was disqualified from driving for six months. Mobil chose to exercise its rights under the contract, and gave Mr Paul 24 hours' notice of

141 Ibid 396.
142 Ibid 397.
143 Ibid.
144 Ibid.
145 Ibid.
146 Commons, supra note 54, 121.
147 [1992] 3 NZLR 194.

termination of the contract. The issue was whether the defendant breached an implied obligation to observe procedural fairness.

The Court was careful to require that "[t]here must be a clear basis for implying any term at all into a formal written contract."[148] In the circumstances of the case, the Court held that there was no implied requirement of procedural fairness. There was a formal written contract, which contained an express right to cancel for certain reasons. The Court concluded that:[149]

> [I]f the facts objectively considered do confer a substantive right to terminate, there will generally be no justification for impeaching the termination upon the ground that procedures not referred to in the contract ... had not been observed.

Because there was a written contract that contained an express right to cancel, there was no ground upon which to read in a requirement of procedural fairness.

7. A Hybrid Solution?

Each of these potential solutions has its drawbacks. Maintaining the status quo does nothing for certainty for parties and protecting vulnerable contractors. Dependent contractors should not be classed as employees, because they do not share all characteristics of employees. Canada's collective bargaining regime for dependent contractors contradicts the notion that contractors run their businesses on their own accounts. Moreover, use of a collective professional association could possibly achieve a similar outcome. Australia's unfair contracts jurisdiction seems a sensible option, but there is uncertainty as to exactly what constitutes an unfair work contract (and the jurisdiction only applies to contracts involving constitutional corporations or Commonwealth authorities). Leaving the Courts to develop a body of case law clarifying the tests would involve costs and delays.

This author proposes a hybrid solution to the problem of vulnerable contractors and certainty in contracts. Statutory intervention is the most appropriate solution, because leaving the Courts to develop the common law will take much time and money. Any legislative reform should be careful not to collapse the distinction between contractors and employees, although the distinction between independent and dependent contractors may not be so clear.

First, any reform should make mediation compulsory for any disputes that arise between contractors and principals. This would address any concerns that vulnerable contractors do not have the same access to the Court system as their well-resourced principals. Interestingly, the Employment Relations Law Reform Bill promotes more effective employment relationship dispute resolution, including disputes that arise between contractors and principals. Clause 46 of the

148 *Paul v Mobil Oil New Zealand Limited* [1992] 3 NZLR 194, 202.
149 Ibid 204.

Bill inserts a new section 144A into the Employment Relations Act. Under that section, the chief executive is authorized to provide dispute resolution services to parties in work-related relationships that are not employment relationships where the parties to the relationship voluntarily agree.

Secondly, the reform should take aspects of the Australian unfair contracts jurisdiction. This would need to involve some recognition of the balance of power between the principal and contractor, and whether the contractor was independent or dependent. In this way, dependent contractors may have some protection in relation to the process of termination of the contract, remuneration, and in the process of the bargaining process itself.

Thirdly, any reform should incorporate some sort of objective standard of good faith and fairness, possibly that adopted by the Court of Appeal in *Andrews v Parceline Express*.[150] This could bring in requirements relating to adequate notice of termination of the contract, and a requirement of good faith in the dealings between the parties.

150 [1994] 2 ERNZ 385.