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## Statement Fair Work Act 1 July 2009

This week the *Fair Work Act* becomes law. It is appropriate for Independent Contractors of Australia to make comment on the Act as it relates to independent contractors/the self-employed.

### Summary

ICA is calling on the Rudd government to change the *Fair Work Act* to remove inappropriate references to independent contractors.

ICA considers that the *Fair Work Act* challenges key undertakings given to ICA by the (now) Deputy Prime Minister Julia Gillard in the lead-up to the 2007 election.

FWA creates mechanisms for potentially placing the commercial contracts of the self-employed into labour law jurisdiction. This denies the self-employed their rights to commercial protections.

### Background

For several decades the rights of independent contractors (self-employed people) to operate under commercial contracts has not been given due consideration. In the past there has been a view pushed from the labour law perspective that the only form of legitimate labour is that undertaken by employees.

In 2003 and 2006, however, (<http://www.contractworld.com.au/pages/PDFs/ILO2006Recommendation.pdf>) the International Labour Organisation accepted that independent contractors are legitimate, are not employees and are subject to commercial law and regulation and not industrial relations law. The Australian government and the Australian Council of Trade Unions supported this position of the ILO at the ILO meetings in 2003 and 2006. ICA supports these significant ILO decisions.

In late 2006, the *Independent Contractors Act* was passed securing the principles established by the ILO in Australian law. ICA strongly supports the *Independent Contractors Act*. The *Fair Work Act* needs to be assessed on the basis of whether or not it breaches the ILO principles supporting independent contractors/the self-employed.

### The *Fair Work Act*

The *Fair Work Act* on the surface appears not to directly attack the rights of independent contractors to operate under commercial contracts. However, it does several things which 'whittle away' the ILO principles.

The Act:

- Includes the *Independent Contractors Act* in the definition of 'workplace law'.
- Gives unions potential jurisdictional reach over independent contractors.
- Allows enterprise agreements to potentially cover independent contractor issues.

ICA made a detailed submission (<http://www.contractworld.com.au/reloaded/ica-senatefairwork.php>) to the Australian Parliament explaining why each of these provisions should not be included in the *Fair Work Act*.

In summary, the Act opens the opportunity for unions and activist labour lawyers to argue that the commercial contracts entered into by independent contractors are subject to industrial relations law, thus destroying the commercial integrity endorsed by the ILO. Such attempts would be subject to considerable commercial challenge.

### **Electoral undertakings by the ALP**

In October 2007 the Deputy Labor Leader Julia Gillard gave the following written undertaking to ICA in the context of the build-up to the 2007 federal election.

- *"...under Labor it will not be lawful for agreements to contain clauses ... to prescribe that contractors be engaged or not engaged on the basis of their industrial agreements ..."*
- *"Labor believes unions should not be permitted to interfere in commercial arrangements involving contractors..."*
- *"Labor's policy is that independent contractors are small businesses which should be regulated by commercial law and not industrial law..."*

(see full letter below)

ICA took the statements made to it at face value. We accepted the commitments made by the Labor Party even when many criticized us on the basis of the Labor Party's historical approach to independent contractors.

In 2008, when the Fair Work Bill became available, ICA made its concerns regarding the Fair Work Bill known to the Rudd Government and sought changes to the Bill, as explained in our submission.

On any assessment, the *Fair Work Act*

- Allows industrial agreements to contain clauses to discriminate against Independent contractors
- Compromises the commercial integrity and status of independent contractors by including the *Independent Contractors Act* under the definition of workplace law. This creates jurisdictional confusion.

### **The federal opposition parties**

In 2008, when no support was forthcoming from the Rudd Government for changes to the Fair Work Bill, ICA sought support from the federal opposition and the minor parties. The opposition in the Senate, led by Senator Eric Abetz, argued for, and moved, each of the amendments we sought. Senator Abetz mounted a strong case for the protection of independent contractors and the full application of the ILO principles. Key comments from Senator Abetz in the Senate debate are below.

On this important issue the federal opposition has shown a clear understanding of the ILO principles and how they should be applied in legislative practice to truly protect the rights of the self-employed (independent contractors)

Independent Contractors of Australia is disappointed that this position is not bipartisan. Based on the undertakings of the ALP's Deputy Leader, ICA had good reason to expect that it was. ICA remains firmly committed to this position and will continue to be willing to work with the Government and the other political parties in the Commonwealth Parliament to frame appropriate amendments to achieve the internationally recognized objectives.

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[Extracts from Hansard: Quotes from Senator Eric Abetz: Debate on the Fair Work Bill 17 March 2009](http://www.aph.gov.au/Hansard/senate/dailys/ds170309.pdf)  
<http://www.aph.gov.au/Hansard/senate/dailys/ds170309.pdf> From pages 1797

“Even the International Labour Organisation as recently as a few years ago said it is vitally important—they can see the sense in this—to separate out independent contractors from the employment relationship.”

“...if we were to pass the amendment that you suggested earlier that we should give effect to—not just consider but give effect to—ILO recommendations in this legislation, there would not be that sort of reference to independent contractors. Even the ILO says that that is a sensible way forward.”

“...we believe that independent contractors should be subjected to commercial legislation. Even the ILO agrees. I honestly thought it would be a no-brainer, given the most recent determinations out of the ILO in 2003 and followed up in 2006, that the government would be supportive of this, especially given that, chances are, the independent contractors are a more representative voice as to the needs and aspirations of small businesses involved in contracting than the government is.”

“Just in relation to our very first amendment in this tranche, if you go to page 6 of the bill, there is the heading ‘Rights and responsibilities of employees, employers, organizations etc’. Anybody would be forgiven for thinking that that was dealing with the heart of industrial relations law. It then says: Chapter 3 sets out rights and responsibilities of national system employees, national system employers, organisations and others (such as independent contractors ...”

“So we are interweaving independent contractors and enmeshing them with employer and employee relationships, which the law has consistently said should be separate. What is more, we can even quote the ILO in support, but we do not get actual engagement in relation to that aspect.”

“What Labor have snuck into this legislation under the definition of ‘workplace law’ is: ‘(c) the *Independent Contractors Act 2006*’. As I have said before, they are deliberately blurring the distinction between independent contractors being covered by commercial law—something the ILO acknowledges, and common law has recognised for a long time—and workplace law. They are now deliberately saying the law that applies to independent contractors will be part of the workplace law regime. Be under no misapprehension what Labor are trying to do with this regime. That is why the independent contractors, and we who unashamedly are on the side of independent contractors, are saying they should be disentangled—because it breaks a tradition of, I think, over 100 years of law in relation to independent contractors and is something that is now being recognized worldwide. I make that point as strongly as I can.”

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1 October 2007

Ken Phillips  
Executive Director  
Independent Contractors of Australia

Dear Ken

We refer to an article in today's *Australian Financial Review* titled 'Labor Pledges to Bar Union Control of Contractors'.

In the article ICA Chairman Michael Kelson refers to a question put to Julia Gillard on 1 August 2007 about sections 799 and 800 of the *Workplace Relations Act 1996* (Cth). Mr Kelson is reported as saying that Labor has failed to provide the ICA with a response to that question.

On 1 August in the question time of a lunch attended by almost 300 people, Julia Gillard was asked a question by Michael Watt from Freelance Global about Sections 799 and 800. Julia indicated she would take that question on notice and we can only presume this is the question to which Mr Kelson refers.

Whatever the origins of the question, we are happy to answer it as Labor has been happy to answer questions formally put by the ICA.

Sections 799 and 800 of the *Workplace Relations Act* are concerned with protecting the rights of independent contractors to do business with employers without interference from third parties. Specifically these sections deal with freedom of association issues.

In Labor's industrial relations legislation there will be strong freedom of association provisions.

Labor's policy is that independent contractors are small businesses which should be regulated by commercial law and not industrial law and that contractors should be supported and should be given fair opportunity to access work.

Labor believes unions should not be permitted to interfere in commercial arrangements involving contractors and the key tenets of freedom of association should be respected at all times.

Our *Forward with Fairness* policy expressly states Federal Labor's view that:

- all workers should be free to decide whether or not to join and be represented by a union, a choice which must be respected;
- it should be unlawful for anyone to try to stop a working person exercising this free choice by threats, pressure, discrimination or victimisation;
- working people must not be discriminated against because of the nature of the industrial instrument that covers their employment; and
- freedom of association is vital for the proper functioning of a fair industrial relations system.

Federal Labor has also publicly clarified our position in relation to right of entry, genuine non union bargaining, agreement content and bargaining fees. As we have stated publicly, under Labor it will not be lawful for agreements to contain clauses which involve matters such as union preferences or union bargaining fees nor for agreements to prescribe that contractors be engaged or not engaged on the basis of their industrial arrangements or the union membership or non-membership of their employees.

Federal Labor understands the importance of independent contractors and small businesses to the Australian economy. We have a dedicated Shadow Ministry for this important group of working Australians. We look forward to an ongoing dialogue with the sector into the future.

Yours faithfully

**Julia Gillard MP**  
Deputy Labor Leader  
Shadow Minister for Employment &  
Industrial Relations  
Shadow Minister for Social Inclusion

**Craig Emerson MP**  
Shadow Minister for Service Economy,  
Small Business & Independent Contractors