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Standing Committee on Social Issues,
Parliament of NSW, Legislative Council
Parliament House
Macquarie Street Sydney
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Dear Katherine Fleming

Re: Reply to Question on Notice regarding Work Choice Inquiry

I refer to your letter dated 23 June 2006 and my telephone conversation with Merrin Thompson on 5 July 2006. This letter is my response to a Question on Notice that you enclosed in your letter. My apologies for providing my response late but as I understand from my conversation with Merrin, it is satisfactory that I provide my response to you by Tuesday 11 July 2006.

You have sought my answer to the following **Question on Notice:**

Could you provide further information concerning the increasing move towards independent contracting, the costs and liabilities it places on workers and the workers it is most affecting?

I state my answer as follows:

Categorizing work relationships to avoid employment protection laws

The categorization of work relationships under statute law and at common law, as your question implies, has significant social and economic implications for NSW workers. In Professor McCallum's and my written and oral submission (tabled in Parliament on 20 June 2006) to the *Inquiry into Impact of Commonwealth WorkChoices legislation* ("the NSW Work Choices Inquiry") we expressed the view that, if independent contracting is used in the situation where a worker is exclusively providing his or her own labour, then this is problematic. It was our opinion that in a contract exclusively for the purpose of a worker supplying his or her labour and one which did not involve short term, intermittent, or irregular work, then the worker should receive all of the normal entitlements of 'permanent' employment.

Unfortunately, in Australia, there is a growing tendency for employers to exploit the way that work relationships are categorized by law so as to obscure workers' 'employee' status. This employer strategy is pursued primarily to minimize employer obligations and liabilities for worker entitlements and protections that may arise under common law, industrial statutes and industrial instruments.[1] One method of avoiding

[1] For literature that has charted the recent history of the contractual manipulation of the employment category see Breen Creighton and Andrew Stewart *Labour Law: An Introduction* (Federation Press, 3rd

obligations and liabilities towards workers is to carefully design contractual arrangements so as to characterise workers as 'independent' contractors. In many situations the label 'independent contractor' is applied despite for all practical purposes the workers involved performing the same role as employees.[2] However, designating workers as independent contractors is only one method of minimizing employment law obligations and liabilities. Other methods are also now prevalent in NSW and include hiring casual employees rather than permanent employees, hiring workers through a labour hire agency and in some cases hiring fixed-term employees. As O'Donnell[3] highlights, all of these work arrangements (sometimes known as 'contingent work') deviate in some way from continuing or 'permanent' employment and involve the loss of some or all of the protections and entitlements that the status of 'permanent' employment usually entails. In other words, there are workers in a number of work arrangements who do not usually enjoy the full protection of relevant employment laws.

Statistics on numbers and percentages of contingent workers in NSW and Australia

Many industrial relations and labour law researchers agree that the various forms of contingent work — including casual employment, independent contracting and labour hire — account for an increasing percentage of the Australian workforce.[4] This academic research is strongly substantiated by statistical data.

NSW information on casuals and labour hire workers

Most of the information about the numbers and percentages of contingent workers is Australia-wide data. However, I am aware of some NSW specific information produced as evidence and referred to in the decision in the NSW *Secure Employment Test Case*.[5] The full bench of the Industrial Relations Commission in that decision noted that:

> there have undoubtedly been significant structural changes in the labour market in New South Wales . . [E]mployers have sought greater flexibility from the workforce resulting in . . . an increased use of casual employment; contracting out of work which was previously performed by employees; and the rise of labour hire. . .[6]

Ed, 2000) pp201-208; Andrew Stewart 'Atypical Employment and the Failure of Labour Law' (1992) 18 *Australian Bulletin of Labour* 217; Andrew Stewart 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour (2002) 15 *Australian Journal of Labour Law* 235.

[2] See Creigton and Stewart, above note 1, p204.

[3] Anthony O'Donnell ''Non-Standard' Workers in Australia: Counts and Controversies' (2004) 17 *Australian Journal of Labour Law* 89-116. This is piece includes some of the most authoritative recent research on how to interprete labour market statistics for labour law purposes.

[4] See for example, O' Donnell, above note 3; Ron Callus and Russell Lansbury, ' Working Futures: Australia in a Global Context ' in Ron Callus and Russell Lansbury (ed), *Working Futures: The Changing Nature of Work and Employment Relations in Australia* (Federation Press, Sydney, 2002) 233-250; John Burgess and Ian Campbell, 'The Nature and Dimensions of Precarious Employment in Australia' (1998) 8 *Labour and Industry* 5; Rosemary Owens, 'Women, 'atypical' work relationships and the law' (1993) 19 *Melbourne University Law Review* 399-430.

[5] *Secure Employment Test Case* [2006] NSWIRComm 38.

[6] *Secure Employment Test Case*, above note 5, paragraph 7 and 8.

In relation to casual employment the evidence of Dr Richard Hall was that 25.9% of employees in NSW are casuals with no leave entitlements.[7] In relation to labour hire in 2000 a NSW government report found (in response to evidence presented to it) that in the preceding decade in NSW: "The number of labour hire companies in operation has increased significantly, as have the number of employees engaged by them."[8]

Australia-wide information on casual employees

The best available primary data on categories of contingent workers is about contingent work Australia-wide and is obtained through Australian Bureau of Statistics. In particular, recent documents in the series titled *Forms of Employment* 6359.0 are instructive on categories of contingent workers in Australia. The latest of these ABS documents was released in November 2004. Note that the nomenclature used to describe categories of workers in this document , in particular the use of the words 'employed' or 'employee' does not necessarily correlate to definitions of work relationships used in employment law.[9] In particular at page 40, the document states that 'employees' are:

"Persons who:

- Work for a public or private sector employer; and
- Receive remuneration in wages, salary, or are paid a retainer fee by their employer and work on a commission basis, or for tips or piece-rates or payment in kind; or
- Operate their own incorporated enterprise with or without hiring employees."

Also on p40 of the document 'Employed' includes persons aged 15 or over who worked for one hour or more for pay, profit, commission or payment of any kind, in a job or business or on a farm or as contributing family members. This definition also includes persons away from work for less than 4 weeks up to the end of the reference week, away from work as a standard work or shift arrangement, persons on strike or locked or persons on workers' compensation. Finally this definition included persons who were employers who had a job, business or farm but who were not at work.

Using these definitions, the November 2004 *Forms of Employment* indicates that *employees* without paid leave entitlements made up approximately 20% of *employed persons* in November 2001 and approximately 21% of employed persons in November 2004.[10]

Other ABS data also gives a longer term picture of the number of employees without paid leave entitlements. An ABS Feature Article discussing data from both the Labour Force Survey and the Survey of Employee Earnings and Benefits in August each year from 1992 to 2003 showed that the employees (excluding owner managers of incorporated associations) without paid leave entitlements made up 16.9% of

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[7] *Secure Employment Test Case* above note 5, paragraph 62. See also research by the federal parliamentary library cited in 'More than Half Jobs Now Casual' *Sydney Morning Herald* 7 June 2004, p2.

[8] 'Labour Hire Task Force, Final Report, available at http://www.industrialrelations.nsw.gov.au/action/reports/index.html as at 8 March 2005.

[9] See O'Donnell, above note 3.

[10] Australian Bureau of Statistics *Forms of Employment* 6359.0 November 2004, p8.

employed persons in August 1992 and 20.4% in August 2003.[11] The ABS feature article also noted alternative figures for the same subject. The ABS stated these alternative figures showed that the proportion of employees without paid leave entitlements (excluding owner managers of incorporate enterprises) increased from 21.5% in 1992 to 25.5% in 2003. The feature article also noted that ABS data revealed a "considerable overlap" between employees without paid leave entitlements and casuals. 86% of self-identified casuals did not have paid leave entitlements, and 89% of employees without paid leave entitlements were self-identified casuals.[12] Other reports have noted that half of all new jobs created in the last 16 years or so have been casual positions. Specifically, in the 15 years to 2003 male casual employment grew by 151% and female casual employment grew by 62%.[13]

Importantly, the ABS feature article has implied that these estimates of employees without paid leave entitlements may be conservative estimates. The article indicates that other ABS data shows much higher percentages of employees without paid leave entitlements: "According to estimates published from the Survey of Employee Earnings and Benefits, employees without paid leave entitlements as a proportion of all employees increased from 22.3% in 1992 to 27.6% in 2003." The article identified that the main difference between the more conservative estimates and the latter estimates was that the more conservative estimates excluded consideration of owner managers of incorporated enterprises.[14] These latter estimates accord more closely with the findings of Dr Richard Hall who found that casual employees with no leave entitlement increased from 16% of the workforce in 1985 to 27% of the workforce in 2002.[15]

Australia-wide information on 'independent' contractors

The November 2004 *Forms of Employment* document produced by the ABS also contained figures regarding 'independent' contractors. Note that the abovementioned definitions of 'employee' and 'employed' would apply to these figures. Owner-managers of incorporated enterprises that did not engage employees made up 2.2% of employed persons in August 1998, 2.4% in November 2001, and 2.6% in November 2004. Owner-managers of unincorporated enterprises that did not engage employees made up 8.7% of employed persons in November 2001 and 9.4% in November 2004.[16] There may be some issue as to how independent many of these workers are given that they do not supply the labour of any employees other than themselves. Given this factor (and in the absence of research to the contrary) many of these workers might be described as dependent contractors.

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[11] Australian Bureau of Statistics Feature Article 'Changes in Types of Employment in Australia, 1992-2003. This article was published in October 2004 issue of the Australian Labour Market Statistics 6105.0.

[12] ABS 'Changes in Types of Employment in Australia 1992-2003' above note 11.

[13] 'More than Half Jobs Now Casual' *Sydney Morning Herald*, 7 June 2004, p2, citing research by the federal parliamentary library.

[14] More than Half Jobs Now Casual', *Sydney Morning Herald*, above note 13.

[15] See *Secure Employment Test Case* above note 5, paragraph 60.

[16] *Secure Employment Test Case* above note 5, paragraph 60; See also discussion and reproduction of data on 'independent contractors in *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements* The Parliament of the Commonwealth of Australia House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Canberra, August 2005,pp14-17.

Australia-wide information on labour hire workers

In relation to the size and scope of labour hire in Australia a 2005 NSW government report stated, based on ABS data that 84,300 persons were paid by an employment agency. 65% per cent of these persons were self-identified casuals.[17] The report also found that at the end of June 1999, 278,937 persons were "on-hired" by businesses in the employment services industries to other businesses.[18] More recently a federal parliamentary inquiry found that there were around 270,000 labour hire workers in 2002 or 3% of employed persons. It also stated that the percentage of employees who were labour hire workers grew from 0.8% in 1990 to 3.9% in 2002.

How does the growth in contingent work affect NSW workers?

By enlarge the most notable features of the growth in contingent work is the *adverse* affects it has on workers. The ABS data confirms that casual employees do not receive sick leave or annual leave entitlements. This stems form the fact that employers are not usually required to provide casuals with these leave entitlements. The growing trend in casual work means that there will be fewer jobs available to NSW workers that will provide those workers with leave entitlements. Research has shown that casual jobs entail poor career opportunities and adverse occupational health and safety outcomes.[19] Casual workers are more likely to be subject to 'job churning' where workers cycle in and out of work without finding long-term secure jobs. Additionally the high level of casualisation of the NSW workforce acts as a disincentive for employers to invest in workers' skill development.[20] Furthermore, casuals are more likely to be marginalised when it comes to workplace decision-making.[21] Also casually employees who have worked for less than 12 months with the one employer are excluded from making a federal unfair dismissal claim.[22] Finally casual employees may find it hard to access finance. A casual may be subject to

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[17] NSW Labour Hire Task Force Report, above note 8; Also the dissenting report in the *Making it Work* document, above note 16, at p166 noted that "Labour hire companies and unions alike provided evidence that the proportion of labour hire employees casually employed was far in excess of the Australian workforce at large."

[18] NSW Labour Hire Task Force Report, above note 8.

[19] ACIRRT, *Australia at Work: Just Managing* (Prentice Hall, Sydney, 1999).

[20] Hall R, Bretherton, T and Buchanan J, 'Its Not My Problem: The Growth of Non-Standard Work and Its Impact on Vocational and Educational Training', National Centre for Vocational Education Research, Leabrook, South Australia, 2000.

[21] Barbara Pocock, Prosser, R and Bridge K, (2004) 'Only a Casual . . .How Casual Work Affects Employees, Households and Communities in Australia, Labour Studies Report, University of Adelaide, 2004.

[22] *Workplace Relations Act* s638(4) states to the effect that a casual employee is excluded from making an unfair dismissal claim unless:

(a) the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and

(b) the employee has, or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer.

greater scrutiny in a loan application process and less likely to be successful than a permanent employee.[23]

For reasons stated in the original submission by Ron McCallum and myself Tabled on 20 June 2006 about the diminution in protections under industrial awards and against arbitrary dismissal, post *Work Choices,* employers will have more discretion and motivation to use 'independent' contractors and labour hire workers rather than permanent employees. It should be noted that we are not concerned here with genuine independent contractors who run businesses with multiple clients or who engage other workers. However, as the dissenting report of *Making it Work* states: '[T]he overwhelming majority of the Australian workforce comprises employees and there is evidence to show efforts are made to hide employment relationships."[24] Workers who are forced to work as so-called independent contractors often forego *all* of the advantages of permanent employees without gaining any advantages such as taxation benefits. The situation Mr Damevski, as reported in the decision *Damevski v Guidice*[25] is an emblematic example. Mr Damevski was a cleaner who worked as a full-time employee of a company called Endoxos. After a period of approximately 2 years' employment, Mr Damevski's employer required that he resign so that he could be re-engaged through a labour hire company that imposed a so-called independent contracting arrangement onto Mr Damevski. Under the arrangement the labour hire company would pay Mr Damevski fortnightly. However Mr Damevski would have PAYG tax, amounts for accident and public liability insurances, long service leave and superannuation deducted from his pay. As part of the arrangement Mr Damevski was required to agree that he was not entitled to holiday pay, sick pay, long service leave or any similar payment. Mr Damevski was no longer able to use the company van or the mobile phone that he had previously used to carry out his work. Instead he was required to supply his own equipment. He was unable to work at the location he was required to without the benefit of the van, due to having only one family car and due to his wife's illness.

This case illustrates that workers who are forced on to independent contracts or who are engaged through labour hire companies as independent contractors, will not enjoy employee entitlements such as annual leave, sick leave, long service leave and personal or carer's leave. They may also not receive any tax benefit from the conversion to independent contracting and will probably have to bear the cost of workers' compensation and public liability insurance and the cost of equipment essential to performing their work. In addition, there is less likelihood that independent contractors will have adequate access to satisfactory union representation. Finally, in most situations workers who are considered independent contractors do not usually have any rights under unfair and unlawful dismissal laws that some employees have access to, (although, currently independent contractors have recourse to unfair contracts provisions in the *Workplace Relations Act 1996 (Cth).*)

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[23] *Secure Employment Test Case* above note 5, at paragraph 81.

[24] *Making it Work*, above note16, at 162.

[25] (2003) 202 ALR 494; (2003) 133 FCR 438.

Which workers are most affected by the growth in contingent work?

It is relevant to reproduce evidence on the percentage and numbers of casuals in NSW by industry that was provided by Dr Richard Hall in the *Secure Employment Test Case* at paragraph 62:

Table 4: Casuals by Industry, NSW, 2001

Industry	**2001 Number**	**2001 % of industry**
Agriculture, Forestry and Fishing	19 594	50.9%
Mining	6 251	18.8%
Manufacturing	47 496	17.3%
Electricity, Gas and Water	np*	np*
Construction	23 430	21.3%
Wholesale Trade	20 810	22.9%
Retail Trade	155 891	48.5%
Accommodation, restaurants and cafes	90 857	59%
Transport & Storage	19 413	17.7%
Communication Services	13 326	18.4%
Finance and Insurance	16 471	11.3%
Property and Business Services	55 564	21.8%
Government Admin and Defence	8 644	8.4%
Education	44 400	16.8%
Health & Community Services	58 407	18.9%
Cultural and Recreational Services	32 136	47.2%
Personal and other Services	30 212	31.2%
Total	**643521**	**25.9%**

Dr Hall also provided NSW specific evidence that elementary clerical sales and services workers had very high rates of casualisation (58.4% in the occupation) as did labourers and related workers (52.1% in the occupation.).[26] This is consistent with ABS Australia-wide data that found that employees without paid leave entitlements were more likely to elementary clerical sales and service workers than any other occupational group.[27]

Dr Hall's evidence also included Australia-wide data about which industries had the strongest growth in casual work. Dr Hall concluded that growth in casual employment has been uneven across different industries with the largest increases being: agriculture, forestry and fishing (16 per cent); transport and storage (14.9 per cent); construction (14 per cent); retail trade (11.8 per cent); wholesale trade (11.6 per cent); and communication services (10.5 per cent).[28] Other research has shown that there has been alarming increases in casualisation in manufacturing and communications, finance and insurance.[29]

In relation to independent contractors, ABS Australia-wide data gives an indication of the prevalent occupational groups in this category. Owner managers of incorporated enterprises were more likely to be associate professionals, whilst 22% of owner managers of unincorporated enterprises were in the construction industry. Almost 25% of owner managers of unincorporated enterprises were tradespersons or related workers.[30]

Conclusion

The emergence of categories of work arrangements such as dependent contracting, labour hire, casual employment poses serious challenges for labour law-makers. As Ron McCallum has highlighted elsewhere:

> "Many academic commentators have lamented the failure of our labour laws to protect independent contractors who are performing employee-like functions . . .As more and more workers operate outside the labour law boundary, especially with the increased use of labour hire arrangements where the workers are independent contractors, the greatest challenge to our labour laws is how to protect these workers from exploitation."[31]

The changes made by the *Workplace Relations (Work Choices) Amendment Act 2005* means that even the status of 'employee' under federal labour laws fails to adequately protect many NSW workers. The burden of the NSW Work Choices Inquiry is primarily to assess the impact that the Work Choices legislation will have on NSW workers. In my view the detrimental affects will be extensive. In particular, for the purposes of this response to the above Question on Notice, the Work Choices legislation will greatly exacerbate the growth in contingent work. Ultimately the task

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[26] *Secure Employment Test Case*, above note 5, paragraph, 63.

[27] ABS *Forms of Employment* 6359.0 November 2004, above note 10, p4.

[28] *Secure Employment Test Case*, paragraph 60.

[29] Ian Watson et al, *Fragmented Futures: New Challenges in Working Life* (Federation Press, Sydney, 2003) p69.

[30] ABS *Forms of Employment* 6359.0 November 2004, above note 10, p4.

[31] Ron McCallum, 'Legal Aspects of the Changing Social Contract at Work' in Ron Callus and Russell Lansbury (eds) *Working Futures: The Changing Nature of Work and Employment Relations in Australia* (Federation Press, Sydney, 2002) pp87-100 at 96-97.

ahead will be to formulate improved legal rights and entitlements for NSW workers who have been adversely affected by the Work Choices legislation.

Yours sincerely

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