Contractors have right to be independent

Recognition is at last being given to a small, but important section of the workforce, argues **Bob Day**.

Twenty-eight per cent of the Australian private sector workforce have jobs but are not employed. They work as self-employed independent contractors. This work reality, which has emerged in the past 20 years and is common overseas, has shaken and confused tax law, labour law, social regulators and business institutions across the world.

The general reaction has been to regard independent contracting as a threat. Tax administrators perceive challenges to their tax collecting powers. Social welfare designers see threats to welfare systems. Labour regulators conclude that non-employees have no protection. Unions see a threat to their power base and employers have difficulty understanding how businesses can operate without employee command and control. Political parties aren't sure how to react.

All these perceptions came to a head at the recent International Labour Organisation Conference in Geneva. The ILO is the peak world labour institution and is a division of the United Nations with an annual budget of $US480 million ($707 million).

The ILO's core activity is the creation of international labour standards, which are statements of principle but which member countries are encouraged to ratify and apply to their respective labour laws.

The standards are created though a consensus-driven process involving government, union and employer representatives.

Since 1996 the ILO has been struggling with the issue of independent contractors and has twice failed to achieve an understanding.

The June 2003 conference considered the issue under the heading of "Scope of Employment", but in reality promoted an agenda to give labour regulators the ability to selectively ban independent contracting under the controversial dependent contractor thesis.

The international union representatives pushed the view that there exist independent contractors who because they have only one client must be "dependent" contractors and therefore must be exploited and therefore are really employees. On the other side, the international employer group said the issue was about the integrity of the commercial contract because it is work under the commercial contract that identifies independent contractors.

In the middle, governments were disjointed. The German government talked about the need to prevent unfair competition. The European Union tried to push a united pro-regulation voice but had internal dissent. The US said the argument was new to them and the government of Guatemala wanted to regulate everything.

Most developing countries said they had trouble regulating anything and needed technical and resource assistance. The Australian government stood as a lonely voice arguing that workers should have the right to choose whether they wish to be employees or independent contractors.

Perhaps the Australian government was more aware of the issues than other nations because Australia had the debate over independent contractors when the tax system was reformed in 2000 (the Ralph reforms) and largely resolved the issue to create tax equity with employees.

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Queensland introduced legislation that declared contractors were employees, but the president of the state's Industrial Relations Commission has declared the legislation a failure. NSW and Victoria toyed with similar legislation but have dropped the idea.

The ILO debate reflected much of the Australian experience. In reality contractors are paid for performance. They are not employees. They are running businesses with all the associated risks and expenses. Even if the idea of "exploitable" dependent contractors seems reasonable, when one digs deeper the issue is to do with the defence of free markets. The commercial contract is the core legal underpinning of free markets and if commercial contracts are capable of being regulated like labour contracts then price fixing, competition destruction and exploitation of consumers become real possibilities.

The final ILO statement, backed by unions, employers and governments, made a commitment to support genuine commercial contracts and genuine independent contracting. They agreed that sham or disguised employment should be stopped. The ILO is to create a labour standard reflecting this outcome.

Now that the peak world labour institution has reached this conclusion, the use of the dependent contractor argument as a vehicle to extend the reach of labour regulation into commercial contracts can be seen as the dangerous sham it always was. Further, in making itself relevant to emerging social realities, the ILO has made a historic defence of the rights of workers to be independent contractors if they wish.

■ *Bob Day is president of Independent Contractors of Australia. ICA sent an observer to the Geneva conference.*