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20 January 2012

Independent Inquiry into Insecure Work in Australia
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To whom it may concern:

**RE: ASU submission to the Independent Inquiry into Insecure
Work in Australia**

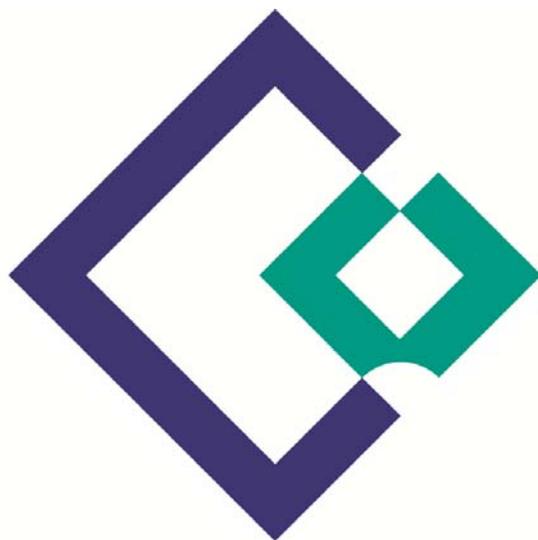
Please find attached for the consideration of the Inquiry the written submission of the Australian Municipal, Administrative, Clerical and Services Union (ASU) which discusses the ASU's experience of insecure work and our recommendations for change.

Yours faithfully


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Australian Services Union

ASU submission to Independent Inquiry into Insecure Work.

Date: Friday 20 January 2012

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ASU National Secretary

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Introduction

1. The ASU welcomes the opportunity to participate in Independent Inquiry into Insecure Work. The ASU supports the research of the ACTU as provided in its discussion paper and is hopeful that the outcome of this Inquiry will lead to real and practical measures that arrest the growth the insecure work and its damaging effects on workers.
2. As noted by the ACTU in its paper, of all OECD nations Australian employers sit second only to Spain in their use of insecure work practices. The ASU agrees with the conclusion that the disproportionately high reliance on temporary employment by employers is both unnecessary and avoidable.
3. It is the argument of the ASU that insecure work caused by the increasing casualisation of the Australian workforce must be combated at a number of fronts. In this context, we refer to casualisation as an umbrella term that encompasses not only employees employed on a strictly casual basis, but also fixed-term employees, labour hire temps and those who are victim to sham contracting. In this submission, the ASU will outline some the experiences, though not unique to the ASU, that highlight our key areas for concern with regard to insecure work.

The ASU experience with insecure work

4. In the private sector, particularly in Victoria, the ASU experience of insecure work is manifest in call centres. Increasingly, employer call centres are predominately using:
 - labour hire temps;
 - fixed term contracts;
 - casual employment; and
 - sham contracting.
5. In addition, the ASU has experienced call centres combining sham contracting with work from home arrangements to further reduce their liability to employees, such as OH&S and access to workers compensation. As 'independent contractors' the minimum wages in the Contract Call Centre Award 2010 do not apply, and contractors are exposed to low wages through a variety of insidious employment practices such as:
 - Cuts to per call rate when quality control standards are not met;
 - No minimum number of calls guaranteed;
 - No minimum length of shift; and

- Payment for own super and insurance.
6. In the public sector, the ASU is deeply concerned for the growing practice of governments outsourcing public services to contractors, including agencies or non-government organisations (NGO). The ASU recognises that governments will generally have procurement policies in place to ensure the operations of a contracted company fit within a government's broad policy parameters. However, in the experience of the ASU, government procurement policies do little to ensure secure employment practices are established and maintained in companies that receive public funding.
 7. By way of example, short term funding that is repeatedly rolled over instead of becoming recurrent funding is a contributing factor to the growth of insecure employment in government funded sectors. Government funding guaranteed over longer periods which comes attached with stringent requirements to provide ongoing job security to those workers employed during the periods, including redundancy provisions, would mitigate the use of casual workers who are employed on the basis of the annual funding cycle.
 8. The ASU believes that governments can and should strengthen procurement policies by attaching secure employment criteria to the public funding of agencies and NGOs.

Casual conversion clauses

9. The casual conversion clause is a primary tool used in the regulation of casual employment. The provision originated in its current form in the Metal Industry Award 1984.¹ It meant that casual employees, employed on a regular and systematic basis could elect to convert after six months to regular full-time or part-time employment with employers retaining the right to refuse on reasonable grounds.
10. The provision was widely prescribed in Awards through the 1980's and 1990's. The terms were made unenforceable in federal awards in 2005 with the introduction of the Work Choices Amendments.² This was reversed in the Fair Work Act 2009 and the provisions were carried through to a number of modern awards where it had previously constituted an industry standard.³

¹ *Metals Casuals Award Case* (2000) 110 IR 247

² *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), s515 (1) (b)

³ [2008] AIRCFB 1000, 51; Alpine Resorts Award 2010 – MA000092, Asphalt Industry Award 2010 – MA000054, Cement and Lime Award 2010 – MA000055, Concrete Products Award 2010 – MA000056, Cotton Ginning Award 2010 – MA000024, Electrical, Electronic and Communications Contracting Award 2010 – MA000025, Food, Beverage and Tobacco Manufacturing Award 2010 – MA000073, Graphic Arts, Printing and Publishing Award 2010 – MA000026, Higher Education Industry – General Staff – Award 2010 – MA 000007, Horse and Greyhound Training Award 2010 – MA000008, Hospitality Industry (General) Award 2010 – MA000009, Joinery and Building Trades

11. There are two Modern Awards that differ in their treatment of casual employment. The Fire Fighting Industry Award 2010 precludes the employment of any casual employees as it requires that all employees engaged on the Award are either of full time or part time status. The Horse and Greyhound Training Award 2010 limits the use of casual employment. It provides that casual employees may only be engaged in circumstances where it is necessary to 'meet short term work needs' or 'carry out work in emergency circumstances' or to 'perform work unable to be practicably rostered to a permanent employee.'⁴ It also provides that an employee who has been employed on a regular pattern of hours in 12 consecutive weeks may elect to convert their employment to full time or part time employment should their employment continue into the next consecutive week. These clauses will be further discussed below.
12. While the ASU has been a strong advocate for the casual conversion clause, the continuing rise in rates of casual employment suggests that, in the very least, the efficacy of the casual conversion clause is questionable. It is certainly considered by some to be a very weak regulatory tool, the provisions of which have had minimal use by casual employees.⁵
13. A key weakness of the casual conversion clause as it stands is that the right is generally subject to the employers' discretion to refuse. While this discretion is tempered by the reasonableness requirement, there have been few cases to articulate what reasonableness might constitute. What is conceptually a bigger problem, however, is that the clause requires that employees not only be aware of their right to convert, they must then be in a position to exercise and assert that right.
14. It is the experience of the ASU that many casual employees are reluctant to exert their right to convert where they have it, often owing to the already precarious nature of their employment and that conversion requires forgoing the 25% loading, what many employees perceive to be a pay cut. However, the ASU believes that many casuals are classified at a lower rate than what they would be against a more rigid evaluation of the work they perform. Therefore, if provision was made for an employee to be correctly classified upon conversion (and

Award 2010 – MA000029, Manufacturing and Associated Industries and Occupations Award 2010 - MA000010, Mobile Crane Hiring Award 2010 – MA000032, Plumbing and Fire Sprinklers Award 2010 – MA000036, Premixed Concrete Award 2010 – MA000057, Quarrying Award 2010 – MA000003, Registered and Licensed Clubs Award 2010 – MA000058, Road Transport and Distribution Award 2010 – MA000038, Sugar Industry Award 2010 – MA000087, Textile, Clothing, Footwear and Associated Industries Award 2010 – MA000017, Timber Industry Award 2010 – MA000071, Transport (Cash in Transit) Award 2010 – MA000042.

⁴ Horse and Greyhound Training Award 2010, Cl 10.4 (b)

⁵ Stewart, Andrew, *Stewart's Guide to Employment Law* (2nd Ed. 2009) p60; Tham, Joo-Cheong, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20(2) *Australian Journal of Labour Law* 123, 9

appointed to the correct paypoint), it may moderate the loss in take home pay as well as providing the employee a genuine choice when deciding whether or not to convert their terms of engagement.

Casual loading

15. It is arguable that increasing the casual loading percentage will make it more prohibitive for an employer to abuse the engagement of casual employees. At the very least, importing a 'casual premium' into the cost of not just casual employment, but all forms of insecure work, would force employers to reconsider how they manage their workforce. Increasing the cost of using casualised labour may also obviate the need for any type of casual conversion clause as employers will seek to reduce their labour costs by employ staff under less expensive terms of engagement.
16. However, given that the current standard loading of 25% in the award system has been endorsed by the Full Bench of Fair Work Australia during the 2009-2010 award modernisation process, it is difficult to envisage FWA being sympathetic to submissions that seek to increase the casual loading at this point in time, though this is not to say it should be ruled out as a future option. In any event, the casual loading itself is not always indicative of insecure work practices, as was noted above, the ASU seeks a broad definition of casualisation of the workforce that includes all forms of insecure work.

A new employment standard for insecure work

17. The casual conversion clauses contained in the Fire Fighting Industry Award 2010 and the Horse and Greyhound Training Award 2010 are examples of regulation that more effectively limit the use of casual employment. While the Fire Fighting provision may have limited applicability in other industries, the Horse and Greyhound Training Award provides an excellent template that is relevant across the casual workforce. That clause appropriately defines casual according to its 'true' meaning; short term and emergency work. It prohibits the use of permanent casuals ensuring that if after an appropriate period of time (in that industry 12 weeks), where an employer does abuse the category of casual employment, a casual employee has an unfettered right to elect to be converted to a permanent worker.
18. It follows that any such conversion clause (particularly where it seeks to convert casual employees to part-time ongoing employees) will need to take into account the requirement for regular work which meets the existing roster requirements, but which does not undermine the

reliable arrangement of part-time hours which are reasonably able to be accommodated within a roster pattern.

19. Flexibility of hours must be balanced with strong minimum standards in areas such as minimum engagement periods for shifts and minimum entitlements to hours of work per week, fortnight or month. The ASU has historically bargained for strong protections for part-time employees whilst acknowledging that genuinely mutual flexibility, which does not undermine other industrial arrangements, can assist in providing regular employment for those employees seeking greater security of ongoing work.
20. Further, the ASU submits that the test case standard casual conversion clause needs a broader definition that considers emerging modes of insecure work such as rolling one year contracts and pay as you earn contracting. The ASU recognizes that the issues for these particular forms of insecure work are complex and need investigation beyond the scope of this paper, but in the least some consideration may need to be given to strengthening the sham contracting clause in the Fair Work Act to better define genuine independent contracting arrangements and better regulate the use of fixed term contracts.
21. The ASU believes that a new standard for insecure work should also contain a right to convert enshrined as an absolute right i.e. not dependent upon employers discretion and 'reasonableness', be given national effectiveness and profile, for example, by being incorporated into the National Employment Standards.

Conclusion

22. The ASU has consistently advocated for full-time ongoing employment for our members, but also recognises that in some circumstances, part-time work will genuinely meet the needs of the employer and employee. The ASU also recognises that there may be, in prescribed, limited circumstances, occasion for the use of casual labour, however, it has all too often been the experience of the ASU that casual employment has become the primary employment contract within an enterprise or an industry when the circumstances do not require it.
23. Effective regulation of insecure employment starts with its correct definition. For true casual employment, the Horse and Greyhound Training Award 2010 provides an excellent template. However, insecure work or casualisation of the workforce is no longer defined solely by the 'casual' employment relationship. In the ASU's experience, rolling fixed-term contracts or employment that has become casualised because of the nature the annual funding cycle and sham contracting are emerging forms of insecure work that also need to be addressed.

24. Consideration must therefore be given to a conversion clause that is accessible to employees who suffer from other forms of insecure work, and has at its essence an enshrined right to elect to be made ongoing employee with the employer. This would help ensure that conversion from insecure to secure forms of work is the norm rather than the exception.
25. Other drivers of insecure work such as government funding models should also be reviewed and adjusted to assist with providing secure jobs for working Australians and act as a model to other industries.
26. The ASU recognises that there is no 'silver bullet' for the problem of insecure work. Minimising its use in the workforce will require a multi-faceted approach. This is why the ASU is considering its own investigation into insecure work practices during 2012. The ASU looks forward to working further with the ACTU in developing a cogent and effective response to the issue of insecure work.