

The International Labour Organisation finally faces reality

Ken Phillips

Something quite dramatic occurred at the International Labour Organisation (ILO) in June this year. For the first time, the peak body of world-wide labour regulators accepted that labour regulations should not interfere in commercial transactions.

As sensible and obvious as this might seem, it in fact represents a huge conceptual leap for the labour regulation community. It is an historic development of significant proportions. In some respects it heralds a further unravelling of the moral foundations of Leftist ideology.

Most importantly, however, it holds out long-term prospects for more practical business and labour regulations globally, regulations that will aid grass roots economic activity and job creation. It has immediate implications in Australia because it secures a moral and legal underpinning to the Federal Government's proposed independent contractor legislation.

What are the issues, how did this situation unfold at the ILO and globally, and why is this development so important?

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The ILO

The ILO was formed in 1919 after the end of World War I, in the belief that the War was in part the consequence of a conflict between labour and capital. This was an understandable view early last century. The Marxist concept of class warfare was in the ascendancy. The old order in Europe was collapsing. Monarchs were being overthrown and organised labour played a major revolutionary role, particularly in Russia. World War I seemed to emerge from this chaotic revolutionary environment.

The ILO was formed in the belief that if labour, capital and governments could get together and talk in a structured way, conflict could be diminished. Following World War II, the ILO survived to become a division of the United Nations. The ILO's principles and structures are still based on the 1919 vision. It operates through a highly formalised 'tripartite' dialogue between unions, employer bodies and governments.

With the UN now having the all encompassing 'world peace' agenda, however, the core task of the ILO has narrowed. Effectively, the ILO is the international standards-setter for labour regulation.

The ILO operates throughout the year, but in June each year its activities culminate in a three-week session in Geneva, Switzerland. Government, union and employer representatives from across the globe meet to make the big decisions.

At the heart of every ILO consideration is the notion that class warfare at work is inevitable and that governments must regulate to manage that conflict. The underlying conceptual orthodoxy is that employers will always want to exploit, and that employees will always be subject to potential exploitation.

Consequently, the ILO has developed a long list of 'standards' covering the role of unions, collective bargaining, child labour, work safety, equal opportunity, anti-discrimination and so on.

Unions, labour lawyers, academics, and government policy bureaucrats all take immense interest in ILO deliberations and decisions. The ILO directly affects the design of national labour laws. For example, most Australian industrial relations, equal opportunity and anti-discrimination laws make direct reference to, and draw upon, ILO Conventions and principles. Hardly any academic discussions on labour issues will occur without reference to ILO standards. The ILO matters!

Diminishing reach and the independent contracting problem

In the mid-1990s, however, concern was expressed by unions, labour academics and regulators that the reach of employment law and regulations was being restricted. The problem manifested itself through the apparent rise of independent contractors. These



The impact of the ILO's new standard on Australian labour law is direct and immediate.

are working people who are not employees. They are the smallest of small business people—businesses of one.

The problems perceived by the regulators were many. Independent contractors were outside the design reach of most income tax withholding laws. Governments could not require businesses to send income tax to them if the worker was not an employee. In addition, businesses allegedly avoided their work safety obligations if independent contractors were used. But perhaps what raised most concern was that independent contractors did not formally come within the reach of the organised labour collective—the unions. Independent workers, by definition, do not engage in collective activ-

ity. These workers threaten the global institutions of the union movement.

These and related issues of concern are both practical and conceptual. On the practical side, for example, governments need to collect tax, work must be safe and, in the mind of the ILO, unions need to function.

There are, however, significant conceptual difficulties when thinking of individuals as businesses.

The most extreme view holds that the phenomenon of the independent worker is in fact an employer plot to further employers' exploitative urges. It's a scam, many allege, designed to enable employers to avoid financial and social obligations. This view is translated into an academic position

called the 'dependent contractor' thesis. It holds that someone might be an independent contractor at law, but if he or she has only one client, then they are in fact 'dependent' and should be treated as an employee.

The dependent contractor thesis gained strong acceptance among respected economists, statisticians and regulators by the end of the 1990s. What few realised was that they were blurring the line between employment law and commercial law.

This blurring developed further with the introduction of the idea of 'the problem of the triangular relationship'. This claimed that if one party had a contract with a second person and the second person contracted fur-

ther with someone else, then this was 'a problem'. When this process occurs repeatedly, it's a series of cascading commercial contracts. It might be 'triangular' but it's precisely how economies operate.

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These concepts—'dependent contractor' and 'triangular relationships'—were not just theoretical. They appeared repeatedly, for example, in Australian legal cases and formed the basis for several pieces of legislation. The New South Wales industrial relations unfair contracts laws are a product of these concepts. It is why the NSW industrial relations commission has repeatedly made rulings on commercial contracts—including retail tenancy leases and franchise agreements.

The issue inevitably found its way on to the ILO agenda. There was one overarching concern, namely, that employment law and regulation was under threat. Workers were leaving employment to become independent contractors but many were allegedly 'dependent'. The process was a sham—an employer scam to avoid obligations. The scam was highlighted by triangular relationships in which employers contracted-out of their obligations through franchising, labour hire and so on. The solution, it was thought, was clear. Labour law needed

to extend its reach to capture commercial contracts.

The ILO debates on the issue began in 1996, occurred again in 1998, had a committee of 'experts' report in 2000 and reached a major 'Conclusion' in 2003. It returned to the agenda in 2006 to achieve a final outcome. It has perhaps been the most protracted and difficult debate in the history of the ILO, causing high anxiety and significant emotion along the way.

The ILO result

For many years the debate was inconclusive, but started to gain focus in 2003. What started to occur was a slow recognition that there is a sharp distinction between the employment contract and the commercial contract—at least in policy terms.

The 2003 ILO 'Conclusion', an interim step to an end result, contained a statement that independent contractors are legitimately outside employment regulations. This was a significant development. The key part of the Conclusion read:

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

This demonstrated that a policy was slowly emerging which understood that, in economic terms, the regulation of commercial contracts and employment contracts are directly opposed. Commercial contract regulation has as its primary objective the prevention of collusive activity that tries to achieve price-fixing and monopoly. By comparison, employment contract regulation facilitates collusive activity to achieve (labour) price-fixing by delivering monopoly bargaining power to the labour collective. If employment regulation intrudes into commercial contracts, price-fixing and monopoly inevitably become sanctified in the broader economy, albeit by stealth. This is economically dangerous. And

once the line has been crossed, containment is not possible.

Independent contractors (self-employed) are the line. They are people who, by definition, earn their living through the commercial contract. To treat these people as employees it is necessary for legislation to declare a commercial contract to be an employment contract.

This is what the Queensland *Industrial Relations Act* allows. When using the Act to declare a corporation to be an employee in 2000, the Queensland Commission said something to the effect: 'it troubles us to declare something to be what it is not, but given that the Act requires us to do so, we must'. In short, the Queensland Act creates legal and economic nonsense and confusion. It distorts reality.

The next ILO development was a first-ever, global survey of employment definitions. One key to the debate for a long time was the view that the definitions of employment and independent contracting were unclear. In surveying some 80 countries, the ILO found the reverse. The 2005 ILO report expressed surprise to find substantial 'convergence between the legal systems of different countries' in the way they defined the difference between employees and independent contractors. Contrary to many allegations, courts worldwide know exactly what they are looking for.

The ILO found that the distinguishing difference is that employees are legally dependent and independent contractors are not dependent.

In lay language, employees are dependent because they do not have the right to control the terms of their work contracts. Independent contractors are not dependent, because they share control of the terms of their work contracts with the other party.

Further, the ILO report recognised the illegitimacy of the term 'dependent contractor' and instead



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emphasised three key terms. ‘Worker’ is a generic term of which ‘employees’ and ‘independent contractors’ are subsets. The ILO stated that a ‘dependent worker’ is an employee.

This new level of authoritative definitional clarity set the scene for the 2006 debate. What emerged was historic.

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

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

This is a new ILO labour standard. It recognises the necessity to keep distinct the line between the employment contract and the commercial contract. It strikes a balance between protecting employees and protecting those who work through the commercial contract.

The importance of the Recommendation

The simplicity of language in this new ILO labour standard understates the huge significance of the 2006 development.

In Australia, the impact is direct and immediate. The industrial relations ‘employment deeming’ provisions in Queensland and the industrial relations ‘unfair’ contracts provisions in NSW are stripped of international labour standards credibility.

The proposed Federal independent contractors legislation is in accord with the new ILO standard. It keeps definitions within the common-law structures which fit with the ILO standards and it targets the elimination of sham or disguised employment.

This flips Australian political norms on its head. Some State Labor governments suddenly find themselves in contravention of ILO labour standards, with the Federal coalition in accord. Australian political orthodoxy would suggest that it’s supposed to be

the other way around!

It is, however, not really all that surprising. Since the collapse of the Berlin Wall, the traditional twentieth-century ‘left versus right’ dynamic of politics has rapidly declined. Communities increasingly do not define themselves in terms of a class war between workers and bosses. Issues that divide and unite communities are now more complex, diverse, unpredictable and fluid.

In the work environment, many workers seek to be, and many are, their own boss. The right to be your own boss is a human rights issue. Governments must not take away that right. This is now recognised at the ILO.

But there’s more. If labour regulations were to have continued their intrusive thrust into commercial transactions, great harm would have been done. Commercial activity has already been severely assaulted by attacks against legitimate contracting-out, labour hire, franchising and leasing. In thousands of unseen ways these regulatory attacks (and others) reduce the success of economies.

In addition, no economy can succeed where certainty of commercial transaction is destroyed by either war, bad public policy or other causes. Where commercial uncertainty exists, the opportunity to break poverty cycles and to achieve national and global economic equity is diminished.

In June 2006, the International Labour Organisation made a step in an historic, positive direction. Understanding the significance of this step and following through with national and global policy alignment is the next challenge.

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