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Submission to
Senate Education, Employment and Workplace Relations Committee
Inquiry into the Fair Work Bill 2008
9 January 2009

Independent Contractors of Australia is pleased to make a submission to the Senate inquiry into the Fair Work Bill 2008. This submission addresses independent contractor issues.

It is accepted that the intent of the legislation is to ensure that jurisdictional separation is maintained between:

(a) employees who are regulated under employment law (workplace relations/industrial relations)

and

(b) independent contractors who are regulated under commercial law.

This is the policy principle established under International Labour Organization instruments and supported by both the Australian Labor Party and the Coalition parties.

However, to secure this principle it is necessary for the Fair Work Bill to make reference to some independent contractor issues, primarily the need to prevent sham contracts and coercion.

In reviewing the bill we have looked at the clauses covering independent contractors and recommend:

- Five clauses where deletions of minor wording should occur. These are technical modifications to assist clarity and consistency in achieving the policy intent.
- Three clauses with references to independent contractors that should be retained.
- The addition of a sentence in one clause to further assist clarity.

We trust that these recommendations are helpful to the Committee's considerations.

General principles

Independent contractors are not employees. They are individuals who earn their income through the commercial contract, not the employment contract. This is a fact of law. As a consequence, independent contractors find their protections and have their contracts regulated through commercial law and not employment or industrial relations law. Every worker has a right to be an independent contractor. That right should not be restricted or diminished through legislative construct.

These basic rights and principles applying to each and every worker were endorsed by the International Labour Organization (ILO) in mid-2006. They were the stated policy undertakings at the 2007 federal election of both the Australian Labor Party and the Coalition parties.

The key clause from the 2006 ILO Recommendation is *clause 8* which reads:

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

This followed an earlier 2003 ILO Conclusion that stated:

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

The Fair Work Bill 2008 has elements which support these principles and elements which are not consistent with these principles. This submission discusses the supporting and inconsistent sections and recommends amendments to rectify the inconsistencies and assist clarity.

Existing protections

In late 2006, the Australian parliament passed ground-breaking legislation for independent contractors that set international precedent by being the first nation to reflect in law the ILO Recommendations of 2006. These are the *Independent Contractors Act* 2006 and the sham contractor provisions of the *Workplace Relations Act* (WRA). The *Independent Contractors Act* has already proven its value with the application of its unfair contract provisions in at least two precedent-setting cases during 2008, both of which favoured independent contractors.

In addition, independent contractors are covered and protected within the ambit of all occupational health and safety, equal opportunity and anti-discrimination and privacy laws. They have the additional advantage of being covered by the *Trade Practices Act* and Fair Trading Acts of each State.

At the 2007 federal election the Australian Labor Party and the Coalition parties had policy positions which supported the *Independent Contractors Act* and the sham contractor provisions of the WRA.

Not industrial relations

Workplace relations law is industrial relations law. It is specifically about the governance of relationships between employers and employees. It is totally different from commercial law because the relationships between employees and employers are substantially different from commercial relationships. For the purposes of clarity and consistency, commercial law and industrial relations law need to be distinct, different and separate. Where either intrudes into the other's jurisdiction, significant confusion is created for both employment and commercial undertakings within the community, which can harm both economic activity and the rights of parties.

The Fair Work Bill 2008 displays some inconsistency in some places in terms of definition and omission. These appear as probable drafting issues which can be clarified through amendments to enhance the clarity of, and consistency with, the policy intent.

SECTIONS WHERE INDEPENDENT CONTRACTORS ARE REFERENCED. COMMENTS & AMENDMENTS RECOMMENDED

Chapter 1: Part 1-1: Division 3: Section 6 (1) [Page 6] reads

> *Chapter 3 sets out rights and responsibilities of national system employees, national system employers, organizations and others (such as independent contractors and industrial associations).*

Comment: The reference to independent contractors is inappropriate because it suggests that independent contractors are within the scope of the legislation.

Amendment needed: The words "independent contractors" should be deleted from this clause.

Chapter 1: Part 1-2: Division 2: Section 12 [Page 18] reads

> *Independent contractor is not confined to an individual*

Comment: This definition is needed to reflect the fact that independent contractors can operate through partnerships, trust or company structures. It is both appropriate and necessary because it clarifies the scope of the sham contractor and anti-coercion provisions later in the legislation.

Chapter 1: Part 1-2: Division 2: Section 12 [Page 18] reads

Industrial association means

(a) An association of employees or independent contractors or both or an association of employers that is registered or recognized as such an association (however described) under a workplace law; or

(b) An association of employees or independent contractors or both (whether formed formally or informally) a purpose of which is the protection and promotion of their interests in matters concerning their employment or their interests in matters concerning their employment or their interests as independent contractors (as the case may be) or

(c) An association of employers a principal purpose of which is protection and promotion of their interests in matters concerning employment and/or independent contractors.

Comment: The references to independent contractors are inappropriate. Associations of employees and/or employers can and should have the right to represent independent contractors. However the representation they exercise for independent contractors should be distinct in its legislative avenues to the representation they exercise for their member employees or employers. Representation and assistance to independent contractors can be exercised through utilizing the *Independent Contractors Act* as one example.

This section (12), however, creates an entirely different outcome. By definition it places independent contractors into the same category as employees for the purposes of representation under the bill. In effect it extends the jurisdictional reach of the bill to independent contractors. This is not consistent with ILO Recommendations or the policy intent of the bill and creates jurisdictional confusion with commercial law.

Amendment needed: The words “independent contractors” should be deleted from this section.

Chapter 1: Part 1-2: Division 2: Section 12 [Page 26] reads

Registered employee association means

(a) An employee organisation or

(b) An association of employees or independent contractors or both that is registered or recognized as such an association (however as described) under a state or Territory industrial law.

Comment: For the same reasons stated previously, the reference to independent contractors is inappropriate.

Amendment needed: The words “independent contractors” should be deleted from this clause.

Chapter 1: Part 1-2: Division 2: Section 12 [Page 30] reads

"Workplace law means

(a) this Act or

(b) Schedule 1 to the Workplace Relations Act 1996 or

(c) the Independent Contractors Act 2006

Comment: The inclusion under sub-section (c) of the *Independent Contractors Act* as a "workplace law" is inappropriate. It changes the commercial ambit of the *Independent Contractors Act*, turning it from commercial law to employment and industrial relations law. It breaches ILO Recommendations concerning independent contractors not being subject to employment law, is inconsistent with the intent of the bill and creates jurisdictional confusion with commercial law. It works against the commercial interests of, and protections afforded to, independent contractors.

Amendment needed: sub-section *(c)* should be deleted.

Chapter 3: Part 3-1: Division 3: Section 342 [Pages 297, 298] reads

meaning of adverse action

(3) a person (the principal) who has entered a contract for services with an independent contractor against the independent contractor or a person employed or engaged by the independent contractor the principal:

(a) terminates the contract; or

(b) Injures the independent contractors in relation to the terms and conditions of the contract or

(c) Alters the position of the independent contractor to the independent contractor's prejudice or

(d) Refuses to make use of or agree to make use of services offered by the independent contractor or

(e) Refuses to agree to supply goods to the independent contractor"

Note: Similar references to independent contractors are made under (4) & (6) of the section.

Comment: This section defines actions that constitute discrimination against independent contractors by a person who has engaged an independent contractor. On the surface the inclusion of independent contractors could appear to be a positive. However, it is in fact inappropriate. It again confuses commercial with industrial relations activity, making a discriminatory act against independent contractors an industrial relations issue. The potential discrimination alluded to would probably arise from a commercial dispute between parties. Commercial disputes should be handled through commercial legal avenues. This is the principle contained in the ILO instrument. In fact, where such disputes could occur, protections are well-afforded through three primary avenues:

(a) anti-discrimination and equal opportunity laws and
(b) the unfair contract provisions of the *Independent Contractors Act*. The two precedent-setting and successful unfair contract actions decided in 2008 effectively addressed the issues covered in Section 342.
(c) general commercial law particularly the Trade Practices Act and state Fair Trading Acts. What is important is that commercial disputes are handled through commercial avenues.

Amendment needed: Delete (3), (4) and (6) from Section 342.

Chapter 3: Part 3-1: Division 5: Section 355 [Page 306] reads

Coercion – allocation of duties etc. to particular person

A person must not organize or take, or threaten to organize or take, any action against another person with intent to coerce the other person, or a third person, to;

(a) Employ or not employ, a particular person or
(b) Engage or not engage a particular independent contractor or
(c) Allocate or not allocate particular duties or responsibilities to a particular employee or independent contractor or
(d) Designate a particular employee or independent contractor as having or not having particular duties or responsibilities.

Comment: This section is directed towards stopping anyone from imposing restrictions on the commercial engagement of independent contractors through the use of industrial relations style activity. The Explanatory Memorandum states *"For example, clause 355 prohibits an industrial association from organising industrial action against a head contractor with intent to coerce the head contractor to engage a specific employee as a site delegate or safety officer."* This protection against industrial relations-type coercion applies also in relation to restrictions that could be applied against the use of independent contractors. It is an appropriate section which addresses potential industrial relations coercion and dovetails neatly with the secondary boycott provisions of the *Trade Practices Act*.

Recommendation: Retain this clause.

Chapter 3: Part 3-1: Division 6: Sections 357-359 [Pages 308 to 309] reads

Division 6 - Sham Arrangements

357: Misrepresenting employment as independent contracting arrangement.

(1) A person (the employer) that employs or proposes to employ an individual must not represent to the individual that the contract of employment under which the individual is or would be employed by the employer is a contract for services under which the individual performs or would perform work as an independent contractor.

(2) Subsection (1) does not apply if the employer proves that, when the representation was made the employer;
(a) Did not know and
(b) Was not reckless as to whether;
The contract was a contract of employment rather than a contract for services

359 : Misrepresentation to engage as independent contractor
A person (the employer) that employs or has at any time employed an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter a contract for services under which the individual will perform as an independent contractors the same or substantially the same work for the employer.

Comment. These sections are a modified and simplified version of the sham contractor provisions contained in the *Workplace Relations Act*. They have the same outcome as the WRA provisions that are intended to make illegal the misrepresentation of an employment contract as an independent contractor (commercial) contract. The provisions are highly appropriate.

Recommendation: Retain these clauses.

Chapter 2: Part 2-4: Division 2: Section 172 [Page 161] states

(1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matter) may be made in accordance with this Part:
(a) matters pertaining to the relationship between an employer that will be covered by the agreement and the employer's employees who will be covered by the agreement;
(b) matters pertaining to the relationship between the employer or employers and the employee organisation or employee organizations that will be covered by the agreement

Comment: The effect of this section and related sections is to allow any matter to be inserted into an enterprise agreement. However, if the matter does not pertain to (a) employer-employee or (b) employer-union relationships, the matter is void (see Section 253 "has no effect") even though the balance of the agreement may be valid. However, if the matter is unlawful *(Clause 194)*, Fair Work Australia cannot approve the agreement. An example of an unlawful matter is the payment of bargaining service fees to a union.

The Explanatory Memorandum (paragraphs 672 & 673) argues that a non-permitted matter would be a clause that prohibited the use of independent contractors and that a permitted matter would be a matter that required independent contractors to be paid under an employee-type pay structure. This is a fine splitting of legal hairs and it will lead to confusion. To require an independent contractor to be paid as if he or she were an employee is effectively to require the independent contractor to be treated as an employee. This, in turn, effectively

means banning the use of independent contractors. On this reasoning the permitted matter is in reality a non-permitted matter. The consequence is that the legislation opens up an area of wide legal uncertainty where the application of the ILO principle becomes uncertain. It is highly probable that this will lead to significant legal dispute.

But there is another aspect alluded to in the Explanatory Memorandum (above). It is recognized that if an enterprise agreement is struck relating to employee pay rates, that agreement should not be breached either through obvious breaches or by sleight-of-hand. A deal is a deal! Where concerns are raised that the use of independent contractors undermined employee enterprise agreement pay rates, the sham contractor provisions are available and should be used.

The need is to achieve both employee and independent contractor protection and this is best achieved through clarity of legislative design. Sham contractor provisions protect employees. This is clear. But the lack of clarity under the permitted/non-permitted matters creates significant potential for discrimination against independent contractors. This is not the intent of the Fair Work Bill. A straightforward resolution is feasible.

It is recommended that the bill be amended to make unlawful any matter in an enterprise agreement that restricts, controls or dictates the use or non-use of independent contractors. This would ensure clarity in the law and diminish the risk of dispute over such clauses in enterprise agreements. It would be consistent with Sections 357 to 359 (prohibiting coercion in relation to the use of independent contractors). It would not affect or diminish the strength of the sham contractor provisions. It would be consistent with the ILO Recommendation requiring that independent contractors are not subject to employment and industrial relations law, and consistent with the 2007 election undertakings of the ALP and the Coalition parties.

Recommendation: That matters classified as unlawful content (clause 194) be expanded to include:

- *any matter that restricts, controls or dictates the use or non-use of independent contractors.*