



Mr Brian Howe AO  
Chair  
Independent Inquiry into Insecure Work in Australia  
Level 6, 365 Queen Street  
Melbourne VIC 3000

By email: [inquiry@securejobs.org.au](mailto:inquiry@securejobs.org.au)

20 January 2012

Dear Mr Howe

### **Submission to Independent Inquiry into Insecure Work in Australia**

The Employment Law Centre of WA (Inc) (**ELC**) welcomes the opportunity to make a submission to the Independent Inquiry into Insecure Work in Australia (**Inquiry**).

ELC is a community legal centre which specialises in employment law. It is the only free and not-for-profit service in Western Australia offering legal advice, assistance and representation in relation to employment law.

Each year ELC provides advice and assistance to over 4,500 vulnerable non-unionised employees in Western Australia. ELC is therefore in a unique position to comment on the extent of insecure work in Western Australia and on those aspects of the legal system which entrench insecure work.

For the purposes of this submission, we have chosen to focus on several forms of employment which involve insecure work, namely casual work, labour hire arrangements, fixed-term contracts and independent contracting.

#### **Casual work**

In the 2011 calendar year, 571 casual employees contacted ELC for advice. Of the 4593 callers who contacted ELC in 2011, employment status was known for 3311 callers. This means that 17% of ELC's callers for whom employment status was known were casual employees. This indicates that casual employees make up a significant proportion of the labour force in Western Australia.

Casual employment is more insecure than other forms of employment in that casual employees are not guaranteed a certain number of hours' work each week and their employment may be terminated at any time with very little, if any, notice. Casual employees are also generally not entitled to paid annual leave, paid sick leave, notice of termination and certain other entitlements.

One recent development which further limits the legal protections available to casual employees is that casual employees are prevented from making unfair dismissal claims

under the *Fair Work Act 2009* (Cth) (**Fair Work Act**)<sup>1</sup>. This is so regardless of the harshness or unreasonableness involved in the dismissal.

The only situation where a casual employee can make an unfair dismissal claim under the Fair Work Act is where the employee can demonstrate that he or she has worked on a regular or systematic basis and that he or she had a reasonable expectation of ongoing employment on a regular and systematic basis.<sup>2</sup> In other words, the employee must demonstrate that he or she is not a true casual employee, but rather a permanent employee.

This entrenches the position under the *Workplace Relations Act 1996* (Cth) of there being a blanket exclusion against true casual employees making unfair dismissal claims. This is disappointing, given that the Fair Work Act removed a lot of other unreasonable restrictions on the rights of employees to seek remedies for unfair dismissal.

Under Western Australian legislation,<sup>3</sup> on the other hand, there is no statutory bar against casual employees making unfair dismissal claims. However, the Western Australian Industrial Relations Commission (the State equivalent of Fair Work Australia) is nonetheless able to take into account the fact that the dismissed employee is a casual employee and often does take this into account.<sup>4</sup>

We have analysed our call statistics and have calculated that approximately 123 employees who considered themselves to be casual employees contacted ELC in 2011 about unfair dismissal under the federal system of laws. In other words, 123 employees who contacted ELC in 2011 were potentially affected by the statutory bar against casuals making unfair dismissal claims.

We submit that the Inquiry, in formulating its recommendations, should recommend that the Fair Work Act be amended such that there is no blanket exclusion against casuals making unfair dismissal claims.

### **Labour hire arrangements**

In 2011, 16 of ELC's callers raised the issue that they were in a labour hire arrangement. However, ELC's statistics are unlikely to reflect the true extent of labour hire arrangements in Western Australia. The reason for this is that labour hire arrangements seem to be most prevalent in the mining industry, where workers are paid very high salaries compared to other industries. ELC prioritises Western Australia's most vulnerable employees by only providing advice and assistance to those employees who fall below certain income thresholds. As such, relatively few of ELC's callers are in the mining industry and labour hire arrangements are likely to be under-represented.

In a labour hire arrangement, a labour hire agency engages a worker (typically as a casual employee or as an independent contractor) and enters into a contract with another entity – termed the “host business” – to provide that worker's services to the host business.

There is usually no contract between the worker and the host business. For this reason, the worker is generally not regarded as an employee of the host business.

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<sup>1</sup> *Fair Work Act 2009* (Cth) s 384.

<sup>2</sup> *Fair Work Act 2009* (Cth) s 384.

<sup>3</sup> *Industrial Relations Act 1979* (WA). See e.g. ss 23A and 29(1)(b).

<sup>4</sup> See e.g. *Brenzi v Marine Fire Security Pty Ltd* [2004] WAIRC 12573; *Cumberbirch v Total Peripherals Pty Ltd* (1995) 75 WAIG 2862; *Despot v Valley View Restaurant & Function Centre* [2005] WAIRC 02601.

This can have serious implications for the remedies that the worker is able to seek. For instance, where the host business informs a worker that it no longer requires his or her services, this may not necessarily be viewed as a termination of the person's employment, particularly if he or she appears to remain an employee of the labour hire agency and it is a term of his or her employment with the labour hire agency that he or she can be assigned to different host businesses.<sup>5</sup>

This is a potentially significant limitation on the rights of labour hire workers to make claims such as unfair dismissal claims and general protections claims under the Fair Work Act, even where they have been treated very unfairly by the host business.

We submit that the Inquiry should consider how legal protections for labour hire workers can be improved to address the inadequacy of the existing laws. For instance, we submit that, at a minimum, section 342 of the Fair Work Act should be amended such that it is made clear that labour hire workers are able to make general protections claims against host businesses who take adverse action against them for unlawful reasons. We submit that the Inquiry should also consider whether unfair dismissal protections should be extended such that labour hire workers can expressly make unfair dismissal claims against host businesses.

### **Fixed-term contracts**

In 2011, 86 of ELC's callers were employees on fixed-term contracts.

Employees on fixed term contracts often suffer from a lack of protection from unfair dismissal protections (as well as job uncertainty) because the employer simply decides not to renew the employee's contract rather than terminating an existing contract. The Fair Work Act in particular makes it very clear that such employees are prevented from making unfair dismissal claims.<sup>6</sup> We have encountered a number of employees whose employers have engaged them on rolling fixed term contracts, seemingly for the purpose of making it easier to dismiss them.

We submit that the Inquiry should consider how legal protections for employees on fixed term contracts could be improved to address this situation.

### **Independent contracting**

Approximately 78 callers who contacted ELC in 2011 raised the issue of whether they were an independent contractor or an employee. Of these, approximately 46 callers appeared likely to be independent contractors.<sup>7</sup> ELC does not provide advice to independent contractors as such, but does assist people to determine whether they are likely to be an independent contractor or an employee. Other service providers who refer callers to ELC are generally aware that ELC does not provide advice to independent contractors. As such, ELC's statistics might not reveal the true extent of independent contracting in Western Australia because less independent contractors might contact ELC in the first place.

There have been some recent improvements with regard to the legal protections that apply to independent contractors. For instance, independent contractors are now protected under the adverse action provisions of the Fair Work Act<sup>8</sup> and are eligible for parental leave pay

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<sup>5</sup> See for example, *David Tse v Ready Workforce Pty Ltd* [2010] FWA 8751.

<sup>6</sup> *Fair Work Act 2009* (Cth) s 386.

<sup>7</sup> It is very difficult to determine accurately how many callers were in fact independent contractors, as it depends on a range of different factors and is rarely clear-cut.

<sup>8</sup> *Fair Work Act 2009* (Cth) s 342.

under the *Paid Parental Leave Act 2010* (Cth).<sup>9</sup> Further, people who are treated as independent contractors by their employers but are in fact employees are protected by the sham contracting provisions of the *Fair Work Act*.<sup>10</sup>

However, independent contracting remains an insecure form of work because, amongst other things, independent contractors are not entitled to regular payment of wages – they may have to wait until the relevant job is completed – and are not entitled to a minimum rate of pay or conditions such as annual leave, unpaid parental leave, sick leave and so forth.

In addition to this, independent contractors have very limited options for obtaining free legal advice or information where they have not been paid, for instance. As noted above, ELC itself does not provide advice to independent contractors but does assist callers to determine whether they are likely to be an independent contractor or an employee.<sup>11</sup> Further, although the federal government has set up an Independent Contractors Hotline to assist independent contractors, the service that the Hotline offers is limited.

We understand from speaking to staff on the Independent Contractors Hotline, for instance, that they do not usually assist callers to determine whether they are independent contractors or employees. Further, the Hotline does not provide advice on monetary or contractual disputes – for these enquiries, the caller is told to seek independent legal advice. The main service which the Independent Contractors Hotline seems to provide is to offer to send callers a copy of the Independent Contractors Handbook and other related publications.

Obtaining legal advice can obviously be very expensive and we believe there is a real need for independent contractors to be able to obtain free legal advice or information.

We submit that the Inquiry should consider how legal protections available to independent contractors can be further improved, as well as considering how independent contractors' access to legal information and advice can be improved. For instance, we submit that the Inquiry should recommend that the federal government expand the services available on the Independent Contractors Hotline so that independent contractors have access to free legal advice or information.

### **Public hearing and further information**

We understand that the Inquiry is holding a public hearing in Perth on 20 February 2012. ELC would welcome the opportunity to participate in this hearing to elaborate on the points above.

Please do not hesitate to contact me should you require any further information.

Yours sincerely



Jessica Smith  
**Acting Principal Solicitor**

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<sup>9</sup> *Paid Parental Leave Act 2010* (Cth) s 35.

<sup>10</sup> *Fair Work Act 2009* (Cth) ss 357-359.

<sup>11</sup> ELC does not provide advice to true independent contractors as our resources are very limited due to funding constraints.