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Australian Institute of Employment Rights

Submission to the Standing Committee on Education and Employment on the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012*

A submission by Australian Institute of Employment Rights Inc. to the House of Representatives Standing Committee on Education and Employment

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Summary

1. The Australian Institute of Employment Rights Inc. ("AIER") is an independent, not-for-profit body that works in the public interest to promote the recognition and implementation of the rights of employers and workers in a cooperative industrial relations framework. It is independent of government or interest groups.

2. AIER welcomes the opportunity to make a submission about the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* ["the Bill"].

3. AIER is supportive of the Bill as a first step in a process towards limiting job insecurity within Australia. We do, however, make some suggestions about how the Bill can be amended so that it better achieves its objective.

4. AIER is also keen to point out that this Bill deals only with a narrow set of insecure arrangements and it only does so in a limited way. AIER, through this submission, seeks to promote further changes to the *Fair Work Act* ["the Act"] and to identify changes outside of legislation that need to be considered should job insecurity be limited.

5. AIER notes that purpose of the Bill is to implement one of the recommendations of the Independent Inquiry into Insecure Work in Australia ["the Howe Inquiry']. The Deputy Chair of that Inquiry was the Honourable Paul Munro, who is the Acting President of AIER and who has advised in relation to this submission.

6. AIER made a detailed submission to the Howe Inquiry and appeared before it to give evidence and further oral submissions. Details of our submission are available from our website www.aierights.com.au . The Appendices to this submission give a summary of AIER's approach.

7. As a result of our research regarding the nature and incidence of insecurity at work, AIER has taken a broad view of job insecurity. Our definition of insecurity includes insecurity that arises from the nature of engagement (standard employment relationships versus atypical or contingent relationships) and that, which arises from the experience that workers have in the workplace (in particular the type of workplace culture that is present).

8. AIER believes that there is an urgent need to address factors that are negatively impacting on the experience of work in Australia. Insecurity is one of the manifest outcomes from this experience.

9. Effective measures to deal with insecure work must involve a range of policy initiatives as outlined by the Howe Inquiry and in AIER's work, not just the measures foreshadowed in the current Bill.

10. Noting the limitations of the Bill, the AIER proposes amendments to the Bill that will strengthen its ability to meet its objectives. These amendments include provisions that provide for a presumption in favour of secure work arrangements unless there is a demonstrated business need.

The importance of secure work

11. Work is important to individual employees [and to the self-employed] as well as to employers, the economy and society as a whole. Work provides income to individuals and their families and dependents and provides the engine of the growth of living standards for employees, employers and nations. As well as boosting national income and living standards, work provides meaning, social esteem and standing and is the means by which crucial services are delivered to the community.

12. The relationship between workers and their employers is of particular importance because it is the success of these relationships that shapes the individual workplace and translates into social and national well being. From the prosperity of the business to the emotional well being of each worker, the quality of workplace relations has a crucial role to play in our society. Access to secure work that has decent salary and conditions is therefore a critical element promoting, happy, healthy and productive workers.

13. Workplace insecurity takes at least two forms: insecurity of tenure and insecurity that arises from poor workplace culture and experiences.

14. This submission does not set out in detail AIER's observations of the negative consequences of insecurity and in particular poor workplace culture. Our research and submissions in relation to this are available at our website.[1] In summary AIER believes the "costs" of insecurity include:

    Greater career instability

    Higher unemployment risks

    Lower upward mobility

    Lower levels or remuneration

    Income stress

    Lower investment in training and skills development

    Long term economic penalties (particularly for women)

    Higher levels of job dissatisfaction

    Higher propensity to mental health issues

    Coronary heart disease

    Family stress and breakdown.

15. The growing incidence of workplace insecurity of both types is a global phenomenon. Australia should not accept that this growing insecurity and the negative consequences

[1] For more details regarding this see the AIER's comprehensive submission regarding Preventative Health and Workplace Culture available at the AIER website http://www.aierights.com.au/2009/08/aier-presents-its-preventative-health-and-workplace-culture-submission/#more-308 . See also Scherer S (2009) *'The Social Consequences of Insecure Jobs'* Department of Sociology and Social Research, Trento University Italy; Laszlo KD et al (2010) '*Job Insecurity and health: A study of 16 European countries',* Social Science and Medicine 70 (2010) 867 -874, D'Souza R et al (2006) *Work Demands, job insecurity and sickness absence from work. How productive is the new, flexible labour force?,* Australian and New Zealand Journal of Public Health 2006 vol 30 no.3 pp205-212.

that flow from it are inevitable. Around the globe international institutions such as the ILO, and various countries are working to limit or end employment insecurity. Of particular concern to Australia are

- the unique features of Australian insecurity including the fact that Australia has one of the highest levels and fastest growing rates of casualisation within the Organization for Economic Cooperation and Development ("OECD") and
- the persistence of inequality associated with the gender segmentation of the workforce and
- growing evidence that poor workplace culture manifested in bullying is the experience of many workers in Australia leading to poor health and well-being outcomes.[2]

16. These factors have the potential to undermine Australia's social cohesion and any attempts to improve productivity. A comprehensive response is required.

17. This comprehensive response should include reasonable regulation of the labour market and education to remodel work place relationships and culture on the ground. This is a task that AIER has been advocating since its inception in 2005.

18. The Bill makes attempts to deal with some elements that would constitute reasonable labour market regulation. Other aspects that would form part of reasonable regulation of the labour market as identified by the Howe Inquiry and advocated by AIER include

- gradual deeming mechanism under which casual employees incrementally accrue access to rights and entitlements currently available only to permanent employees

- greater requirements being placed on employers to consult with unions with respect to the engagement of casual, fixed term, labour hire workers and contractors

- Fair Work Commission to be granted general jurisdiction to resolve disputes about matters in this area

- addressing the faults inherent in retaining definitions of employer and employee that effectively encourage exponential growth in forms of insecure employment and unrestricted resorts to engagement of labor hire employees or contractors

- inclusion within modern awards of appropriate definitions of casual and fixed term employment.

19. AIER believes that the Bill needs to be strengthened and that, the Bill is only part of the solution: the approach to job insecurity needs to be broadened.

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[2] See "*We just want it to stop*" House of Representatives Standing Committee on Education and Employment Report on the Inquiry into Workplace Bullying (2012)

AIER's response to the Bill

20. The Bill seeks to promote "secure employment arrangements" by the insertion into the Act of a new Part 2-7B. The existing definitions of national system employer and employee are incorporated within the new Part and applied in relation to casual employees and a new category of "rolling contract employee. Provision is made for a process to bring about secure employment arrangements. Essentially the process involves an individual employee or representative organization being granted the right to request a change from insecure to a secure employment arrangement. It also allows for an associated power within the Fair Work Commission to make a secure employment order binding upon the relevant employment.

21. According to the sponsor of the Bill, the Honourable Adam Bandt, MP, the purpose of the Bill is to implement at least one of the recommendations contained in the *Lives on Hold* Report, prepared by the Howe Inquiry.[3]

22. The *Lives on Hold* Report noted the need for universality in labour law, including expanded definitions of employer and employee and mechanism to capture exploitative indirect employment arrangements. It also called for firmer definitions of casual work and an expansion of the National Employment Standards to create a set of universally available minimums.[4] The recommendations of that Report therefore extend beyond the initiatives incorporated with the Bill.

23. AIER supports the initiatives outlined within the *Lives on Hold* Report. AIER had called for many of these changes as part of a suite of amendments that we believed would result in effective and reasonable labour market regulation.

24. To the extent that the Bill does not deal with a broader suite of initiatives and in particular does not work to address the issue of universality of entitlements, AIER believes that it will have limited impact.

23. Casual and rolling contract employees are the only subsets of insecurity dealt with by the Bill. It does not address what has been identified as significant exploitation associated with inappropriate labour hire and sham contracting arrangements. The Howe Inquiry pointed to an abundance of material evidencing growing propensity across most employment sectors to avoid minimum employment standard obligations by the use of labour hire and dependent contractor engagements.

25. The AIER is concerned that the limited operation of the Bill, if implemented alone, may be the trigger for a surge in exploitative labour hire or sham contracting arrangements once it becomes more difficult to exploit casual and rolling contract arrangements.

26. Noting the limitations of the Bill as set out above, the AIER suggests the following amendments to the Bill to strengthen it and help it to better meet its stated objective.

27. Include within Part 2-7B a set of overarching provisions outlining the Objective associated with secure employment arrangements. The Secure Employment Objective to include a presumption in favour of secure employment arrangements and a requirement that the Fair Work Commission establish Secure Employment Arrangements having regard for

    (a) the needs of employees to have secure jobs and stable employment

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[3] Media release: *Bandt introduces Bill to tackle insecure work,* 21 Nov 2012, http://adam-bandt.greensmps.org.au/content/media-releases/bandt-introduces-bill-tackle-insecure-work

[4] Lives on Hold, Report of the Independent Inquiry, p 10

(b) an employer's capacity to use arrangements that are not secure employment arrangements only in cases where this is genuinely appropriate having regards to the need of the business.

28. There should be a presumption similar to that which applies under s65(5) of the Act in relation to requests for flexible working hours that secure employment arrangements are to be the norm unless it can be established that there is a genuine business need for insecure arrangments.
29. Consequential amendments should also therefore be made in ss 306N, 306Q and 306R that reflect this presumption in favour of secure employment arrangements.
30. For the Bill to be effective, the Parliament needs to ensure that all understand that employees should have access to secure employment, if this is at all possible in the circumstances of the particular employer. It is both logical and desirable for the onus to be on employers to show why secure employment is not possible in a particular workplace or for a particular class of employees.
31. It is difficult for any employee to present the evidence to support a prima facie business case in favour of the secure arrangement. Employees do not generally have access to type of business information required for this. This information rests generally with the employer.
32. AIER therefore recommends that the onus should be on the employee or an organisation of employees to demonstrate only that there is insecure work at a particular workplace or enterprise and that fact having been established, the onus should be on the employer to establish there is a compelling business case against making secure employment available in that workplace generally or for a particular class of employees.

The Broader approach advocated by AIER: A comprehensive plan for secure work

33. AIER is concerned that the notion of dignity at work, including a respect for employment security has been lost in public policy frameworks and public discourse around work in Australia. The erosion of those public policy values has been driven by many factors. A number were functions of Australia's need to adapt to societal and organisational imperatives in a global economy. Political and economic philosophies have also been factors generating momentum for or against respect for employment security and similar values over time. In Australia in the 1990s and still, neoliberal philosophy and the promotion of self dependency have weighed heavily against measures that Australians long held to be crucial to dignity at work and secure employment.

34. Neo-liberal tenets informed the challenge that the 2006 Work Choices legislative scheme posed for the preservation of regulatory policy settings that afforded greater protection for employees and more secure forms of employment. The public repudiation of Work Choices has not resulted in a declared abandonment of neo-liberal precepts that underpinned substantial elements of the legislative scheme. In large measure, the establishment of the AIER and its subsequent work was motivated by what was seen as the need to strike a balance between demands for change, for flexibility in working patterns on one hand, and the retention of respect for fairness, workers' dignity and well-being on the other.

35. In this section of our submissions we develop the ways in which the AIER's perception of that balance influences what we believe should be measures taken to reduce the socio-economic dysfunctions of insecure work.

36. AIER has developed and promotes the Australian *Charter* of Employment Rights as being those rights that should exist within the law in every Australian workplace in order to promote security in workplace relationships. The Australian *Standard* of Employment Rights is the tool to achieve that goal. [see Annexures]

37. The AIER supports policy and strategy that moves to an emphasis on establishing rights that are universally accessible for all those who work without distinction. AIER supports a comprehensive approach to the promotion of secure work for all Australian workers.

38. Minimum employment protections should be available to any person defined as a worker.

39. A person is a worker within a business that takes the benefit of the worker's labour ("the employer") if the person meets two or more of the following indicators:

- the person is subject to the control of the employer in relation to how the work is performed
- the person usually works for the one employer and only that employer
- the person is treated as, or portrayed to others as, part of the employer's organization

- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer
- the person has regularly worked for the employer over a three month period
- the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)
- **and** the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

40. The AIER recommends that the following test be adopted for determining whether a worker is a worker of the entity that gets the benefit of the worker's work (the true employer) in circumstances where a third entity purports to be the employer.

- A worker is a worker of the true employer, where the person meets two or more of the following indicators:
- the person is subject to the control of the true employer in relation to how the work is performed
- the person usually provides work in the business of the true employer and only that business
- the person is treated as, or portrayed to others as, part of the true employer's business organization
- the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the true employer
- the person has regularly worked for the true employer over a three month period
- the person uses equipment or other facilities needed to perform the work provided by the true employer (other than the usual tools of trade)
- but not where the third entity which is contracted to provide the person's labour to the end-user business has a contract with that business which provides a commercial return to the third entity and which by reason of the provision of the labour under the contract, as compared with the use of direct employees, provides the end user business significant and genuine economic efficiencies unrelated to the comparative cost of employing that person's labour directly and unrelated to any intent on the part of the end user business to undermine the capacity of workers working in its business to collectively bargain together.

41. In addition AIER recommends amendments to legislation that presume an employment relationship for all workers and allow for access to the tribunal to resolve issues in dispute where the nature of the relationship (employee or contractor) is subject to dispute.

42. AIER has previously recommended that there should be review of Modern Awards to examine provisions in relation to the definition of casual employees and the rights and benefits afforded to them. The first full review of modern awards in 2014 is an appropriate time and opportunity for this exercise to occur.

43. In the interests of transparency, and to remove ambiguity, the AIER recommends the inclusion in Modern Awards of a standard definition of a true casual worker that provides greater clarity to the appropriate use of casual work. This common definition to include concepts of intermittency an irregular engagement that should be at the heart of casual work.

44. AIER submits that Australian labour law needs to be recast in the following ways

- By rethinking work relationships, consciously acknowledging the impact of the bread-winner model on our industrial regulation and practice and committing to overturning the impact of this. In particular to address the discrimination that has resulted for women workers.

- By recasting our law so that every worker has access to a suite minimum entitlements/rights on a pro rata basis. There should be no ability to contract out of these. This also means that mechanisms to qualify for rights or benefits such as continuity of service, number of hours worked, periods of service or methods of engagement should also be discarded.

45. The AIER therefore recommends that Government adopt the ILO definition of decent work as a policy objective and framework and utilise this for the development of appropriate new forms of industrial regulation, policy, cultural change and educative initiatives and on the ground practice.

46. The AIER believes that greater effort needs to be put to rebuilding an environment of genuine tripartism. AIER has previously called for support for a Centre for Workplace Citizenship.

47. AIER acknowledges that the Government has recently made some decisions with respect to improving the performance of Australian workplaces, including the Centre for Workplace Leadership.

48. However, AIER renews its call for an even broader initiative via this submission. Workplace citizenship is an initiative that will strengthen workplace rights, including rights to more secure work and have a range of social and economic benefits in our submission.

Appendix A: Factors influencing AIER's approach to the issue of insecure work

Insecurity is not just a feature for those in precarious or contingent relationships. Those who have a permanent or ongoing relationship can experience insecurity.[5] For example, workers who are not engaged in decision making or consulted about change often feel insecure and experience anxiety when changes are introduced in their workplace. The relationship between a worker and an employer is unique because of its humanness. The balance between the expectations of the worker and what they bring to the relationship and how they are treated in the workplace is often referred to as the psychological contract. Kein and Wilkinson note:

> *"The psychological contract is based on the belief that "hard work, security and reciprocity are linked. From an employee's perspective, the psychological contract guarantees job security, fair wages benefits, and a sense of self worth for doing the job well. The employer obtains and retains dedicated workers who perform their jobs well, are satisfied in their jobs and are committed to the organization."* [6]

Insecurity arises when the psychological contract is shaken or broken.

A useful framework that the Inquiry may wish to adopt is that developed by Burgess and Campbell utilising the work of Guy Standing. This work identifies eight forms of insecurity that impact on workers in today's workplaces

- Employment insecurity—when workers can be dismissed or laid off or put on shorter time without difficulty
- Functional insecurity — when workers can be shifted at will or where the content of the job can be altered or redefined
- Work insecurity — when the working environment is unregulated polluted or entails other things making it dangerous to continue
- Income insecurity — when earnings are unstable, contingency based or not guaranteed or near poverty
- Benefit insecurity — when access to standard benefits is limited or denied
- Working-time insecurity — when hours are irregular and at the discretion of the employer or insufficient to generate adequate income
- Representation insecurity — when the employer can impose change and need not, or may refuse to, negotiate with the workers' representatives; and

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[5] Brosnan P & Underhill E (1998) *Introduction: Precarious Employment* 8 Labour & Industry p.1

Burgess J & Campbell I (1998) *The Nature and Dimensions of Precarious Employment in Australia* 8 Labour & Industry p.5

[6] Kein C & Wilkinson A (2011) *The Broken Psychological Contract: Job insecurity and Coping*, Business Perspectives, Fall (2010/Winter 2011) pp 22-26 at p.24

- Skills reproduction insecurity — when opportunities to gain and retain skills through access to training and education are limited.[7]

As noted above these aspects of insecurity can be experienced by all workers however the AIER acknowledges that they are more likely to be present and more acutely felt for workers in particular circumstances including those that are engaged precariously or contingently, those in workplace where representation is not available to workers and those whose employment conditions are not "settled" collectively.

The AIER's Charter of Employment Rights addresses the above aspects of insecurity. Firstly, where the Charter refers to "workers" it obviously includes employees, but it also includes dependent contractors and other workers who personally perform work under a contract that seeks to conceal, distort or disguise the true nature of the underlying employment relationship. Because common law approaches have so far failed to adequately address the problem of disguised employment relationships, the Charter aims to spell out how a true employee and a true employer is to be identified.

The AIER recommends that this is an approach that should be taken in policy development, regulation and practice. The emphasis should move to establishing rights that are universally accessible for all those who work.

Secondly, the Charter and its accompanying Standard define key components, beyond the form of engagement, that go together to promote work relationships founded on good faith and dignity and recognition of mutuality and the need for reciprocity. In this way the Charter promotes ways of "being" and "doing" that will aid in eliminating insecurity and its negative consequences via changing the experience that workers have in the workplace and the culture of workplaces.

[7] see Owens R (2002) *Decent Work for the Contingent Workforce in the New Economy* 15 AJLL 209

Appendix B: Definitions of employment – promoting insecurity

The last thirty years have seen profound changes in the way work is performed in Australia. New forms of working relationships that do not easily fit the traditional mould have proliferated, among them engagement through labour hire companies and the use of self employed contractors.

The growth in atypical modes of employment is an international phenomenon. As the ILO stated in its 2006 *Report on the Employment Relationship*:

> *The profound changes occurring in the world of work, and particularly the labour market, have given rise to new forms of relationship that do not always fit within the parameters of the employment relationship. While this has increased flexibility in the labour market, it has also led to a growing number of workers whose employment status is unclear and who are currently outside the scope of protection normally associated with the employment relationship.*[8]

In 2000 a meeting of experts of the ILO recognised this problem and stated that recent transformation in the way work was being performed resulted in situations in which the legal scope of the employment relationship did not accord with the realities of working relationships. The Experts found that this had resulted in a tendency whereby workers who should be protected by industrial laws were not receiving that protection.

The current industrial laws protect many of these different types of workers but not others. We need to recognise that the current way our industrial laws are framed, protecting employees recognised as such under common law, and not other workers, institutionalizes discrimination against a growing number of workers.

A purpose of industrial laws, and one of the purposes of the Charter, is to redress the inequality of bargaining power between those who perform work and those for whom work is performed. In a similar vein, the ILO's 2006 *Recommendation Concerning the Employment Relationship* states:

> *"Labour law seeks to address what can be seen as an unequal bargaining position between parties to an employment relationship … The protection of workers is at the heart of the mandate of the ILO."*

Modern democracies implicitly recognise the inequality of bargaining power and throughout the twentieth century sought to redress it by enacting minimum employment conditions and allowing for collective representation of workers. However the common law and parliaments have used the concept of employment to distinguish between those workers who merit protection from the inequality of bargaining power and those who do not merit that protection. Many laws that protect employees provide limited protection to labour hire

[8] para 6

workers and virtually no protection to self-employed contractors. In Australia the emphasis given within our system to the concept of the male bread-winner and the concept of standard employment as the norm has also meant that part-time and casual workers have suffered significantly because of the limitations enshrined within the law.

If one of the purposes of industrial laws is to protect people who perform work, who are vulnerable to exploitation and who suffer as a result of an inequality of bargaining power, the current laws exclude a range of workers that logic and fairness suggests should be protected.

AIER has addressed this issue in defining the scope of the Charter. The Charter grants rights to employers and workers. Where the Charter refers to "workers" it includes employees, but it also includes dependent contractors and other workers who personally perform work under a contract that seeks to conceal, distort or disguise the true nature of the underlying employment relationship.

Because common law approaches have so far failed to adequately address the problem of disguised employment relationships, the Charter aims to spell out how a true employee and a true employer is to be identified. Beyond the Charter, this formulation is proposed as a way for all labour laws to deal with the issue.

From the mid-nineteenth century through the twentieth century the concept of employment was developed by the common law and a distinction was recognised between employees and independent contractors. Parliaments commonly adopted this distinction and conferred the protection of industrial laws on employees but left independent contractors relatively unregulated. Over time it has become increasingly difficult to distinguish between employees and independent contractors, with courts and industrial commissions using various tests to define the distinction.

At times the difference was thought to lie in the issue of control: an employer could control what, where, when and most importantly how work was performed by employees, whereas independent contractors were relatively free of control by the principal contractors.

At times the test was variously stated as: is the worker integrated into the employer's organisation? Or is the worker in business on his or her own account? Or is the essence of the contract for the supply of the work and skill of the worker? Or is the worker part and parcel of the employer's organisation? Or is the worker engaged to produce a given result?

The current approach adopted by Australian courts is a multifactor test: it permits courts to consider a wide range of indications, none of which is determinative in itself. Courts have recognised that there is no magic touchstone; the search for a single distinguishing factor is futile. In the words of Justice Deane in the High Court, the distinction between employment and other relationships *"has become an increasingly amorphous one as the single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia"*.

One problem with an ambiguous distinction between employees and independent contractors is that employers can often avoid laws meant to protect employees. They do this

by structuring their relationship with the worker so as to avoid recognising the worker as an employee and instead categorising the worker as though she or he is self-employed. This is often achieved by the contract between the employer and the worker expressly stating that the relationship is not an employment relationship. Such contractual declarations of intent are not conclusive, but courts often place great weight on them when determining whether the relationship is one of employment.

Another means of avoiding obligations imposed by laws intended to protect workers is to interpose another entity between the employer and the worker. For example, the employer may arrange for a labour hire agency and not the employer to engage the worker directly. Alternatively, as a condition of obtaining the job, the employer may insist that the worker become a "one person company" that the employer then engages under a supposed commercial contract.

The effect of these legal devices is to avoid industrial laws, awards and in some cases collective agreements, that should apply given the true nature of the relationship between the worker and the business receiving the benefit of the worker's work.

The ILO has focused on the issue of contracts that conceal, distort or disguise the true nature of a relationship between employer and worker. The 2006 Report on the Employment Relationship defines a disguised employment relationship as

> *"one which is lent the appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law".*

The 2006 recommendation accords with the 2003 ILO Resolution on the Employment Relationship, which declares that *"all workers, regardless of employment status, should work in conditions of decency and dignity".* The approach adopted corrects the tendency recognised by the ILO Meeting of Experts on Workers Needing Protection for workers who should be protected by industrial laws not to be afforded that protection due to limitations on the legal scope of the employment relationship.

Solutions to the problem

In the last few decades parliaments in Australia have adopted a range of solutions to deal with the problem of the inadequacy of the common law meaning of employment.

One solution is to deem specified classes of workers to be employees for the purposes of particular laws.

Another solution, adopted in payroll tax legislation, is to treat contractors who personally perform work as employees, even though the contractor may be engaged through a one person company. In the United Kingdom many industrial laws apply to "workers", not just employees. The Canadian Labour Code extends certain benefits to dependent contractors. While useful, these laws have not addressed the problem in the comprehensive way that is proposed here.

The solution adopted in the Charter is that it grants rights to employers and workers. A "worker" means an employee and includes a dependent contractor. Where, by reason of the use of an agency or labour hire arrangement, a triangular relationship exists which disguises the true employer of the worker, the Charter extends to the true employer.

The Charter adopts a relatively simple yet comprehensive definition of "worker". A person is a worker within a business that takes the benefit of the worker's labour ("the employer") if the person meets two or more of the following indicators:

the person is subject to the control of the employer in relation to how the work is performed
the person usually works for the one employer and only that employer
the person is treated as, or portrayed to others as, part of the employer's organisation
the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the employer
the person has regularly worked for the employer over a three month period
the person uses equipment or other facilities needed to perform the work provided by the employer (other than the usual tools of trade)

and the person does not engage in entrepreneurial activities characteristic of the conduct of a business in relation to the work provided to the employer. Typically, those characteristics will include exposure to financial risk, the provision of a commercial service (and not merely labour) to a range of customers, the capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others.

As noted above, the Charter will also apply to dependent contractors. Dependent contractors personally perform work under a contract and are directly or indirectly economically dependent on one principal contractor. For the purposes of the Charter, the principal contractor is regarded as the employer. This includes: contractors whose sole or predominant source of income is earned from one principal contractor (most outworkers will fall into this category.); workers who personally perform work for an entity (such as a company, partnership or trust) where the entity's sole or principal source of remuneration is payment for the work provided by the worker. This point deals with one of the interposed entity problems: the fact that the services of the worker are provided to the principal contractor, through a one person company.

There is a third problem. This involves addressing conduct that disguises the reality of a relationship by masking the identity of the real employer. Such a situation usually occurs where a worker is engaged by the true employer through an intermediary, such as an agency or an entity that purports to be a labour hirer. Recent Australian experience suggests that the use of this kind of device is not confined to small fly-by-night operations but is used from time to time by major corporations. Its detrimental effect on workers is threefold and potentially very severe. Firstly, it enables the true employer to avoid direct responsibility for the payment of the worker's wages and other entitlements, denying workers access to the wealth of the business which has taken the benefit of their work.

Secondly, by this device the true employer is able to distance itself from wage claims or other grievances raised by the workers whose labour it takes the benefit of. The imposition of an intermediary "employer" means that workers are unable to collectively bargain with and take action against the true employer; are unable to join with regular employees of the true employer for collective bargaining, thus weakening the collective; and are unable to take up grievances directly with the true employer despite the source of the grievance being the conduct of that entity.

Thirdly, because agreements usually impose obligations only on the particular employer(s) named by those instruments, those obligations can be avoided by the named employer devolving the role of employer to an intermediary not named by those instruments.

The law should apply to the true employer despite the imposition of an intermediary or third party "employer". A test is required to distinguish between legitimate third party arrangements where the business taking the benefit of the work should not be regarded as the employer and illegitimate third party arrangements designed to avoid employment obligations, in which case the business is to be regarded as the true employer. The traditional common law tests have proven difficult and a test directed at the purpose of the use of the intermediary is likely to provide a more appropriate dividing line. The test proposed acknowledges that agency and labour hire arrangements can be used for legitimate purposes by the end user business because, in a wide range of circumstances, such arrangements generate economic efficiencies that have nothing to do with the avoidance of labour costs or employment obligations.

The Charter adopts the following test for determining whether a worker is a worker of the entity that gets the benefit of the worker's work (the true employer) in circumstances where a third entity purports to be the employer. A worker is a worker of the true employer, where the person meets two or more of the following indicators:

> the person is subject to the control of the true employer in relation to how the work is performed
> the person usually provides work in the business of the true employer and only that business
> the person is treated as, or portrayed to others as, part of the true employer's business organization
> the person performs work that is the same as or similar to that performed by others who are treated as regular employees by the true employer
> the person has regularly worked for the true employer over a three month period
> the person uses equipment or other facilities needed to perform the work provided by the true employer (other than the usual tools of trade)
>
> **but not** where the third entity which is contracted to provide the person's labour to the end-user business has a contract with that business which provides a commercial return to the third entity and which by reason of the provision of the labour under the contract, as compared with the use of direct employees, provides the end user business significant and genuine economic efficiencies unrelated to the comparative cost of employing that person's labour directly and unrelated to any intent on the part of the end user business to undermine the capacity of workers working in its business to collectively bargain together.

Wedded with the above definitions could be a recasting of to legislation such that it presumes an employment relationship for all workers and allows for access to the tribunal to resolve issues in dispute where the nature of the relationship (employee or contractor) is subject to dispute.

Annexure 1 : Australian Institute of Employment Rights Inc.

Patrons

The Honourable RJ Hawke

Professor Ron McCallum AO

Executive Members

President (Acting)

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Vice Presidents

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Members

Sean Reidy – Queensland Bar

Mark Irving - Victorian Bar

Trevor Clarke – ACTU

Tim McCauley - AMWU

Lisa Heap – AIER Executive Director

Annexure 2: The Australian Charter of Employment Rights

Recognising that: improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers.

And drawing upon: Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

1. Good faith performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a "fair go all round".

2. Work with dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being: treated with respect recognised and valued for the work, managerial or business functions they perform provided with opportunities for skill enhancement and career progression protected from bullying, harassment and unwarranted surveillance.

3. Freedom from discrimination and harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age
- physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion
- irrelevant criminal record
- union membership or participation in union activities or other collective industrial activity

- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

4. A safe and healthy workplace

Every worker has the right to a safe and healthy working environment. Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

5. Workplace democracy

Employers have the right to responsibly manage their business. Workers have the right to express their views to their employer and have those views duly considered in good faith. Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

6. Union membership and representation

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference. Every worker has the right to be represented by their union in the workplace.

7. Protection from unfair dismissal

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organization standards.

8. Fair minimum standards

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

9. Fairness and balance in industrial bargaining

Workers have the right to bargain collectively through the representative of their choosing. Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith. Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires. Employers and workers may make individual agreements that do not reduce

minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

10. Effective dispute resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy. The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.

Annexure 4: The Australian Standard of Employment Rights

Recognising that: improved workplace culture requires workers and employers to recognise their pivotal role as industrial citizens.

And building upon: the Australian Charter of Employment Rights, this Standard has been framed as a statement of the reciprocal rights and responsibilities of workers and employers in Australian workplaces which have received the distinction of being a 'Charter-Accredited Workplace'.

1. Good faith performance

A. Employers and workers do not seek to mislead, deceive or trick each other but always seek to act in an honest and trustworthy manner.

B. Employers and workers do not abuse any powers or discretions granted to them in the employment contract.

C. No person in or associated with the workplace is subjected to harassment or humiliation so as to cause psychological harm or distress.

D. Workers and employers act in good faith during termination of the employment relationship. Workers are dismissed only for a reason relating to their performance or conduct, or for operational business reasons. Workers are willing to serve the notice period required in their contract if they decide to terminate their employment.

E. Employers and workers do not maliciously damage the reputation of the other.

F. Employers do not seek to place an illegitimate restriction on the freedom of workers to pursue their careers once their employment relationship is over.

2. Work with dignity

A. Employers and workers are committed to recognising and affirming the dignity of every person in the workplace.

B. There is no bullying and harassment in the workplace.

C. The employer regularly invests in the skill formation of workers and appropriate career paths are developed within the workplace.

D. Surveillance of the workplace only occurs with the consent of workers and when used for a legitimate purpose.

E. Every person in the workplace is committed to treating others with respect.

3. Freedom from discrimination and harassment

A. The employer is committed to achieving a workplace that is free from discrimination and harassment based on protected attributes.

B. The employer makes non-discriminatory decisions about all work related matters by giving every worker and job applicant fair access to all workplace opportunities and benefits.

C. The employer has a clear set of policies and procedures for addressing and managing the risks arising from discrimination and harassment in the workplace. This includes:

i preparing and distributing a written policy on discrimination and harassment

ii ensuring that there is in place a protective investigation process which deals with complaints promptly and properly

iii maintaining thorough records and (subject to legal requirements) guaranteeing confidentiality

iv promoting the policy throughout the business

v providing training on operation of the policy to all workers, including those in leadership positions

vi if possible, appointing trained discrimination and harassment contact officers

vii reviewing work practices and regularly monitoring and evaluating the workplace culture to ensure compatibility with appropriate standards

viii guaranteeing that no worker will be victimised for making a complaint or for supporting someone who has done so

ix ensuring that all parties to the complaints process are permitted to have a support person, advocate, union official or other similar representative accompany them to any interviews or meetings

x providing a worker who has suffered discrimination or harassment in the workplace with access to counselling services or other employee assistance programs

xi dealing with perpetrators in a manner proportionate to the severity of their behaviour

D. All workers are committed to achieving a workplace that is free from discrimination and harassment based on protected attributes.

4. A safe and healthy workplace

A. The employer is committed to making safety part of the lifeblood of the business by minimising exposure to health hazards and taking all steps to minimise deaths and injuries in the workplace.

B. The employer has a systematic, proactive and comprehensive risk management process to ensure the achievement of a safe and healthy workplace.

C. There is consultation with workers about major changes to safety and health measures as well as changes to work that may have safety or health implications.

D. Workers are given the opportunity to be represented in dealings with their employer concerning health and safety issues.

E. There is adequate information, instruction, training and supervision given to workers to enable them to perform their work in a manner that is safe and without risks to health.

F. The workplace is free of bullying, stress, abuse and anxiety that is detrimental to the worker's mental health.

G. All workers are committed to achieving a safe and healthy workplace and to cooperating with management about workplace safety measures.

5. Workplace democracy

A. Both employers and workers reject adversarial workplace relations and commit to seeking mutually beneficial outcomes.

B. The employer does not have a blanket managerial prerogative but is committed to managing the business in a responsible manner.

C. Both employers and workers are committed to engaging in constructive dialogue. As part of this, workers are allowed to express their views in the workplace and have their views considered in good faith by their employer.

D. In the case of business decisions that have significant implications for workers such as workplace restructuring, workers have the opportunity to participate in the decision-making process by being provided with information and meaningful consultation.

E. Workers are committed to cooperating with and supporting the employer's right to responsibly manage their business.

6. Union membership and representation

A. Workers are not discriminated against or treated detrimentally for joining or being a member of a union or on account of their union activities.

B. No job or other employment benefit is offered on the condition that the worker is not a union member or relinquish the right to union representation.

C. The employer does not refuse to recognise a union or punish its members for participating in lawful industrial activity.

D. The employer recognises that the right to collectively bargain is an integral aspect of union membership.

E. The employer does not restrict the role of the union in representing workers within the workplace.

F. Workers and their unions exercise their right to collectivism, responsibly, in good faith and with regard to their ongoing employment relationship and the dignity of every person in their workplace.

7. Protection from unfair dismissal

A. The employer has a systematic and comprehensive risk management process to managing dismissals or terminations of employment in the workplace.

B. The employer has a legitimate reason for termination of employment when that termination relates to the worker's conduct.

C. Prior to termination and where possible, an employer should warn the worker about conduct or performance matters so that the worker has a reasonable opportunity to rectify the conduct or improve performance.

D. Workers who are being dismissed are entitled to procedural fairness in the dismissal process.

E. Where a worker is terminated because of the employer's operational requirements, the termination is to be treated as a redundancy, and procedures for determining and dealing with redundancies are followed.

F. The employer is committed to respecting the dignity of all those involved in the termination process.

8. Fair minimum standards

A. The employer is committed to complying with fair minimum standards imposed externally to the workplace.

B. The employer, in consultation with workers, is willing and committed to providing fair standards that build upon the legislative minimum and which are tailored to the needs of the workplace.

C. The employer respects the need of workers to live a fulfilling life and to attain a fair balance between work and the rest of their lives. In recognising this, the business is committed to developing policies on flexible work practices, parental leave, working hours and workloads, and other conditions within the workplace.

9. Fairness and balance in industrial bargaining

A. Workers have the right to bargain collectively.

B. All parties involved in bargaining for workplace agreements act in good faith and with due regard for the dignity and integrity of all persons in the workplace and relevant third parties.

C. Workers have a right to use representatives of their choosing in the bargaining process.

D. Workers have the right to use lawful industrial action as part of the bargaining process. Employers have a right to respond to this.

E. The use of statutory individual agreements does not undercut collective agreements and is not used as a mechanism to avoid or undermine collective bargaining with workers.

10. Effective dispute resolution

A. The process of dispute resolution is clearly documented and accessible to all workers, offering both formal and informal options.

B. The employer has a well-designed dispute resolution process that aims to:

i Guarantee timeliness, confidentiality and objectivity

ii Be administered by trained personnel

iii Provide clear guidance on the investigation process

iv Guarantee that no worker is victimised or disadvantaged for making a complaint

v Be regularly reviewed for effectiveness

vi Guarantee that the worker can participate in the dispute resolution process without any loss of remuneration

vii Graduate from informal to formal measures

C. The dispute resolution process is procedurally fair.

D. The process of dispute resolution allows the worker and the employer to be represented. Full access to relevant records and information as to the dispute resolution process is provided to the worker and their representative.

E. If the dispute cannot be resolved at the workplace level, the dispute is referred to an independent and impartial body that has the power to resolve the dispute.