NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

INQUIRY INTO

INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

11 MARCH 2005

CONTENTS

Introduction and Overview

1. On 24 January 2005, the House of Representatives Employment Workplace Relations and Workforce Participation Committee announced that it had been asked by the Minister for Employment and Workplace Relations to inquire into and report on:

    1. the status and range of independent contracting and labour hire arrangements;

    2. ways independent contracting can be pursued consistently across state and federal jurisdictions;

    3. the role of labour hire arrangements in the modern Australian economy; and

    4. strategies to ensure independent contract arrangements are legitimate.

    (The individual terms of reference were not numbered in the original media alert or on the Committee's website, however they are numbered here and throughout the submission for convenience).

2. The NSW Government, through the Minister for Industrial Relations, The Hon. John Della Bosca MLC was invited to put its views on these matters by means of a letter dated 21 January 2005 from the Chair of the Committee, Mr Phillip Barresi MP.

3. The NSW Government appreciates this invitation and our submission to the Inquiry is set out in the succeeding pages.

4. In summary, the NSW Government:

    - Recognises that labour hire and independent contracting are legitimate ways of doing business and earning a living (although neither is either as prevalent nor as rapidly expanding a category as has been suggested)
    - Asserts that this is subject to the proviso that any such arrangements be freely entered into with a proper understanding on the part of the participants of the nature and incidents of their relationship
    - Is concerned about the tendency for such arrangements, if not freely entered into, to undermine security of employment and to inappropriately transfer the burden of risk to the worker rather than the person for whom the work is performed

- Affirms the role of government in protecting persons who enter into such arrangements with limited information or misunderstanding of how the relationship will operate
- Achieves this beneficial goal in this state by a variety of means, including:
    - both general and specially tailored legislative provisions, including the definition of 'employee', expanding the category of employee by deeming certain classes of 'at risk' workers to also be employees and providing remedies for workers in unfair or exploitative relationships including:
        - unfair contract provisions which provide a remedy where the contract avoids the provisions of an industrial instrument.
        - contract carriers provisions which create a special jurisdiction for dealing with the needs of that industry
        - provisions designed to prevent the exploitation of clothing outworkers.
    - by maintaining an independent umpire, the Industrial Relations Commission, which is able, after hearing from the parties about the needs of particular industries or occupations, to craft acceptable and lasting settlements on how these issues should be dealt with through awards and agreements
- Confirms that as the labour market evolves and new forms of employment emerge, this legislative and arbitral framework also needs to evolve to address new issues, without abandoning the core commitment to a fair go for all workers and employers
- Questions the legislative capacity or concern of the Commonwealth in addressing the needs of workers at risk of being exploited or treated unfairly through such arrangements
- Is particularly concerned that this Inquiry is being undertaken against the background of federal government announcements of its intentions to 'take over' the state industrial relations systems, with little or no consultation with the states, and to reduce the already limited federal safety net still further.

Structure of this Submission

5. This submission is in four parts:

Part 1 Background

The Inquiry Terms of Reference and accompanying material make it clear that the focus of the Inquiry is on workers involved in labour hire or independent contracting arrangements. Part 1 considers what these terms mean in practice and examines the legal mechanisms used to distinguish between employees and non employees, and independent contractors in particular.

Part 2 Issues

In this Part, the policy issues arising from labour hire and independent contracting arrangements are considered. Given the large proportion of labour hire workers who are engaged as casual employees, issues relevant to the latter are also considered, as appropriate.

Part 3 Remedies

Part 3 examines possible ways of addressing these policy issues. It considers firstly NSW legislative and regulatory approaches and following on from these, approaches based on the NSW award system. This Part concludes with a brief examination of further strategies that may assist in dealing with some of the issues. The limitations of the current legal framework used to identify independent contractors are also discussed.

Part 4 Conclusion

Based on the discussion of issues and remedies in preceding Parts, the final Part contains some concluding observations in response to the Terms of Reference of the Inquiry, as well as a general statement of the NSW Government's position.

Part 1 – Background

6. The Terms of Reference and accompanying material make it clear that the focus of the Inquiry is on workers involved in labour hire or independent contracting arrangements. Some consideration is now given to what these terms mean in practice.

New Forms of Employment

7. Discussion of so-called 'new forms of employment' has become common in recent industrial relations policy debates – see, for example, Watson et al (2003), Pocock et al (2004a), Stone (2004), Munro (2004), Buchanan (2004), Supiot (1999), ILO (2004), O'Donnell (2004), Burgess and Connell (2005).

8. The focus of these discussions is 'new' or 'non-standard' workplace relationships such as labour hire, independent contracting, casual employment and outwork. In a historical sense, none of these relationships are particularly novel in themselves, having existed in one form or another for long periods. What does appear to be new is the rapid growth of these work relationships in the contemporary workforce, with some displacement of the 'traditional' employee/employer relationship.

9. As Pocock and her colleagues put it:

> 'Over the past twenty years, employment in Australia has changed significantly: especially in terms of its forms, quality, hours, the industries and occupations in which it is located, the skills that employment and productivity rely upon, the nature and distribution of its rewards, and the sources of productivity and growth….
>
> 'Non-standard' is now a significant employment category in many occupations and industries; it is far from a minor portion. The categories of 'standard' jobs and their 'non-standard' shadows, are useful to highlight the fact that there are jobs that create a 'standard' that continues to 'stand' at the centre of the labour market. This standard embodies certain rights, conditions, obligations and expectations of employment….
>
> Non-standard jobs include casual work, part-time work, employment through third parties, 'dependent contractors', and limited term contracts…
>
> The growth in such employment in Australia is an unintended, unanticipated evolutionary outcome resulting from a regulatory regime that did not forsee the growth in new types of employees, in an environment of changing labour supply and demand…' (Pocock et al (2004a) pp6-8).

10. O'Donnell summarises this trend cogently by noting that:

> 'Currently, 80% of workers work under contracts of employment, and this represents a significant drop from 1971 when employees made up 86% of workers' (O'Donnell (2004) at 113)

11. These shifts are summarised at Appendix A. Appendix B also provides a picture of the overall composition of the workforce based on ABS statistics for 2000. Appendix C sets out the composition of job growth over the period 1990 – 2000. Appendix D sets out the growth and extent of temporary employees in OECD countries including Australia.

12. While the focus of this Inquiry is labour hire and independent contractor relationships, there is, in the NSW Government's view, some value in considering these particular relationships in the context of the wider workplace changes cited above, and this submission will return to this point from time to time.

13. We now examine some of the relevant characteristics of the two categories of non-standard employment upon which this Inquiry is focused, labour hire and independent contractors.

14. Before doing so, it is worth noting the paucity of detailed data available in relation to the various categories of non-standard employment. While casual employment is reasonably well documented, labour hire employment is less so, and independent contractors even less so. O'Donnell provides a good discussion of the extent and limitations of the available data (O'Donnell (2004)). Recent work by the Productivity Commission (Laplagne et al (2005)) appears to be aimed at filling these gaps in relation to labour hire workers.

Labour Hire

15. In considering the definition and characteristics of labour hire, the 2001 NSW Labour Hire Task Force took the view that:

> 'Labour hire is characterised by the triangular employment relationship between three parties – the labour hire company, the worker and the host organisation.
>
> The labour hire company sources the work and engages in a contract for delivery of services with the host organisation.' (NSW Labour Hire Task Force Report p19)

16. In a similar vein, O'Neill says:

> 'The term labour hire elicits many connotations but few firm definitions. It can refer to the use of alternative workforces by businesses, where a supplier provides short or long term labour to a principal (the host). The service might be comprised of a total

function formerly performed by the host but subsequently performed by the labour supplier, or the service may simply be the referral of individual workers to be directed to perform the work by the host. Employment placement services form the broader group of services in which labour hire operates. Where a person referred for a position from an employment agency is accepted by the host, it is usual for the relationship between the person referred and the employment agency to terminate immediately (assuming fees and so on have been met). Under labour hire arrangements, the three-way relation of host, agency and worker continues for the period of the workers engagement with the host.' (O'Neill 2004 p3)

17. In line with the broad picture painted by Pocock et al above, Curtain provides the following details about the growth and extent of labour hire employment:

> '32. Employment services as an industry or service sector has grown significantly between 1998-99 and 2001-02 [ABS 2003(8558.0)]. Total income generated by employment services organisations increased by 31 per cent over these 3 years. At the same time, the total number of organisations providing employment services increased by 29 per cent…
>
> 33. The ABS estimates that 290,115 employees were on-hired through agencies in the year to June 2002. This represents 3.1 per cent of total employment at that time….'
>
> (Curtain (2004))

18. Appendix E sets out the proportion of employment gained through employment services agencies for various OECD countries including Australia. It is clear from this table that the Australia is significantly above the OECD average for such placements.

19. As far as employer motivations for using labour hire workers are concerned, the NSW Labour Hire Task Force noted that:

> 'Adecco and AIG attribute the growth to various factors including:
>
> - Corporate restructuring to concentrate on core business
> - Increased flexibility to meet work fluctuations
> - Greater competitive pressures as a result of globalisation
> - Outsourcing of functions in the private and public sectors
> - Extended hours of operation
> - Fast changing technology
> - Growth of new industries eg call centres, information technology
> - Flexibility for workers to choose where and when they work.'
>
> (NSW Labour Hire Task Force (2001) p15)

20. Labour hire employees are, in the vast majority of cases, considered to be the employees of the labour hire company (see paragraphs 50-52 below). According to evidence supplied by the Recruitment and Consulting Services Association (RCSA) to the NSW Secure Employment Test Case, the majority of such employees are employed as casuals:

> '..three quarters of the NSW (RCSA member) firms surveyed have 90 per cent or more of their on-hired employees employed as casuals. On the other hand, 15 per cent of firms have no on-hired employees employed as casuals…' (Curtain 2004 para 63).

21. In its submission to the NSW Taskforce, the Australian Industry Group (AiG), estimated that 97% of labour hire workers are engaged as casuals (NSW Labour Hire Task Force (2001) p24).

22. Given the casual status of many, if not most, of these employees, it is worth noting some of the following features of casual employment:

- Recent employment growth has been concentrated in casual employment, both full and part time, as can be clearly seen in Fig 2;
- On the basis of the 'no leave entitlement' definition of casual employment, casual employees comprise around 27% of all workers, having grown from 15% in 1988 (Appendices A and D refer)
- 57% of casual workers are women (Pocock et al (2004a) p11)
- The average tenure of casual workers is 2.6 years, with 57% having more than one years' tenure, according to data from the HILDA survey (Wooden and Warren 2003 at 13)
- '(C)asual employees have relatively low earnings. Even if we adjust for hours worked, the hourly earnings of casual employees is still only around 83 per cent of permanent employees, despite the fact that many casual employees receive a pay loading in lieu of leave entitlements' (Wooden and Warren 2003 p12)
- Casual work is concentrated in the retail sector (45% of employees) and accommodation cafes and restaurants (56%). Other sectors have experienced significant growth of casual employment: agriculture forestry and fishing (from 38% in 1985 to 57% in 2002), manufacturing (from 8% to 16%) and construction (18 to 32%) (Watson et al 2002 p69)
- 'Casual work is highly feminised. Across Australia, casual workers are concentrated in the two occupations where over half of all women are employed: basic and intermediate clerical, sales and service workers. Over half of *all* women in elementary clerical sales and service jobs identify as casual.' (Pocock et al (2004a) p9, emphasis in original)

23. Despite a growing body of statistical information about casual employees, not a great deal is known about the motivations and desires of this body of employees. Wooden and Warren have done some work regarding the work time preferences of casuals based on HILDA data (Wooden and Warren (2003), Pocock et al (2004a) pp11-13) and Watson and his collaborators provide various anecdotes from casuals and other non-standard workers (Watson et al (2003)). Pocock's 2004 survey (Pocock et al (2004b)) examines the experiences of casual workers in some depth, however it is based on a small sample of 55 casual workers. Beyond this however, it appears that there is an absence of data upon which one can base a robust analysis of why casual workers choose (if that is the right word) to work as such.

24. There is a similar lack of data regarding labour hire workers and independent/dependent contractors.

Independent Contractors

25. While there appears to be no fixed definition of an independent contractor, it is generally accepted that such workers are not employees at law. In contrast to employees, who are said to operate under a contract *of* service, independent contractors operate under a contract *for* services.

26. Broadly speaking, the focus of a contract for services is the nature of the service delivered by the contractor, rather than both the service delivered and the manner in which it is delivered, as is the case in relation to a contract of service.

27. Importantly, the independent contractor is regarded as being in business for her/himself, rather than being an employee of the contractee's business.

28. An important sub-category of independent contractors are those contractors who work exclusively or predominantly for a single contractee (Creighton and Stewart (2000) p204. These are usually referred to as 'dependent contractors', on the basis of their economic dependency on a single organisation.

29. The EU's *European Industrial Relations Observatory Magazine* devoted a supplement to what it termed 'Economically Dependent Workers' in August 2002 (Issue 4/02). These workers were said to be

> '…those workers who do not correspond to the traditional definition of "employee" – essentially because they do not have an employment contract as a dependent employee – but who are economically dependent on a single employer for income..'.

30. Such relationships are clearly employee-like, and as will be seen below at paragraphs 94-111 below, they are the subject of legal controversy.

31. As is the case with other non-standard workplace relationships, there is a paucity of data regarding independent contractors. However, as can be seen from Appendix B, Watson et al estimate that 6% of the 2000 workforce were employed as contractors.

32. O'Donnell's view, based on ABS figures (*Forms of Employment, Australia*, Cat No. 6359.0 and *Australian Social Trends 2000* Cat No. 4102.0 p116) is that the figure is around 10%. He says:

> '(c)urrently 80% of workers work under contracts of employment…' and '…(o)f the remaining 20% or so of employed persons – owner-managers of enterprises, employers and own account workers and so on – around half are single self-employed workers supplying their labour on a contract basis…'
>
> (O'Donnell (2004) at 113).

33. The generally accepted figure appears to be around the 10% mark.

34. It is noted that the 24 January 2005 Media Release announcing this Inquiry claimed that 'employees form around 60% of the workforce', with the presumed inference that the remaining 40% are non-employees and therefore independent contractors to a greater or lesser degree. As can be seen from the foregoing, reputable estimates of the number of employees and independent contractors differ significantly from this figure, with a generally larger figure for the number of employees (around 80%), and a correspondingly smaller proportion of independent contractors (around 10%).

35. The NSW Government is unaware of any research which supports the quoted 60% figure, and we would therefore submit that this figure is erroneous, and should be disregarded.

36. The letter to the NSW Minister inviting a submission to the Inquiry notes that : '…(m)ore than one million Australians work as independent contractors and sole traders…'. Whilst this statement is broadly correct sole traders are not the subject of this Inquiry. The relevance of conflating numbers of sole traders with those of independent contractors is therefore not clear.

37. Mention should also be made of work arrangements where both labour hire and independent contractors are present. The most common arrangements of this nature are known as Odco type arrangements, after a landmark decision of the High Court regarding a labour supply company called Odco Pty Ltd (see paragraphs 54-56 below). In such arrangements, a labour supply company provides independent contractors (the original Odco case concerned tradespersons in the construction industry) to

perform work for its client enterprises. These arrangements are designed to ensure that, given the current labour law framework, no employee-employer relationship can be deduced or inferred from the terms of the arrangement. No statistical information about the numbers of people working in such arrangements is available.

Legal Foundations

38. As can be seen from the foregoing sections, the ability to discern a contract of employment is crucial to identifying whether a particular worker is an employee or non-employee. As will be seen below, many of the issues that arise in relation to labour hire workers and independent contractors have their origins in the legal dicta on which the categories of employee and non-employee rest, and the manner in which courts and tribunals go about the business of fitting workers into these categories.

39. It is therefore appropriate to spend some time examining the legal basis of these concepts.

Identifying Employees

40. Employment law in Australian jurisdictions applies, for the most part, to workers in an employment relationship. The characteristic and traditional method of determining whether or not there is an employment relationship is for the court or tribunal to examine the relevant facts and establish firstly whether or not there is a contractual relationship in existence between the parties, and if there is, whether the contract is an employment contract, or a contract of service. Contracts *of* service are distinguished from contracts *for* services, which may involve the performance of work, but not as part of an employee/employer relationship.

41. Stewart summarises these distinctions as follows:

> 'Over the past century a particular conception of employment has come to act as the primary trigger for various forms of regulation. That conception, rooted in the common law but consistently adopted and legitimated by legislation, requires or assumes the existence of a contract of employment (or contract of service) between the person who pays for work to be performed (the "hirer") and the person who is to perform that work (the "worker"). As such, it excludes a range of work relationships which either (a) are not contractual in nature at all, as where work is performed voluntarily or for purely domestic purposes; (b) do not involve a contract directly between the hirer and the worker; or (c) involve a contractual relationship between hirer and worker which is characterised as something other than a contract of employment, as where the worker is said to be an "independent contractor" engaged pursuant to a "contract for services".' (Stewart (2002a) at 235)

42. The NSW Industrial Relations Commission sets out the task of the relevant court or tribunal as follows:

> ‘9 It is, we think, fundamental in resolving the present issue to have in mind that the ultimate conclusion as to whether Mr Terkes was an employee of the appellant is a question of fact, although it is to be acknowledged that in reaching that conclusion questions of mixed law and fact may, and probably will, arise: see *Clarkson v. Dent* (1998) 84 I.R. 250 at 252-253 and the authorities cited therein. The learned authors of *The Liability of Employers* (Glass, McHugh and Douglas, 2nd. ed., 1979, Law Book Company) put it in the following way (at pp.69-70) :
>
> > Whether or not the relationship of employer and employee exists depends upon whether the person employed works under a contract of service or a contract for services. The distinction between a contract for services and a contract of service is that, in the former case the employer can only order or require what is to be done. In the latter case, however, he can not only order or require what is to be done, but can also direct how it is to be done (*Collins v. Hertfordshire County Council* [1947] K.B. 598, per *Hilbery* J. at p.615; [1947] 1 All E.R. 633, at p.638). This test, which may be conveniently called the control test, is the most valuable criterion for determining whether the relationship of employer and employee exists…’
>
> (*Swift Placements Pty Limited v WorkCover Authority of New South Wales (Louise May)* [2000] NSWIRComm 9 (3 March 2000))

43. A typical application of this approach can be found in *Advanced Australian Workplace Solutions (AAWS)*, in which a Full Bench of the AIRC (Guidice P McIntyre VP Redmond C) was asked to consider an appeal by AAWS against a decision of Simmonds C in the matter *P Fox and Kangan Batman TAFE* (Simmonds C original decision AIRC Print No R6604, Full Bench Appeal Decision S0253). Originally, Simmonds C, formally determined that Kangan (the host employer) was Ms Fox’s true employer. Applying the traditional common law tests, with primary emphasis on the control test, he concluded that:

> ‘[19] ..I do not consider that Ms Fox's relationship with Kangan was a contract for services. The control and the apparent right to exercise that control over the performance of her work and matters ancillary thereto …was significant. It would appear that the extent to which Kangan controlled her was similar to that of other teachers at the campus, almost all of whom were direct employees…’
>
> (Simmonds C decision AIRC Print No R6604).

44. On appeal, the Full Bench overturned Simmonds C's finding. The Bench took the view that the threshold issue to be decided was whether or not there was a contract of any type at all between Ms Fox and Kangan. To decide this issue, the Full Bench applied the common law of contracts, which holds that a number of elements need to be evidenced before it can be concluded that a contract exists. Instead, the Full Bench found that:

> '[89]….it is our view that no contract existed between Ms Fox and Kangan because, of the essential elements for a contract, three were missing; namely:
>
> - an intention between the parties to create a legal relationship, the terms of which are enforceable
> - an offer by one party and an acceptance by the other
> - valuable consideration….'
>
> (AIRC Print No S0253).

45. The Bench also took the view that, while there had been some sort of relationship between Ms Fox and Kangan, it was not an employee-employer relationship:

> '[88]...We have considered all the evidence before Simmonds C. While there are parts of it that point to a contract between Ms Fox and Kangan, they are, in our view, outweighed by the other parts which, in our view, point to there being no contract…'.

46. If the court or tribunal satisfies itself that there is a contractual relationship between the hirer and the worker (to use Stewart's terminology), its next task is to determine the nature of that contractual relationship and in particular, whether it is a contract of employment, or some other type of contract.

47. Stewart sets out this procedure in some detail:

> '(This procedure is based on) the formalistic approach adopted by the courts in applying the common law principles as to employment status, as determined by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd* ((1986)160 CLR 16). These principles do not embody a definition of employment as such. They rely instead on a test which involves the consideration of a number of established factors or indicia, some of which are characteristic of a contract of service and others of which suggest a non-employment relationship. The task of the court or tribunal which must assess the employment status of a worker is to consider the parties' relationship in light of each of these indicia and to determine, on balance, into which legal category the relationship falls. The approach is necessarily impressionistic, since there is no

universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee (See Sammartino v Mayne Nickless (2000) 98 IR 168 at 189). In effect, this "multi-factor" test proceeds on the assumption that the courts will know an employment contract when they see it.

As to the indicia themselves, the extent of the hirer's right to control not just what work is done, but the way it is done, is 'very important, perhaps the most important of such indicia' (*R v Allan; Ex parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237 at 248; *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385 at 387…). The greater the capacity for control, the more likely it is that the worker is an employee. Other relevant indicia can be summarised on the following checklist, which indicates whether a positive answer to each question points to the worker being an employee or a contractor:

Indicia	*Employee*	*Contractor*
Is the worker "integrated" into the hirer's organisation?	Yes	
Must the worker supply/maintain any tools or equipment?		Yes
Is the worker paid according to task completion, rather than receiving wages based on time worked?		Yes
Does the worker bear any risk of loss, or conversely have any chance of making a profit from the job?		Yes
Is the worker free to work for others at the same time?		Yes
Can the worker sub-contract the work or delegate performance to others?		Yes
Is taxation deducted by the hirer from the worker's pay?	Yes	
Is the worker responsible for insuring against work-related injury they might suffer?		Yes
Does the worker receive paid holidays or sick leave?	Yes	

Of these, the last three should arguably (and indeed generally do) receive relatively little weight in the balancing equation, since the matters in question are governed by legislation whose application itself depends on how the worker is characterised (*Re Porter* (1989) 34 IR 179 at 185. Cf *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150 at 152…). Typically, if the worker is an employee

then the hirer is legally obliged to deduct tax, pay workers compensation premiums and (unless the worker is a casual) provide various forms of leave. The fact that the employment contract stipulates otherwise may simply mean that the hirer is acting illegally. Nevertheless, the inclusion in a contract of provisions to that effect, while in a sense risky, may help to support an impression created by other aspects of the relationship that the contract is not one of service.

As a final note on the individual indicia, it is important to stress the significance of the worker having a power to delegate or sub-contract. Notwithstanding judicial emphasis on the significance of the question of control, this is arguably the single most determinative factor. It is clear from the case law that an employment relationship is viewed as essentially personal in nature, and that no amount of authority to control the way in which work is done can make a person an employee if they are not contracting to supply their own personal labour (See eg *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539.). Hence if a worker is free to delegate or sub-contract, that is almost inevitably regarded as inconsistent with the presence of a contract of service (*Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 391; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 26, 38.).'

(Stewart (2002a) 242-244)

48. The AIRC explicitly adopted Stewart's table of indicia in *Josie Bianchi and Staff Aid Services* (2003) AIRC Print No PR937820 (See also the relevant appeal case: *Staff Aid Services and Josie Bianchi* (2004) AIRC Print No PR945924).

49. Many decisions exemplify this approach: *Hollis v Vabu Pty Ltd [2001]* HCA 44 (9 August 2001); *Sheahan v Guiseppe Belcaro (T/as Breakaway Security)* [2001] SAIRComm 44 (17 October 2001); *The Construction Forestry Mining and Energy Union of Workers v Personnel Contracting Pty Ltd t/a Tricord Personnel* WA Industrial Relations Commission Full Bench 2004 WAIRC 11445; *Abdalla and Viewdaze Pty Ltd t/as Malta Travel* (2003) AIRC Full Bench PR927971 14 May 2003.

Labour Hire Workers

50. The position of labour hire workers as employees at law is reasonably well established. However, it should be noted that the making such of determinations is considered to be largely a question of fact, as the passage quoted from *Swift Placements* at paragraph 42 above points out. Thus, the determination of the nature of any given employee relationship in a labour hire situation will depend on the relevant facts.

51. *Swift Placements* is one of the leading decisions regarding labour hire workers. In that case, the Full Bench of the IRC of NSW was required to determine whether a labour hire worker (Mr Rudolf Terkes) was firstly an employee, and secondly, whether he was the employee of the labour hire agency (Swift Placements – the appellant), or of the host employer (Warman International Pty Ltd). The Full Bench concluded that:

> In our opinion, Mr. Terkes and the appellant had a legal relationship according to a contract for the performance of work on a casual basis from time-to-time and where the performance of the work, for which wages would be paid, would depend upon the appellant allocating work to Mr. Terkes according to the requirements of its clients and where Mr. Terkes was obliged to accept such work once it was allocated….
>
> In light of the legal principles referred to by us as developed and formulated in the authorities cited, and in particular *Stevens v. Brodribb Sawmilling*, we entertain no doubt that on the totality of the facts of this case the relationship we have found between the appellant and Mr. Terkes was that of employment pursuant to a contract of employment between them….
>
> …
>
> 66 We have said earlier that an element involved in an employment relationship was that the performance of the work concerned must be for the benefit of the employer. Here, of course, the work performed by Mr. Terkes at Warman's Artarmon factory was subject to regular on-the-job control by Warman as to the work to be performed and how that should be achieved. Indeed, it was that aspect which was at the core of Mr. *Macken's* case that the control and direction over Mr. Terkes was exercised by Warman so that it was the true employer of him and that was so because the work was for Warman as part of its manufacturing process. As much as that may be, we do not consider mere on-the-job direction of a person necessarily makes that person the employee of the person directing.
>
> ….
>
> 69 And, in our opinion, … the services of Mr. Terkes as an employee of the appellant were provided for reward to Warman so that he remained the employee of the appellant and did not become the employee of Warman.
>
> (*Swift Placements Pty Limited v WorkCover Authority of New South Wales (Louise May)* [2000] NSWIRComm 9 (3 March 2000).

52. It is worth noting that, in *Swift Placements*, the Commission was asked to consider argument that the host employer was in fact the true employer,

and the Commission explicitly rejected these arguments. Similar arguments were rejected by the IRC of NSW in *WorkCover Authority of NSW (Inspector Robins) v Labour Co-operative Ltd (No 1)* [2001] NSWIRComm 223.

53. Finally, it is noted that some recent cases have, based on their particular facts, arrived at the opposite conclusion. For example, in *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel and Theiss Services Pty Ltd t/as Theiss Services*[2003] NSWIRComm 1006 (3 March 2003), the NSW Commission found that the host employer could be considered as the 'real' employer of a labour hire worker, for the purposes of the worker pursuing an unfair dismissal claim. A similar conclusion was reached by the NSW Commission in *Shop Distributive and Allied Employees Association, NSW of a dispute with Smithkline Beecham (Australia) Pty Ltd, re: Incidents outside the workplace* [2002] NSWIRComm 1025 (11 June 2002). However, both cases are generally considered to turn on their own particular facts, and the more generally accepted view is along the lines of *Swift Placements* and similar cases.

54. As noted above at paragraph 37, Odco type arrangements include features of both labour hire work and independent contracting. These arrangements are so named as a result of the High Court's decision in what has become known as the Troubleshooters case (*Building Workers Industrial Union v Odco Pty Ltd t/a Troubleshooters Available* (1991) 34 IR 297)).

55. While Odco arrangements involve the supply of labour on the same basis as the more common labour hire arrangements, they are distinguished from the latter by the quite specific and deliberate actions of the parties to ensure that, given the current labour law framework, no employee-employer relationship can be deduced or inferred from either the terms of the relevant contracts, or the facts of the relationship. The terms of the relevant contracts are drafted to this effect, and the parties conduct themselves with this goal in mind.

56. In the original Odco decision, the Court held that that the builders who used Odco's services did not have an employment contract with the workers supplied by Odco and further that there was no employment relationship between Odco and the relevant workers. The absence of any employment relationship meant that the jurisdiction of awards or relevant industrial instruments or statutes was not activated, because the latter only apply where there is an employee-employer relationship at law.

57. In broad policy terms, Stewart summarises the distinction between employees and non-employees as follows:

> 'There does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's. It is a distinction that has not only been articulated in these terms by the courts, (See eg *Marshall v*

Whittaker's Building Supply Co (1963) 109 CLR 210 at 217; *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 at 275, 277) but that most people in the community would implicitly understand and accept. The entrepreneur risks whatever capital they have been able to accumulate in a bid to profit from their venture. They may earn a little or a lot, or indeed they may lose money. Within whatever constraints are imposed by the need to raise finance and/or the conditions of the relevant product market, the entrepreneur makes their own decisions as to how the business is to operate. As Leighton notes, the distinction between being in business is as much as anything else a matter of attitude:

> The genuine self-employed are risk tolerant, want autonomy in decision-making and accept risk, costs, insecurity etc, as constant features of their work. They see themselves, generally, as detached and self-reliant. They offer their services widely and are disinterested in employing organisations, labour market policies and macro-economic issues generally(P Leighton 'The European Employment Guidelines, "Entrepreneurism" and the Continuing Problem of Defining the Genuinely Self-Employed' in Collins Davies and Rideout 2000).

The employed worker, on the other hand, generally works on the basis that some remuneration at least will be received for their efforts, even if (as in the case of piecework or other performance-based pay arrangements) the amount is uncertain. They are also aware that someone else is ultimately responsible for making the decisions that will determine whether they continue to be given a chance to earn that remuneration' (Stewart (2002a) at 261).

Conclusion

58. As Pocock and her colleagues put it:

> '..The growth in (non-standard) employment in Australia is an unintended, unanticipated evolutionary outcome resulting from a regulatory regime that did not forsee the growth in new types of employees, in an environment of changing labour supply and demand…' (Pocock et al (2004a) p8)

59. In this sense, the issues that are canvassed above should not be viewed as no more than the result of unscrupulous or devious attempts to evade legal obligations. Indeed, as Stewart points out, many of the arrangements entered may be perfectly legal. Similarly, the deployment of non-standard forms of employment may be an entirely understandable and rational response to competitive pressures on a particular enterprise or industry.

60. The issues raised above should rather be understood as structural issues which result from the deployment of non-standard forms of employment.

61. The salient question is whether these results are acceptable public policy outcomes, and if they are not, what remedies should be applied.

Part 2 – Issues

62. In this Part the issues arising from labour hire and independent contracting arrangements are considered. As noted earlier, given the large proportion of labour hire workers who are engaged as casual employees, issues relevant to the latter are also considered, as appropriate.

Policy Issues

63. One of the key observations made by the NSW Labour Hire Task Force was:

> 'Labour hire arrangements will continue to provide flexibility and opportunities for both business and workers into the future. The Task Force recognises that choice should exist but it should not be unlimited nor at the expense of labour hire workers and reputable labour hire companies.
>
> The challenge is to balance fairness and equity with economic efficiency and competition. Current relationships are categorised by the devolvement of risk (from host organisation to labour hire company and host organisation and labour hire company to labour hire worker). The question is how to share risk fairly.' (NSW Labour Hire Task Force (2001) p52.

64. Buchanan expresses a similar view in relation to casual employment:

> 'The unequal treatment of many casuals is merely the most obvious. Of greater significance is the process of casualisation itself. Australian casualisation does not necessarily entail cuts in wages or the universal imposition of crude forms of labour flexibility. It is, however, integral to a new approach to managing labour that boosts labour productivity by pushing many of the costs and risks of employment onto workers. Many casual workers accept their secondary labour market status as the only way to reconcile work with other commitments such as caring responsibilities or study. For growing numbers of blue collar males it is the only form of employment available. As such casualisation is best seen as a distinctively Australian way of redefining labour market rights as life courses change and as levels of under-employment rise. This outcome is not inevitable..'

and

> 'The coexistence of stable job duration and rising levels of casual employment…are indicative of the messy reality in which gaps in labour law have been used to create jobs with lower levels of

employer obligation than would exist if standard employment rights were attached to them.' (Buchanan (2004) p4, p13).

65. In considering an application to vary the Federal Metal, Engineering and Associated Industries Award, the AIRC recently recognised that:

> 'The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, and public holidays, sick leave and personal leave are fundamentals…[T]he category of the permanent casual is founded upon an entrenched diminution of workers' rights' (AIRC Print No T4991: 24).
>
> Essentially, the regulation of casuals has hinged around a circular definition of casual as those hired as such, and paid a loading. There has been no effective regulatory constraint upon the growth in *forms* of employment that are temporary and insecure even where they are, in *substance*, ongoing.' (Pocock et al (2004a) p20).

66. O'Neill makes similar observations regarding labour hire workers:

> 'There also appears to be some consensus on the role of labour hire as a means to resolve demands for short-term labour, and the unions in the main acknowledge this. However, the debate becomes sharper where businesses, as a matter of policy, determine to hire otherwise ongoing workers through labour-hire agencies. From one point of view, the lack of regulation over repeat short-term contracts is likely to make this practice attractive. Union attempts in NSW to have both casual and labour-hire employment converted to ongoing and direct employment after six months service constitute an attempt to limit the repeat use of temporary workers.' (O'Neill (2004) p23).

67. The specific issues which flow from these broad observations are numerous. The research which has highlighted these issues has been aimed at the category of casual employees at large, rather than the narrower group of labour hire workers which are the specific subject of this Inquiry. However, as can be seen from paragraphs 20-21, the vast majority of labour hire workers are employed on a casual basis by the relevant labour hire agency. Further, none of the literature suggests that labour hire workers stand outside the range of issues affecting casual employees at large.

68. Some of these issues are as follows:

Lack of Employee Choice

69. As Pocock et al point out:

> '….By categorising employees as casual and paying them as such, employers can intensify work and finely tune employment levels to production or service demands, shifting income and hours' risks to casual employees.
>
> Analysis of changes in casual work amongst different groups (by age, sex and student/non-student status) suggests that a significant portion of the rapid growth in casual work between 1984 and 1999 occurred amongst young males who are non-students, and prime age and mature-age men (Campbell 2000: 90). Growth in casual work amongst these groups, at a time when their overall participation in paid work did not change very much, is suggestive of '*employer* predispositions to use casual employees' – that is, demand side factors and employer choice (Campbell 2000: 92).
>
> In a number of industries the bulk of jobs are only offered on a casual basis (eg hospitality and retail) and increasingly the only means into work is through casual employment (eg in manufacturing workplaces and call centres).'
>
> (Pocock et al (2004a) p22).

70. Buchanan takes a similar view (Buchanan (2004 p21). The result is that:

> 'First, many part-time or casual workers *must* trade-off career for less than full-time jobs or some control over their hours. Second, some choose part-time or casual jobs in order to work full-time hours, rather than excessive hours. Third, many part-time employees, regardless of their preferences, give up job security when they take a part-time job: they are casualised as a by-product of their hours decision. Finally, part-time and casual work often unhinges workers from core labour markets…' (Pocock et al (2004a) p23)

71. This suggests that casual employment is not necessarily to the mutual advantage of the employee and employer. For the employee, it means reduced income, job security and career prospects. For employers, it may mean a less committed, less innovative workforce – and ultimately a deskilled and/or demotivated pool of workers from which to hire. As Buchanan puts it '*the better deployment of labour undermines its longer term development*' (Buchanan 2004 p1, emphasis in original).

72. Similar considerations apply to labour hire arrangement and dependent contractor relationships. The *Damevski* and *Country Metropolitan Agency Contracting Services* cases cited below (see paragraphs 97-106 below) are examples of employer initiated dependent contractor arrangements which have gone on to operate to the disadvantage of the worker involved.

Incorrect Status

73. Although casual employment is ostensibly 'informal, irregular and uncertain' (Moore J, in *Reed v Blue Line Cruises* (1996) 73 IR 420), casuals 'often work long, stable and predictable hours of work' (Buchanan (2004) p3). This leads to the (oxymoronic) notion of the 'permanent casual', which the AIRC has said '…detracts from the integrity of an award safety net in which standards for annual leave, and public holidays, sick leave and personal leave are fundamentals…[T]he category of the permanent casual is founded upon an entrenched diminution of workers' rights' (AIRC Print No T4991: 24).

74. In this connection, it is apposite to note that the average tenure of casual workers is 2.6 years, with 57% having more than one years' tenure, according to data from the HILDA survey (Wooden and Warren 2003 at 13).

75. It is easy to see how the particular situation of labour hire workers could make most, if not all of these issues more acute. As the employees of someone else (the labour hire agency), the employment issues encountered by labour hire workers are unlikely to be the host employer's concern. The host employer may continue to use the labour worker's services for an extended period of time, but unless the worker raises matters of concern to them on their own initiative, they may remain unaddressed. This is likely to be exacerbated by the fact that the labour hire agency will normally be at some physical remove from the host's workplace.

Loss/Diminution of Conditions

76. The presence of a casual loading is intended to compensate casuals for absence of leave entitlements. Leaving aside the question of whether the loading is actually paid (see Campbell (2004) at p10), recent cases in which it was successfully claimed that existing loadings fail to adequately compensate workers for these losses indicate that '(t)he gap between the loading and the value of lost conditions varies according to the conditions in the relevant award.'(Pocock et al (2004a) p15).

77. The absence of these leave entitlements for a significant part of the workforce can be easily seen by considering ABS data which reveals that in 1991, 80% of all employees were entitled to paid holiday leave or paid sick leave, however by 2001, this had fallen to 73% (Employee Earnings, Benefits and Trade Union membership ABS Cat No 6310.0)

78. Dependent contractors are the most extreme extension of this problem. The arrangements they operate under provide that they are not employees at all, and are therefore not entitled to benefits, nor even the benefit of a loading to compensate for the absence of such benefits. In addition, dependent contractors may be required to bear the liabilities of workers' compensation superannuation, public liability insurance, and so on.

79. Given the tenure issues identified in the previous point, the continuing absence of such entitlements for a substantial body of workers must be viewed as a matter of some concern.

Lack of Skills Development and Training

80. A number of researchers have pointed to poor levels of access to training opportunities for casual workers (Watson et al (2003) Ch10, Hall et al (2000), Hall et al (2002), Buchanan et al (2002)). As Watson et al, put it, the priority appears to be 'deployment, not development, of labour' (Watson et al (2003) p159).

81. On the other hand, it should be acknowledged that some labour hire firms, particularly the larger firms, do devote substantial resources to the training of their employees (See NSW Labour Hire Task Force (2001) p25, Parliament of Victoria (2005) pp59-65)).

82. The net effect however appears to be a lack of skills and training amongst casual employees, with clustering of these workers in low-skill-low pay industries such as accommodation cafes and restaurants, and retail (see paragraph 21 above). This is a problem not just because it traps workers in low paid, low skill jobs, but it also reduces the skills development in the labour force in aggregate. There has been a substantial amount of recent public debate about a pervasive 'skills crisis' in the Australian labour market at large (See for example DEST (2004), Priest (2005), Tingle (2005), ABC (2005)).

Reduced Job Security

83. Some tribunals have recognised that casuals do have some unfair dismissal rights (See for example *Yasmin S B Cetin v Ripon Pty Ltd t/as Parkview Hotel* AIRC Full Bench Print No PR938639 25 Sept 2003, *Shop, Distributive and Allied Employees' Association, New South Wales v Librus Pty Ltd t/as Dymocks Parramatta* [2001] NSWIRComm 26 (26 March 2001)). However, legislative amendments in the federal jurisdiction (insertion of a new s170CBA in the WR Act in November 2003) appear to have successfully diminished these rights somewhat (See *B Nightingale and Little Legends Childcare* AIRC Full Bench Print No PR948229 23 June 2004).

84. Labour hire workers may face a more complicated situation: if the host employer decides to dispense with the services of a particular labour hire, it is prima facie not dismissing the worker since the latter is not their employee. However, as pointed above at paragraph 52 tribunals have recently shown some willingness to carefully analyse the facts of the situation and grant unfair dismissal claims against the host (see for example *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel and Theiss Services Pty Ltd t/as Theiss Services*[2003] NSWIRComm 1006 (3 March 2003), *Shop Distributive and Allied*

Employees Association, NSW of a dispute with Smithkline Beecham (Australia) Pty Ltd, re: Incidents outside the workplace [2002] NSWIRComm 1025 (11 June 2002), Melbourne v JC Techforce Pty Ltd [1998] SAIRComm 62 (23 July 1998)). This said, it should be noted that these cases turned on the particular facts of each situation.

85. In any event, the exercise of these rights is dependent on the willingness and ability of the relevant employee to make and progress an application before the relevant tribunal. For employees faced with difficult choices about balancing work and other commitments, and possessing low skills and resources, doing so may not be a viable option.

86. The mooted removal of unfair dismissal rights for employees working in enterprises of 20 employees or less, together with the hostile federal takeover of the bulk of state unfair dismissal jurisdictions threatens to make this problem even more acute. If successful, these legislative actions would totally remove even the minimal access to unfair dismissal procedures described above.

Lower Pay

87. As has already been pointed out at paragraph 21 above, casual workers suffer lower earnings than their permanent counterparts: 'Even if we adjust for hours worked, the hourly earnings of casual employees is still only around 83 per cent of permanent employees, despite the fact that many casual employees receive a pay loading in lieu of leave entitlements.' (Wooden and Warren 2003 p12).

88. Dependent contractors appear likely to suffer such difficulties to an even greater degree, given that they do not receive casual loadings and are likely to have a greater range of liabilities as (putative) non-employees (See paragraphs 27-29 above).

Pay Inequities

89. In some cases, labour hire workers and contractors are paid less than direct employees of the host employee performing the same work under the same conditions. The NSW labour Hire Task Force considered this issue (NSW Labour Hire Task Force (2001) pp71-75), as has the more recent Victorian Inquiry (Parliament of Victoria (2005) p22). This issue is also an important element of the Unions NSW claim in the Secure Employment Test Case currently before the NSW IRC (see Labor Council (2003) proposed Secure Employment Clause, sub-clauses d(ii) and (e)(vii)(1)).

90. These inequities are not just harmful to the labour hire workers and contractors that they directly affect, they may also have the effect of undermining the pay and conditions of permanent workers, particularly in bargaining context, leading to a 'race to the bottom', where 'enterprises

short-sightedly compete based on suppression of unions, low wages, poor working conditions, (and) precarious employment ….'. (ILO 2004 at [16]).

Gender Issues

91. Casual employment concentrates women workers in low-pay low skill industries:

> 'Casual work is highly feminised. Across Australia, casual workers are concentrated in the two occupations where over half of all women are employed: basic and intermediate clerical, sales and service workers. Over half of *all* women in elementary clerical sales and service jobs identify as casual.' (Pocock et al (2004a) p9, emphasis in original).

92. Overall pay outcomes for women remain poor: the Victorian Pay Equity Working Party found that Australian women earn $150 per week less than men. This study found a gender pay gap of 18.4% for full-time adult workers and 11.2% for full-time non-managerial employees. For part-timers, the gap was 6.1%, however, this lesser figure 'attributable to the fact that the overwhelming proportion of part-time workers are women - almost 72%.' (Victorian Pay Equity Working Party (2005) p3).

93. Given the preceding list of issues, it can be concluded that the detrimental effects arising out of casual employment fall disproportionately on the female working population. This has implications for the long term security of Australian families, as it makes them increasingly dependent on insecure, low paid, low skill employment.

Legal Limitations

94. The approach set out at paragraphs 39-48 above has been the focus of considerable criticism. In a recent speech, Justice Paul Munro, formerly of the AIRC said:

> **[23]** The concept of the employment relationship is the fulcrum upon which the federal arbitral power is exercised. It has never been modified to accommodate mushrooming forms of quasi-employment. It remains to be seen whether it will adapt any better to the needs of the 'new psychological contract', or meet what Professor (Katherine) Stone describes as 'the misfits between current labour and employment regulation and new workplace practices'….
>
> **[24]** A concept of employment also operates in other ways through the regime of the Act to prevent regulatory or representational intervention. The common law notion of employment, the contract of service between master and servant, creaks around in the foreground of federal industrial legislative

> and case-law settings. It thereby effectively governs the content of industrial matters able to be collectively bargained for or subjected to tribunal regulatory intervention. It impacts also upon representation rights and structures. The roots of that governance are the legal reasoning applied at the start of last century. A premise for some of that reasoning was that the civil rights of masters should prevail against the growth of any new province for intervention not expressly authorised by the [Conciliation and Arbitration Act 1904]. That and similar reasoning serves today to dictate inflexibility in the arbitral and collective bargaining system. That inflexibility will obstruct the system from dealing with interests and concerns critical to addressing workplace and related livelihood problems associated with the steepening decline in economic security.
>
> (Munro (2004) pp8-9)

95. The practical effect of these implications can be described as follows:

> '…What I do understand to be the case, both from published research and anecdotal observation, is that….it is common to find relationships which **in substance** involve the subordination and the dependence characteristic of employment but which have quite lawfully been constructed as subcontracting arrangements.
>
> The fact is that any competent employment lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor….thereby avoiding the effect of a wide range of regulation which is typically applicable only to employees, such as industrial awards, registered agreements, leave and superannuation legislation, and unfair dismissal laws.
>
> There are two basic ways to do this. The first is to prepare a written contract for the parties to sign which has as many indications as possible of a contract for services: payment by results rather than a regular wage, the requirement to supply a tax invoice when claiming payment, a notional freedom to work for other "clients", denial of leave entitlements, supply by the worker of their own tools and equipment, a requirement to self-insure against injury - and most importantly, if at all possible, the power to delegate or sub-contract tasks to other workers, a feature the courts have always treated as incompatible with an employment relationship.
>
> The alternative method is to interpose some form of legal entity between the worker and the client business, since in the absence of a direct contract between the two there cannot be an employment relationship. That entity might be a labour hire

agency, or a personal company, or a partnership constructed for the purpose between two or more workers.

The point I wish to stress is that in a purely legal sense there is nothing "illegitimate" about these arrangements. They are quite lawful. On the other hand, I (and many other commentators) have long argued that the law as it stands is deficient, in that form is so readily allowed to prevail over substance. There are many genuine contractors….who quite clearly run businesses of their own and provide services to a range of different clients. They are not the concern. Rather it is the "dependent contractor" who as a matter of practical reality is indistinguishable from an employee.

It is true that many (though certainly not all) dependent contractors quite happily accept their status. They may believe that they will be better off in financial terms, especially if they are unconcerned with (or fail to take account of) the value of leave entitlements, superannuation contributions and the like. And in symbolic terms, some quite clearly prefer to be regarded as self-employed, even if in truth their degree of independence is minmal.

Nonetheless, I firmly adhere to the view that it should not be possible to contract out of protective regulation. If a contract to pay an employee less than applicable award conditions or to deny them leave entitlements is illegal and unenforceable, why should it be lawful to do the same thing through the device of a delegation clause or an interposed entity – even if the worker freely consents?…' (Stewart (2002b).

96. In short, the common law construction of the employment relationship allows particular work arrangements to be viewed as non-employment relationships even though the substance of the relationship is indeed subordination and employment. This consideration applies principally to what have been termed dependent contractor relationships.

97. Odco type arrangements are an example of an area where the strategies described by Stewart are used to disguise employment. For example in *Damevski v Guidice* (FCAFC 252 (13 November 2003)), a cleaner (Mr Damevski) was advised by his original employer, Endoxos Pty Ltd, that he should resign from his then position and contract his services to MLC Workplace Solutions (MLC). MLC and associated entity, the Australian Independent Contracting Association (AICA) provided documents to the cleaner that said the contracting system was an 'Odco style labour hire' arrangement, based on a daily contract between the contractor and the labour hire company.

98. There was no direct contact or discussion between MLC and Mr Damevski while this arrangement was being effected. The new arrangements were put in place almost entirely by Endoxos.

99. Endoxos management told Mr Damevski and its other former employees (who had also entered into Odco arrangements) ‘nothing would change’ under their new arrangements, but if they didn't sign with MLC they wouldn't get any further work. Mr Damevski continued to perform the same work after moving to the contractor arrangements. Endoxos also continued to provide him with an Endoxos van (which it fuelled and maintained), Endoxos-badged shirts and hats, two pairs of trousers and a mobile phone.

100. Endoxos also determined Mr Damevski’s rate of pay, although MLC actually paid him.

101. In February 2002, Endoxos moved Mr Damevski to a different worksite and removed his access to the work van. Mr Damevski could no longer access the worksite and neither Endoxos nor MLC were able to offer him work elsewhere. Mr Damevski applied for relief against Endoxos in the AIRC pursuant to ss170CE(1) and 170CM(1) of the *Workplace Relations Act 1996* (Cth) (WRA) in respect of the termination of his employment during February 2002.

102. The AIRC, both in the form of a single Commissioner and then a Full Bench, refused Mr Damevski’s application. Based on reasoning identical to that deployed in the AAWS case (also a matter concerning an Odco type arrangement). The Full Bench determined that:

> *[20] In order to succeed in the appeal, the first task confronting the appellant was to demonstrate that he was in a contractual relationship not with MLC but with Endoxos at the relevant time.*
>
> *...*
>
> *[22] It is clear, in our view, that the documentary evidence shows that the appellant agreed to perform work for MLC and to be paid for it by MLC.* ***That the work was to be performed pursuant to a contract between MLC and Endoxos tends to confirm the absence of a contract between the appellant and Endoxos.*** *We think this evidence is conclusive and the Commissioner was correct so to find.* (AIRC Print No 922380 13 September 2002, emphasis added)

103. The matter was appealed to the Federal Court, where it was heard by the Full Court (Wilcox, Marshall and Merkel JJ), which handed down its decision on 13 November (FCAFC 252). In an almost unanimous decision, the Court quashed the AIRC’s decision, firstly on the basis of the process of assessing the facts of the situation, and secondly on the basis of weight given to some of the facts.

104. Although each member of the Bench delivers a separate judgement, the common theme is that the reality of the situation, as opposed to labelling

by the parties, or simplistic application of contract theory, should be the primary consideration.

105. The unanimous finding of the Bench was that Mr Damevski continued in an employment relationship with Endoxos, notwithstanding the efforts of Endoxos and MLC to portray Mr Damevski as an independent contractor.

106. It should also be noted that the Bench distinguished this case from the original Troubleshooters case (see paragraphs 54-55 above), noting that: *65 Endoxos did not establish an arrangement in the form recognised in Odco or any like arrangement.*(per Marshall J).

107. A similar approach, with a similar result was taken by the Workers Compensation Tribunal of South Australia in *Country Metropolitan Agency Contracting Services Pty Ltd v Slater, Irene & Workcover Corporation/CGU Workers Compensation (SA) Pty Ltd* (Workers Compensation Tribunal (SA) Full Bench [2003] SAWCT 57). This case concerned a tomato picker who had entered into an Odco type arrangement.

108. In such cases, the interposing of a third party and the construction of a contract which has numerous indications of a contract for services, are used to disguise an employment relationship.

109. However, notwithstanding the willingness of the courts and tribunals concerned to look at the substance of the relevant relationship in these examples, the established common law approach continues to have judicial ascendancy (See for example *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] Supreme Court of WA WASCA 312 22 December 2004, majority judgement Steytler and Simmonds JJ, EM Heenan J dissenting). This said, it should be noted, as the NSW IRC points out above at paragraph 42, that these matters are largely questions of fact.

110. To deploy some of the analysis used earlier in assessing the policy issues, the legal approach described here allows the risks of the employment relationship to be shifted totally onto the worker in a dependent contractor relationship. This appears to be the most extreme version of the 'risk-shifting' described by Buchanan, Pocock and others above.

111. As Stewart puts it:

> '(some decisions) do illustrate that there are limits as to how far hirers can go in seeking to "disguise" employment relationships as something else. Indeed the courts have repeatedly insisted that if a relationship is in substance one of employment, the parties cannot alter that fact merely by having the contract state, or the worker acknowledge, that their status is that of independent contractor (*Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJR 163; *Narich v Commissioner of Pay-roll Tax (NSW)* (1983) 50 ALR 417;

though cf *Merceica v Wade* [2000] SASC 441 (21 December 2000). The label attached by the parties to their relationship may, on the other hand, have some relevance where the equation is otherwise finely balanced: *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385 at 389–390….). As Gray J so memorably put it in *Re Porter*, "the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck" ((1989) 34 IR 179 at 184).

The fact is though that it *is* possible under Australian law to do just that. If the contract that governs the parties' relationship has enough duck-like features, most courts and tribunals will be persuaded that they are looking at a duck — even if the underlying reality of the relationship would suggest a rooster (See eg *Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees v Bark Australia Pty Ltd* [2001] QIRComm 22 (28 February 2001). The key to this, and to the success of the drafting strategy just described, is the preoccupation that most judges have with the formal terms of the arrangement they are scrutinising. ' (Stewart (2002a) at 246-7, emphasis in original).

Part 3 - Remedies

112. The issues that accompany non-standard forms of employment in general, and labour hire and independent contracting in particular, are complex and wide-ranging. Resolution of these issues is made more difficult by the level of controversy between employer and employee representatives about these issues, as the Final Report of the NSW Labour Hire Task Force clearly shows. The NSW Government's experience is that this level of controversy has remained undiminished, as evidenced in the deliberations of the Labour Hire Licensing Working Party.

113. Inasmuch as there has been extensive discussion of the issues, many solutions have been proposed, in both broad and narrow terms.

114. In broad terms, Buchanan suggests:

> '…non-standard work need not necessarily be sub-standard work….the challenge is not to pit 'standards' against 'flexibility' but rather to devise standards for flexibility.' (Buchanan (2004) p31).

115. More specifically, Pocock et al note that various OECD countries attempting to deal with these issues are seeking to ensure that:

'…

- certain forms are encouraged and others discouraged (or indeed proscribed);
- quality of employment is maintained and improved;
- wages and conditions do not diverge too much from standard employment;
- employee choice is given an adequate role;
- there is no lasting disadvantage associated with the choice of particular forms of employment;
- mobility between forms of employment is fostered; and
- standard employment is not crowded out.'

(Pocock et al (2004a) p37)

116. In terms of the specific issue of differentiating genuine independent contractors from disguised employees, the ILO's International Labour Conference (Scheduled for May 2006) will consider a recommendation for member government's national policy frameworks to include the following elements:

'…

– providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self employed persons;

– combating disguised employment relationships which have the effect of depriving dependent workers of proper legal protection;

– not interfering with genuine commercial or genuine independent contracting;

– providing access to appropriate resolution mechanisms to determine the status of workers.'

(ILO (2004) at [64]).

117. However, it is to the NSW jurisdiction that we first turn in examining possible ways of addressing these issues. The succeeding sections consider firstly NSW legislative and regulatory approaches, and then approaches based on the NSW award system. These sections demonstrate the capacity of the NSW industrial system to innovatively deal with the needs of persons working in non-standard employment or non-employment situations who require some means of redressing potential imbalances in their relationship with the person who provides them with work.

Existing NSW Legislation and Policy

Deeming Provisions

118. Schedule 1 of the New South Wales *Industrial Relations Act* deems certain types of workers to be employees. The deeming provisions recognise that a number of categories of workers exist who are often in weak negotiation positions and that in many instances, the relationship which exists is not substantively different to that of employee and employer.

119. The practical effect of Schedule1 is to absorb defined classes of workers within the jurisdiction of the Commission so that they may enjoy the protection of generally accepted standards of industrial regulation.

120. Examples of deemed employees include cleaners, carpenters, joiners or bricklayers, plumbers, drainers or plasterers, painters and clothing outworkers.

121. These workers would usually be considered to be independent contractors at law, viewed by both the courts and legislature to be 'in business for themselves'. If not for the deeming provisions, they would be left to their own devices and denied the protections enjoyed by employees,

notwithstanding that, like employees, there may be a significant degree of inequality in bargaining power between the worker and the provider of work. Any suggestion that the Commonwealth should move to nullify the effect of the NSW deeming provisions is therefore rejected.

Unfair Contracts

122. The unfair contracts provisions in NSW have for decades provided relief to persons who find themselves bound by unfair work contracts, be they employees or independent contractors who have no access to the award jurisdiction. The jurisdiction provides access to a tribunal primarily guided by principles of fairness and justice between the parties.

123. Section 106(1) empowers the Commission to make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.

124. Section 106(2) provides that the Commission may find that a contract was unfair either at the time it was entered into or that it subsequently became unfair because of any conduct of the parties, any variation of the contract or any other reason.

125. An 'Unfair contract' is defined by s105 as a contract:

(a) that is unfair, harsh or unconscionable; or

(b) that is against the public interest; or

(c) that provides a total remuneration that is less than a person performing the work would receive as an employee performing the work; or

(d) that is designed to, or does, avoid the provisions of an industrial instrument.

126. This is a longstanding jurisdiction, originally inserted into the former *Industrial Arbitration Act 1940* in 1959.

127. Employees earning greater than $200,000 are excluded from the jurisdiction.

128. The unfair contracts provisions have been adept at dealing with unfairness arising out of a dependent contractor being treated less fairly than they would have had they been an employee. Some examples of decisions concerning dependant contractors are as follows:

Sisley v Ellenberger t/as GEB Security [2004] NSWIRComm 341

129. A security guard worked for ten years as a static security guard, under her contract she paid her own tax and did not receive annual leave, sick leave, long service leave or superannuation contributions. The employer refused to engage her as an employee. The guard was initially paid $11 per hour, rising to $14 per hour in 2000 when she ceased work.

130. The applicant complained that the monies paid to her by the respondent were less than she would otherwise have earned pursuant to the provisions of the relevant industrial instrument, the Security Industry (State) Award.

131. The Commission in Court Session found that the contract was unfair because the woman:

> 'performed personal services of the same kind and in the same circumstances as would have been performed by an employee of the respondent'.

132. The company was ordered to pay $91,481.49 comprising of $63,663.34 underpayment of award wages, $6,827.72 long service leave, $13,218.96 superannuation and $7,717.47 interest on outstanding contribution.

Faraci v The Leak Shop Pty Ltd [2003] NSWIRComm 169

133. A worker was engaged to provide shower repairs. The applicant was pursuing the Leak Shop for wrongful deduction of workers compensation premiums and unauthorised retention of payments in respect to work done. The question that needed to be resolved by the NSW IRC was whether the contractual relationship was that of employment or principal and independent contractor. Some factors characterised the work contract as one of employment, for example:

- he was working exclusively for the respondent
- he was subject to control and discipline
- he was prohibited from performing any private leaky shower repairs other than as specified and approved by the respondent.

134. On the other hand, the worker was required to supply a motor vehicle certain materials, tools and mobile telephone. He was paid on a per job basis upon the provision of an invoice and subject to a six month restraint of trade clause upon termination.

135. Peterson J concluded that the employer was clearly acting against the public interest:

> 'They were abusing a position of trust and prejudicing vulnerable persons who stand in a weaker position'

136. The company was ordered to pay $5,406.03 comprising workers compensation premiums deducted from the applicants earnings, unauthorised retention of payments, superannuation and interest.

O'Brien v Australian Native Landscapes Pty Ltd [2001] NSWIRComm 145

137. A worker performing work in the transport and timber industry initiated s106 proceedings concerning his contract, which he believed avoided the provisions of an industrial legislation including underpayment of wages, annual leave and long service leave and failure to pay agreed superannuation contributions.

138. The Commission in Court Session noted that the contract:

> '… provided for a remuneration that was less than fair or reasonable in all the circumstances and less than an employee would have received for doing similar work under an award…the applicant was at all material times in a position of unequal and inferior bargaining power in respect of his dealings.'

139. The contract arrangement was declared void from commencement and an order for the payment of money was made encompassing underpayment of wages at the rates prescribed from time-to-time by the Transport Industry (State) Award, annual leave, long service leave, redundancy and unpaid superannuation.

Contracts of Bailment and Contracts of Carriage

140. The Chapter 6 is a discrete regulatory regime which applies to contracts of bailment (taxi drivers) and contracts of carriage (drivers involved in the transportation of goods who own their own vehicle).

141. Under this Chapter, the Commission has the power to make contract determinations (analogous to awards) and to approve contract agreements (analogous to enterprise agreements) between parties in relation to such contracts. The IRC is also empowered to resolve disputes in the industry.

142. The Chapter 6 scheme is based on the premise that the drivers involved are, in terms of bargaining power, in an analogous position to employees. In other words, although the contractual agreements entered into by these drivers are not employment contracts at law, nevertheless they are in a vastly inferior bargaining position as against the large transport companies for whom they perform services.

143. Taxi drivers are a category of worker whose industry, for the benefit of the community is regulated by the State Government in NSW. A central part of that regulation is that taxis are permitted to charge a fixed rate. This means that neither bailee (driver) nor bailor (operator) have any power to determine price in the industry. The provisions of Chapter 6 as they apply

to taxi drivers are therefore designed to ensure fair distribution of the charge between bailor and bailee.

144. In the absence of regulatory provisions such as Chapter 6, these drivers are left in a 'no man's land'. Not being employees, they cannot seek the normal protections enjoyed by employees, such as union membership and award coverage. On the other hand, the drivers do not possess the resources, expertise or skills to deal on an equal footing with principal contractors.

145. Chapter 6 establishes a framework which provides an appropriate balance between the need to address the inferior bargaining position of owner drivers and the desirability of fostering optimal productivity and efficiency benefits. A summary of the measures used to achieve this are as follows:

- Contract Determinations (IRC can determine minimum conditions for certain contracts of carriage/bailment – these instruments deal usually with very few issues and are designed to ensure that some basic aspects central to the viability of the contractual relationship cannot be bargained away);
- Contract Agreements (Groups of owner drivers, whether or not represented by a union, can enter enterprise specific arrangements with their principal contractor – these arrangements provide commercial certainty to drivers and principal contractors alike through provisions designed for the enterprise, and also provide administrative ease and therefore further cost benefits to principal contractors);
- Reinstatement of Contracts of Carriage (IRC power is parallel to that of unfair dismissal which recognises the significant risk in terms of investment made by owner drivers);
- Dispute Resolution (A predetermined, cheap, quick and effective conciliation procedure before members of the Commission with relevant expertise and either personal or institutional access to relevant industrial processes and history);
- Compensation for Goodwill (Introduced by the state Liberal government in 1994, this enables owner drivers to recover the goodwill when it is reasonable and fair to do so without the expense and risk of costs associated with conventional civil claims that would otherwise have to be pursued);
- Recovery of money provisions (owner drivers are able to pursue underpayment for the work they perform through the same streamlined processes as employees).

146. Lack of access of owner drivers and the transport companies who engage them to a settled system which has provided economic certainty and industrial harmony for decades would not be in the public interest. It would result, amongst other things, in the disruption of over 170 registered contract agreements between owner-drivers and companies. This would undermine the commercial confidence of both sides of the contractual relationship.

147. Absence of the Chapter 6 scheme would also jeopardise the safety of owner-drivers and the general public by enabling larger companies (both consignors and freight forwarders) to exploit their superior bargaining power to force unsafe systems of remuneration upon owner-drivers by requiring them to either work longer (leading to fatigue) or faster (leading to excessive road speed) in order to make a living.

148. Mooted Commonwealth legislation threatens to undermine the effective functioning of the Chapter 6 framework by narrowly focusing on the role of unions in contract negotiations. It is understood that proposed amendments to the *Trade Practices Act 1974* (Cth) prevent unions from acting as bargaining agents in contract negotiations thus undermining the role played by the Transport Workers Union as the body which undertakes collective bargaining in the transport industry. The union, which represents owner-drivers, has long operated under an authorisation under the *Trade Practices Act* which permits it to negotiate collectively on behalf of owner-drivers with the Australian Road Transport Federation to establish owner-driver rates for long distance freight haulage. This may involve interstate haulage, which is beyond the reach of the Chapter 6 jurisdiction.

149. The Trade Practices Legislation Amendment Bill would prevent any union from being able to notify collective bargaining under the new scheme. There is no good reason for excluding unions from this scheme. The results under the Chapter 6 scheme demonstrate how the TWU in particular contributes to the achievement of settled and productive relationships in this industry. It seems anomalous that a government which purports to promote freedom of association would legislate to exclude independent contractors from exercising their freedom to choose a union as their bargaining agent.

Outworkers

150. The NSW Government's three year, $4 million dollar Clothing Outworker Strategy, *Behind the Label*, operated from July 2001 to mid way through 2004. However, the Government remains committed to addressing the exploitation of the State's most vulnerable workers.

151. One of the most successful initiatives of *Behind the Label* has been the Vocational Education and Training Program, which aims to increase the skills base of the labour force and provide opportunities for those who wish to leave the industry.

152. To assist the clothing industry and protect Australian businesses from unethical competitors who exploit outworkers, the NSW Government recently introduced a mandatory code of practice for the clothing industry. The Scheme will operate in conjunction with the existing industry developed voluntary code, the Homeworkers Code of Practice.

153. Entitled the Ethical Clothing Trades Extended Responsibility Scheme, the mandatory code places obligations on retailers and suppliers of clothing products manufactured in Australian for retail sale within NSW to:

- keep and exchange records about the details of manufacture of those clothing goods, including the use of outworkers;
- requires retailers to provide regular summary reports of those records to the Office of Industrial Relations (OIR) and the Textile, Clothing & Footwear Union of Australia (TCFUA);
- provides for the inspection of detailed records kept by retailers to enable OIR and the TCFUA to identify suppliers in order to ascertain levels of compliance with the Award.

154. The Scheme is the first of its kind in Australia and is the product of years of close collaboration between the State Government and all major players in the industry.

155. Inspectors of the Office of Industrial Relations are empowered under the Industrial Relations (Ethical Clothing Trades) Act 2001 to instigate proceedings for prosecution of contraventions of the Scheme.

156. The outworker strategy demonstrates the superior capacity of the state system to bring about an integrated multi-pronged approach to dealing with an entrenched problem of extreme exploitation. NSW built on its legislative power to deem dependent contractors to be employees in order to establish a creative new approach to enforcement and compliance in the clothing industry, integrated with one-on-one assistance to outworkers through established vocational education methods.

Minimum entitlements for casual workers

157. In NSW casual employees are able to access a number of entitlements enshrined within the *Industrial Relations Act 1996* including access to parental leave and the unfair dismissal regime. These ensure that casual employees with a pattern of ongoing employment are not excluded from access to entitlements enjoyed by other employees.

158. Casual employees who work on a regular and systematic basis for a period of at least 12 months and have a reasonable expectation of

continuing employment, are entitled to 12 months' unpaid maternity, paternity or adoption leave (s57(3) of the NSW Act).

159. Casual employees engaged on a regular and systematic basis for a period of at least six months who believe that their termination is harsh, unreasonable or unjust may lodge an unfair dismissal claim. (s83)

The Secure Employment Test Case

160. In August 2003, the Labor Council of NSW applied to vary a number of NSW awards in relation to matters concerning job security for casuals and labour hire workers, as well as consultation about outsourcing and contracting out. The claim:

- seeks to provide permanent employment for regular casual and labour hire employees after six months if there is on-going work
- requires staff of labour hire companies or contractors to receive the same wages and conditions of employment that prevail in the enterprise that has engaged the labour hire company's or contractor's services
- seeks to establish a process for consultation and dispute resolution in relation to contracting out situations
- includes a number of provisions regarding consultation about OH&S matters and rehabilitation of injured labour hire workers.

161. The claim is being opposed by various employer groups. In response, Employers First have lodged a counter claim regarding the deregulation of part-time work provisions in awards. This counter claim was formally joined with the Labor Council claim, with the Labor Council claim to be dealt with first.

162. The NSW Minister's position is to support the Commission considering in detail the important issues raised by the Test Case proceedings. The Minister opposes the establishment of a test case standard, proposing instead that principles be established to guide Commission members in dealing with applications on an award by award basis. The Minister also opposes the insertion of an OHS/rehabilitation clause in the terms sought by the Labor Council, on the grounds that these matters are dealt with in the OHS and Compensation legislation.

163. In relation to the Employers First counter claim, the Minister's position is that it is not necessary to set principles as to the nature of part-time employment provisions in awards. There is sufficient flexibility in the award variation, award review and part-time employment provisions of the Act to permit part-time work arrangements appropriate to particular awards and parties to be established.

Workers Compensation – Developing a New Definition of Worker

164. The question of who is an employee and who is not arises in a variety of scenarios, not just in the traditional industrial relations arena It is also a an important question for Occupational Health and Safety and Workers' Compensation legislation particularly.

165. In January 2005, the NSW WorkCover Authority initiated a consultation process regarding possible changes to the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) (the 1998 Act), via a discussion paper entitled 'Definition of Worker' (WorkCover NSW (2005)).

166. The purpose of the paper is to canvass possible changes to the definition of worker in the 1998 Act, in order to address issues such as:

> Individual contractors who do not employ workers and who perform work as part of an independent business are not considered to be workers of the principal.
>
> In some circumstances, it may be difficult to determine if the contractor is operating an independent business or is dependent on the principal in a similar way to an employee under a contract of service.
>
> Where the status of the contractor is unclear, and in disputes about whether an injured contractor is a worker of a principal, the common law indicia are used to consider whether the contractor is a worker of the principal, or is carrying on a business on his or her own behalf.
>
> …….
>
> Many of the common law tests rely on evidence that is unknown or yet to be established at the commencement of a contract, which makes it difficult to determine the contractor's status in advance. Also, a contractor's status cannot necessarily be determined by the terms of the contract, as courts will look at the whole circumstances of the relationship between the parties when deciding whether an employment relationship exists.
>
> …
>
> In many cases, the status of a particular contractor does not come into question until they are injured, lodge a claim with the insurer of the principal and the insurer rejects the claim on the basis that the contractor is not a worker.
>
> ….
>
> As well, in some cases, contractual arrangements may be worded to give the appearance that the contractor is independent, in order to avoid the workers compensation insurance obligations.

> As a result, the lack of clarity about the status of dependent contractors may result in intentional or unintentional premium avoidance, and may delay the treatment and payment of compensation to injured dependent contractors until disputes are lodged and resolved.
>
> (WorkCover NSW pp9-10)

167. In its present form, the 1998 Act defines a worker to be a person working under a contract of service (s4(1)). In a similar manner to the *Industrial Relations Act* 1996, it deems certain classes of workers to be employees for the purposes of the Act (Schedule 1 of the Act, cf paragraphs 118-121 above).

168. A number of options for change are offered for consideration by stakeholders, particularly including a specific test designed to more readily determine when a particular person is genuinely operating their own business, and if so whether they are a genuine independent contractor, or alternatively, whether they are a genuine employee. If this option is put into effect, it would supplement the current deeming provisions in Schedule 1 of the 1998 Act. This test is modelled on that found in the *Income Tax Assessment Act* 1997 (Cth) at Divisions 84-87.

169. As can be seen from the foregoing paragraphs, there is substantial congruence between the issues being addressed in this consultation process, and those identified earlier in this submission (see paragraphs 63-111 above). The deployment of a test of the type proposed is considered below.

170. This consultation process is ongoing.

The NSW Labour Hire Task Force

171. The NSW Labour Hire Task Force reported on December 2001. The Task Force considered many of the issues outlined above and made specific recommendations regarding changes to legislation, licensing and an education campaign. A licensing working party made further progress on this issue in 2002-3.

172. In March 2003, the Premier undertook to set up a Labour Hire Industry Council to oversee industrial relations and occupational health and safety compliance in the labour hire industry. Following the Minister's intervention in the Secure Employment Test Case, work on this Council has been suspended pending a decision in this Case. This decision has been taken on the basis that, if the Test Case is successful, many of the industrial relations matters that were to have been overseen by the Council will have been addressed through the Test Case outcomes.

Conclusion

173. The existing legislative provisions (Schedule 1, the unfair contracts provisions, the special outworkers jurisdiction and Chapter 6) are all aimed at workers who, although they are not employees at law, exhibit many 'employee-like' characteristics. As such, they bear significant resemblances to the category of dependent contractors discussed above at paragraphs 28-30. The intent of these provisions is to ensure that these employees are in a fair bargaining position in dealing with the relevant contractee, and confer rights upon them which place in a position similar to that of employees. As such, these provisions could be said to be aimed squarely at some of the issues faced by non-standard employees discussed above. The changes under consideration for the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) may extend this approach further.

174. The matters raised in the Secure Employment Test Case are focused principally on casuals, labour hire workers and part-time workers, all of whom are very much the focus of this Inquiry to a greater or lesser degree. The position taken by the NSW Government has two key aspects: firstly that the matters raised, such as casual conversion, are matters to be resolved at industry level, by the relevant industrial parties; and secondly that existing Commission processes, industrial instruments, and relevant legislation have sufficient breadth and flexibility to deal with the matters claimed.

175. It should be mentioned that this situation is at some variance with that currently prevailing in the federal jurisdiction. Since the decision in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] (HCA 40 (2 September 2004)), there has been some doubt about the matters which can be included in federal awards and agreements at large, and the inclusion of clauses regulating the use of contractors and labour hire workers in particular. (See *National Union of Workers and KL Ballantyne* AIRC Print No PR952656 22 October 2004*, Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737 (23 December 2004). It therefore appears that there may be significant barriers to dealing with these matters by means of federal awards and agreements, absent any amendment to the *Workplace Relations Act* 1996 (Cth).

176. By means of these measures and important policy development processes such as the Labour Hire Task Force, the NSW Government has attempted to come to grips with some of the issues that have arisen from recent changes to NSW labour markets. These efforts are by no means at an end, and the NSW Government will take further policy and legislative action as and when appropriate.

177. Remedies of this nature are regularly available to the Commonwealth, subject to the limits of the Constitutional powers within which it must operate.

Further Remedies

178. This Part concludes with a (brief) examination of further strategies that may assist in dealing with some of the issues. These are:

- A genuine business test to differentiate genuine independent contractors from employees
- Joint employment concepts

179. The discussion of these matters does not, and should not, be taken to mean that the NSW Government is committed to any of these strategies. Our purpose in including them is merely to ensure that they become part of the policy debate.

A New Test to Identify Independent Contractors

180. The principal deficiency identified in the standard common law approach to identifying employees is its readiness to accept form over content and readily identify employees as independent contractors, in spite of the true nature of the contractual relationship. It follows that a more stringent test to perform such functions may be appropriate.

181. Such a test would, broadly speaking, be aimed at determining whether a particular person is in business on their own account (and therefore is an independent contractor), or alternatively whether they are actually working for someone else (and therefore is an employee). As Stewart puts it:

> 'There does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's. It is a distinction that has not only been articulated in these terms by the courts, ….but that most people in the community would implicitly understand and accept…' (Stewart (2002) at 261).

182. Examples of how such a test might be constructed already exist, most notably in current Commonwealth income tax legislation. In 2000, the Commonwealth Government amended the *Income Tax Assessment Act* 1997 (Cth) (by means of the *New Business Tax System (Alienation of Personal Services Income) Act* 2000) to provide for a test to identify what it terms personal services income (ITAA Divisions 84-87). The test is aimed at ensuring that, inter alia, 'is that income generated from the supply of personal labour by an entity will be attributed to the individual or individuals who are actually providing that labour, unless once again the entity is a genuine business' (Stewart (2002) at 258).

183. The test proposed by the NSW WorkCover Authority for the *Workplace Injury Management and Workers Compensation Act* 1998 is in similar terms, albeit with some different features.

184. Stewart also proposes a test of this nature (Stewart 2002 at 268 – 275) which is constructed somewhat differently, its key features being 'firstly to put the onus on a person who wishes to deny that a relationship is one of employment to show that the worker concerned is genuinely carrying on a business, and secondly to set out certain factors to which regard should or should not be had for that purpose' (Stewart 2002 at 271).

Joint Employment

185. The joint employment concept is well established in US labour law. Broadly speaking, it provides that, depending on the relevant facts, both the supplier of labour in a labour hire situation, and the host employer have an employment relationship with individual workers. Jenero and Spognardi describe its operation in the following way:

> '…Before assessing liability for violations of the NLRA (National Labour Relations Act) in temporary employment relationships, the NLRB will seek to determine whether the temporary service provider and client employer are 'joint employers' under the Act. Applying the standard enunciated by the Supreme Court in Boire v. Greyhound Corp., 376 U.S. 473 (1964), the question of `joint employer' status is a factual issue and requires examination into whether the employer that is alleged to be a joint employer (the client employer) possesses sufficient control over the work of the employees at issue to qualify as a joint employer with the actual employer (the temporary service provider). Under this standard:
>
> [W]here two or more employers exert significant control over the same employees - where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment - they constitute `joint employers' within the meaning of the NLRA. [NLRB v. Browning-Ferris Indus., 691 F. 2d 1117 (wd Cir. 1982); see also, TIJ, Inc., 271 NLRB 798 (1984).
>
> > *At the outset, it should be noted that `joint employers' are businesses that are entirely separate legal entities, although both `take part in determining essential terms and conditions of employment of the group of employees [See Capitol EMI Music, 311 NLRB 997 (1993). In that case the National Labour Relations Board held the temporary service provider and client employer to be joint employers because they shared and codetermined the essential terms and conditions of employment of temporary employees. The temporary employment agency negotiated the wage rates of its temporary employees assigned to Capitol, while Capitol's supervisors assigned all work and supervised the temporary employees, effectively disciplined the temporary employees, and made effective recommendations concerning the firing and discharge of the temporary*

employees]. Thus, joint employer relationships are found where, despite the absence of common ownership, one entity effectively and actively participates in the control of labor relations and working conditions for employees of the other entity [Goodyear Tire & Rubber Co., 312 NLRB 674 (1993)].

The Board has defined 'essential terms and conditions of employment' as those involving such matters as hiring, firing, discipline, supervision, and direction of employees [Ibid Goodyear Tire at 676]. Moreover, the presence of an operational control clause in a temporary services agreement - that is, a clause that gives one employer the sole and exclusive right to direct the temporary employees - is not, in and of itself, conclusive evidence of joint employer status [Ibid]. Rather, to establish joint employer status, there must be a showing that the employer meaningfully affects essential terms and conditions of employment of the temporary employees' employment, and that its involvement is more than minimal or routine [Laerco transportation 269 NLRB (1984)]…' (Jenero and Spognardi (1995) pp128-129).

186. There has been some discussion of this concept in Australian jurisdictions since an AIRC Full Bench raised it in its decision in *Morgan v Kittochside* (AIRC Print No PR918793, 13 June 2002). It has been raised in a number of decisions since that time (See, for example *Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel & Theiss Services t/as Theiss Services* [2003] NSWIRComm 1006 (3March 2003), *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13 (29 March 2004), t*he Construction Forestry Mining and Energy Union of Workers v Personnel Contracting Pty Ltd t/a Tricord Personnel* WA Industrial Relations Commission Full Bench 2004 WAIRC 11445, *Matthews v Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Ltd* 2003 WAIRC 10388 and *Damevski v Guidice* FCAFC 252 13 November 2003).

187. Harley (2003) also discusses the concept, concluding that:

> 'An examination of the Australian authorities reveals that a concept of joint employment is emerging as a new development in Australian law. The introduction of the doctrine is likely to have significant implications, particularly for labour hire arrangements.' (Harley (2003) at 85).

188. The joint employer concept was considered in the recent review of the South Australian industrial relations system (Stevens (2002)), which recommended its adoption, subject to relevant judicial discretion (pp60-62). However, this recommendation was not carried forward to the final Bill, which has yet to pass the SA Legislative Council.

Part 4 – Conclusions and Response to the Terms of Reference

189. Based on the foregoing discussion of issues and remedies, our concluding observations are as follows:

- The last 10-15 years have seen substantial growth in non-standard employment – casuals, labour hire workers, independent contractors, dependent contractors and so on. This presents potential problems for policy makers presiding over industrial relations systems predicated on a standard model of employment.
- Whilst the contraction of standard employment and the corresponding growth of independent contractor arrangements have been significant, the level of growth of the latter has not been as significant as the terms of reference suggest, with approximately 80% of workers still employees, and only around 10% of workers in contracting arrangements.
- Issues in relation labour hire workers and casual employees at large are: lower pay, loss/diminution of conditions, lack of employee choice, lack of training and skills development, greater vulnerability to unfair dismissal, and others.
- The mooted removal of unfair dismissal rights for employees working in enterprises of fewer than 20 employees, together with the hostile federal takeover of the bulk of state unfair dismissal jurisdictions threatens to make the problems faced by these workers even more acute.
- Current common law based legal tests for identifying genuine independent contractors appear to be deficient.
- Current NSW legislation such as the unfair contracts jurisdiction, Chapter 6, Schedule 1, the *Industrial Relations (Ethical Clothing Trades) Act 2001*, and the minimum conditions prescribed in the *Industrial Relations Act 1996* are specifically aimed to assist non-standard workers.
- The NSW Minister's position in the Secure Employment Test Case is also intended to assist casuals, labour hire workers and contractors via existing industrial instruments and Commission processes.
- The federal jurisdiction appears to now be unable to use awards or agreements to address issues involving non-standard workers following the High Court's decision in *Electrolux*. Constitutional limitations may similarly restrict the Commonwealth's ability to directly legislate for the same purpose.

- These limitations suggest that a cooperative approach with the States is the way forward in dealing with the many complex issues generated by non-standard work. Unfortunately, the Commonwealth Government does not appear to be presently interested in cooperation with the states.

190. With regard to the specific Terms of Reference for this Inquiry, the status and range of labour hire and independent contracting arrangements (Term of Reference 1) and the role of labour hire arrangements (Term of Reference 3) have been dealt with in Parts 2 – 4 of this submission. Strategies to ensure that independent contract arrangements are legitimate (Term of Reference 4) are dealt with in Part 3.

191. Term of Reference 3 directs the Committee to inquire into 'ways independent contracting can be pursued consistently across state and federal jurisdictions'. This would appear to suggest a common legislative and regulatory approach across state and federal jurisdictions.

192. It is difficult to reconcile such a request to the NSW Government with current Commonwealth Government policy positions as publicly stated. On 25 February 2005, the Commonwealth Minister for Employment and Workplace Relations indicated that the Commonwealth Government will proceed with legislative changes that will put in place

> 'a package of reforms, based on the corporations power that will cover the field and bring roughly (depending on the estimates used) 85-90% of employees into an Australian workplace relations system'
>
> (Andrews (2005) p8)

193. This policy position does not appear to include a substantial ongoing capacity for making industrial laws on the part of the states, thus rendering proposals for future legislative coordination somewhat academic, to say the least.

194. In their Joint Communique of 25 February 2005, state industrial relations Ministers said:

> 'We call upon Mr Andrews to meet his commitment to consult. Until the federal Government does so, the states and territories will reject all hostile attempts to expand the federal jurisdiction.
>
> We invite the federal Government to engage in a meaningful dialogue with the states and territories to discuss reform in an inclusive and consultative manner'.
>
> (Joint States IR Ministers (2005))

195. Common approaches to legislation are very difficult in this type of environment. This not to say that the NSW Government would be opposed to such discussions. However, the broader context in which they may occur would also have to be considered.

196. In summary, the New South Wales Government:

- Recognises that labour hire and independent contracting are legitimate ways of doing business and earning a living (although neither is either as prevalent nor as rapidly expanding a category as has been suggested)
- Asserts that this is subject to the proviso that any such arrangements be freely entered into with a proper understanding on the part of the participants of the nature and incidents of their relationship
- Is concerned about the tendency for such arrangements, if not freely entered into, to undermine security of employment and to inappropriately transfer the burden of risk to the worker rather than the person for whom the work is performed
- Affirms the role of government in protecting persons who enter into such arrangements with limited information or misunderstanding of how the relationship will operate
- Achieves this beneficial goal in this state by a variety of means, including:
    - both general and specially tailored legislative provisions, including the definition of 'employee', expanding the category of employee by deeming certain classes of 'at risk' workers to also be employees, and providing remedies for workers in unfair or exploitative relationships including:
        - unfair contract provisions which provide a remedy where the contract avoids the provisions of an industrial instrument.
        - contract carriers provisions which create a special jurisdiction for dealing with the needs of that industry
        - provisions designed to prevent the exploitation of clothing outworkers.
    - by maintaining an independent umpire, the Industrial Relations Commission, which is able, after hearing from the parties about the needs of particular industries or occupations, to craft acceptable and lasting settlements on how these issues should be dealt with through awards and agreements

- Confirms that as the labour market evolves and new forms of employment emerge, this legislative and arbitral framework also needs to evolve to address new issues, without abandoning the core commitment to a fair go for all workers and employers
- Questions the legislative capacity or concern of the Commonwealth in addressing the needs of workers at risk of being exploited or treated unfairly through such arrangements
- Is particularly concerned that this Inquiry is being undertaken against the background of federal government announcements of its intentions to 'take over' the state industrial relations systems, with little or no consultation with the states, and to reduce the already limited federal safety net still further.

Index of Appendices

APPENDIX A

Table 2: Indicative material on the rise of non-standard employment, Australia, late 1970s compared to late 1990s.

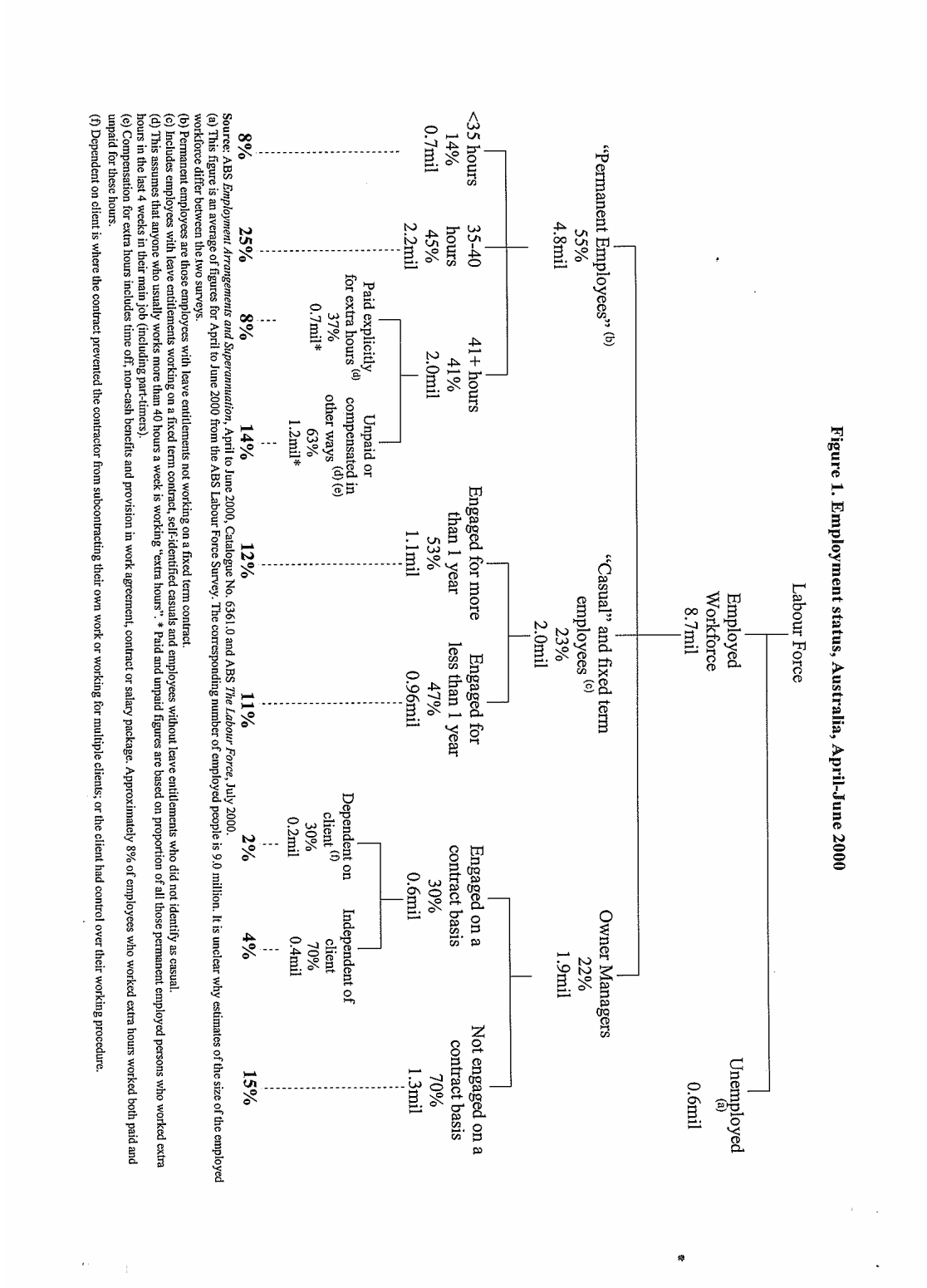
	Late 1970s	Late 1990s
Casuals	10	20
Contractors • Sole Traders • Owner managers of incorporated enterprises	 15 2	 14 6
Total	27	40

* Expressed as a percentage of the total workforce.

** Adapted from ABS, Labour Force, Australia, July 1997, Tony Kryger, Casual Employment, Research note 2, 1999-2000, Statistics Group, Parliamentary Library, August 1999.

APPENDIX B

Figure 1. Employment status, Australia, April-June 2000



Source: ABS *Employment Arrangements and Superannuation*, April to June 2000, Catalogue No. 6361.0 and ABS *The Labour Force*, July 2000.

(a) This figure is an average of figures for April to June 2000 from the ABS Labour Force Survey. The corresponding number of employed people is 9.0 million. It is unclear why estimates of the size of the employed workforce differ between the two surveys.

(b) Permanent employees are those employees with leave entitlements not working on a fixed term contract.

(c) Includes employees with leave entitlements working on a fixed term contract, self-identified casuals and employees without leave entitlements who did not identify as casual.

(d) This assumes that anyone who usually works more than 40 hours a week is working "extra hours". * Paid and unpaid figures are based on proportion of all those permanent employed persons who worked extra hours in the last 4 weeks in their main job (including part-timers).

(e) Compensation for extra hours includes time off, non-cash benefits and provision in work agreement, contract or salary package. Approximately 8% of employees who worked extra hours worked both paid and unpaid for these hours.

(f) Dependent on client is where the contract prevented the contractor from subcontracting their own work or working for multiple clients; or the client had control over their working procedure.

APPENDIX C

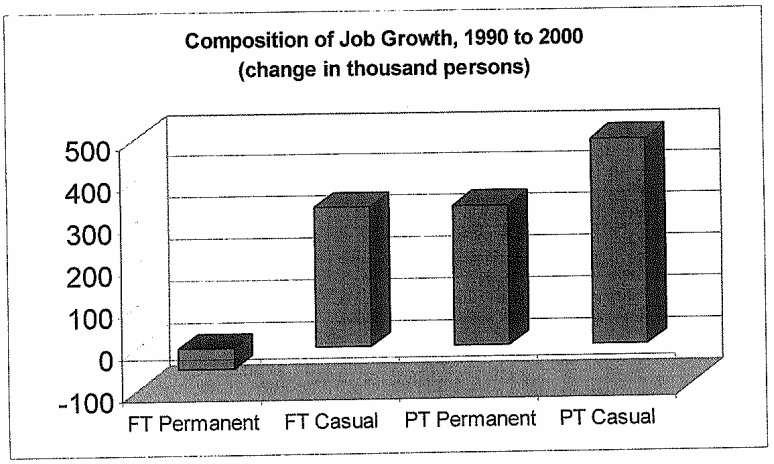


Figure one: Composition of Job Growth, 1990 to 2000
Source: Borland, J, Gregory B, & Sheehan B Eds. *Work Rich, Work Poor: Inequality and Economic Change in Australia*, Centre for Strategic Economic Studies, Victoria University, Melbourne, based on cat no 6310.0

APPENDIX D

Table 4: Temporary employees as a proportion of total employees in selected OECD countries, 1983, 1994, 1998 and 2002.

	1983	1994	1998	2002
Australia a)	*15.6*	*23.5*	*26.9*	*27.3*
Belgium	5.4	5.1	7.8	7.6
Denmark	12.5	12.0	10.1	8.9
Finland b)	11.3	13.5	17.7	17.3
France	3.3	11.0	13.9	14.1
Germany c)	10.0	10.3	12.3	12.0
Greece d)	16.2	10.3	13.0	11.3
Ireland	6.1	9.4	7.7	5.3
Italy	6.6	7.3	8.5	9.9
Luxembourg	3.2	2.9	2.9	4.3
Netherlands	5.8	10.9	12.7	14.3
Portugal e)	14.4	9.4	17.4	21.8
Spain f)	15.7	33.7	32.9	31.2
Sweden f)	12.0	13.5	12.9	15.7
United Kingdom	5.5	6.5	7.1	6.1

a) 1984, 1994, 1998 and 2002
b) 1982, 1993, 1998 and 2002
c) 1984, 1994, 1998 and 2002. Data for 1984 are for West Germany
d) Due to a definitional change in 1992, the data for 1994 and 1998 are not strictly comparable with 1983
e) 1986, 1994, 1998 and 2002. Due to a definitional change the data for 1994 and 1998 are not strictly comparable with 1986
f) 1987, 1994 , 1998 and 2002

Source: Figures in the first two columns are from the OECD report (1996: 8). Figures in the third and fourth columns are from official labour force data for Australia (ABS *Employee Earnings, Benefits and Trade Union Membership Australia*, Cat. No. 6310.0) and Europe (Eurostat 1999, 2003).

Table 1

Proportion of employment gained through employment services agencies, EU 1999, USA, 2000 and Australia 1999

Country	Per cent of total employment	Country	Per cent of total employment
Netherlands	4.0	Spain	0.8
Luxembourg	3.5	Sweden	0.8
Australia	3.1	Austria	0.7
France	2.7	Denmark	0.7
USA	2.6	Germany	0.7
UK	2.1	Finland	0.6
Belgium	1.6	Ireland	0.6
EU	1.4	Italy	0.2
Portugal	1.0	Greece	0.0

Sources: Storrie, D, 2002, Temporary Agency Work in the European Union, European Foundation for the Improvement of Living and Working Conditions, Dublin, Table 3, p 28; Houseman, S., A. Kalleberg, and B. Erickcek, 2001,'The role of temporary help agencies in tight labor markets,' Upjohn Institute Staff Working Paper No. 01-73 cited in Neugart, M and Storrie, D; 2002, 'Temporary work agencies and equilibrium unemployment' Program for the Study of Germany and Europe Working Paper No. 02.6; Center for European Studies, Harvard University. Australian data from ABS, 2000, Employment Services, Australia, 1998-99 Cat. No. 8558.0 and June1999 total employed from ABS, 2004, Cat 6202.0.55.001 Labour Force, Australia, Spreadsheets, Table 1 labour force status by sex – trend.

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