Australian Institute of Employment Rights

Submission to the Senate Select Committee Inquiry on Job Security

Australian Institute of Employment Rights

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Summary of Recommendations

The Australian Institute of Employment Rights' recommendations are described in detail at the conclusion of this submission. In summary, the AIER recommends that the Australian Government:

1) Expand the basic rights and entitlements described in the Australian Charter of Employment Rights to all workers;
2) Remove hurdles in the Fair Work Act to bargaining beyond at the single enterprise level;
3) Reform casual employment;
4) Supplement court-based recovery and enforcement of entitlements;
5) Inquire into the impact of immigration policies on employment and working conditions; and
6) Avoid insecure and precarious work in government's direct and indirect workforces and supply chains.

About the AIER

The Australian Institute of Employment Rights (AIER) is an independent not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of workers and employers in a cooperative workplace relations framework. The work of the AIER is informed by the Australian Charter of Employment Rights and the subsequent Australian Standard of Employment

Rights1 and overseen by a tripartite Executive Committee drawn from unions, industry and academia committed to these rights and principles.

Introduction – the Charter

We thank the Senate Select Committee for the opportunity to contribute to its Inquiry into Job Security. In our submission, we make reference to the Australian Charter of Employment Rights ('the Charter') and wish to explain its relevance to the inquiry.

Developed by the AIER in 2007, the Charter aims to identify the fundamental values upon which good workplace relationships and laws should be based if they are to provide for fair and decent work. The Charter is the result of a deliberative process of eminent scholars and legal practitioners and broad community consultation.

The rights listed in the Charter are derived from fundamental rights enshrined in international instruments that Australia has willingly adopted and which, as a matter of international law, it is bound to implement and observe; as well as values imbedded in Australia's history of workplace relations such as the "important guarantee of industrial fairness and reasonableness"[2], and well-established common law rights.Hence, the Charter is intended as a handy distillation of fundamental standards that can be used to guide the development of just, fair and reasonable labour laws and Australian workplace practices. It is intended as a blueprint for assessing government policy, legislative reform and workplace relations conduct. We encourage the Inquiry to use it as a reference for principles that need to be considered in order to tackle insecure and precarious work and to promote fairness and dignity within Australian workplace relations.

In summary, the Charter expresses 10 fundamental rights, all of which are appropriate to workers in precarious employment. We list them here, some with some clarification, however, most speak for themselves.

1. *Good faith performance* – this broad principle holds that all parties to working relationships have an obligation to cooperate in good faith to ensure a 'fair go all round'. Good faith requires

[1] Bromberg, M. and Irving, M. (eds). 2007. *Australian Charter of Employment Rights*, Melbourne: Hardie Grant Books; Howe, J. 2009. *Australian Standard of Employment Rights: A How-to Guide for the workplace*, Melbourne: Hardie Grant Books. The ten principles of the Charter and Standard are included at appendix A.
[2] New South Wales and Others v Commonwealth [2006] HCA 52 [523-5].

that parties to work engagements ought not to seek to disguise the true nature of those engagements for the purpose of regulatory avoidance.

2. *Work with Dignity* – this fundamental principle respects the humanity of the worker and holds that they are entitled to respectful treatment.
3. *Freedom from Discrimination and Harassment*.
4. *A Safe and Healthy Workplace*.
5. *Workplace Democracy* – which requires that workers should be entitled to be consulted on matters affecting their work.
6. *Union membership and representation* – this assumes also that workers should not only enjoy the freedom to join associations, but also the right to bargain collectively to secure decent wages and conditions of work.
7. *Protection from Unfair Dismissal*. The right to contest capricious termination of a work contract is fundamentally important in ensuring respect for all other workplace rights. A worker who can lose their job without recourse to review is vulnerable to abuse on all grounds. Those who cannot contest a capricious dismissal cannot safely raise other concerns about their treatment at work.
8. *Fair minimum standards* – including fair wages and also fair conditions of work, such as entitlements to take leave from work when ill without risking one's employment.
9. *Fairness and balance in industrial bargaining*.
10. *Effective dispute resolution*. This right is also fundamental to ensuring respect for all other rights. Accessible and affordable avenues of dispute resolution that can deal with problems in a timely manner are essential when the interests at stake are a worker's livelihood.

A copy of the Charter is attached as an appendix to this Submission. Each right is discussed in more detail in Bromberg, M. & Irving, M. *Australian Charter of Employment Rights* (2007). Below, we discuss the most relevant rights as they relate to the Inquiry's terms of reference (TOR). We focus on a selection of the terms of reference within our purview.

Extending Charter rights to non-employed workers

Bromberg and Irving, in Chapter 11 'The Scope of the Charter', established the case for applying the fundamental rights articulated in the *Charter* beyond the boundaries of the employment contract, as defined by common law tests. In critiquing the common law 'multi-factor test', they noted that the

ambiguities in this test leave scope for employers to 'avoid laws meant to protect employees'.[3] Employers achieve this by deliberately choosing contractual terms to avoid employment (such as including apparent entitlements for the worker to delegate work to others, even though delegation would be impractical in the circumstances), or often by interposing an intermediary (such as a labour hire agency) to avoid any direct contractual relationship with the worker. The ease with which employers have been able to escape the application of protective labour laws by these means is manifested in the rising numbers of workers engaged on contracts other than continuing full-time employment. Where available, statistics on the extent of precarious forms of work engagement are provided in the Comments on the Terms of Reference, in Section (a) below.

Bromberg and Irving explained (and we continue to maintain) that an extension of *Charter* rights to dependent workers, whether or not they are directly engaged as permanent employees, is justified on the basis of the purpose of industrial laws, as expressed in International Labour Organisation instruments. '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.'[4] The ILO's 2006 Recommendation Concerning the Employment Relationship supports 'action to combat disguised employment relationships that hide the true legal status of the relationship'.[5]

For this reason, we continue to press for the recognition of these basic Charter rights for categories of worker who fall outside of the common law definition of employment but nevertheless undertake subservient work for another who engages their labour on terms largely dictated by the hirer. This includes workers who have been found to be genuine 'independent contractors' according to the common law test, because many of these workers also manifest a serious inequality of bargaining power in the context of providing services under an essentially labour-only contract. As Bromberg and Irving have stated, a truly entrepreneurial worker is one who provides 'a commercial service (and not merely labour) to a range of customers', and has 'capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others'.[6] Contractors who are not running businesses of their own, in which they enjoy the prerogative to negotiate the price of their services and develop their own business goodwill, are as much in need of the protections articulated in the Charter as employees. This is especially so in the case of that new classification of worker – the on

[3] Bromberg, M. and Irving, M. (eds). 2007., above n1 at p 119.
[4] Above n1 at p 121.
[5] Ibid.
[6] Ibid p 123.

demand 'gig worker' – whose existence was not so prominent in 2007 when the *Charter* was first published as it is now.

We also note that Bromberg and Irving recommended that the Charter apply to 'true employers' in any arrangement where an intermediary has been interposed between the true employer and the worker for the purposes of avoiding labour costs or undermining the capacity of employees to engage in collective bargaining.[7] They proposed that a host employer should be treated as the true employer where the worker is 'subject to the control of the host employer in relation to how the work is performed', and usually provides work only to the host employer's business, doing work that is the same as the host employer's directly engaged staff.[8]

Comments on Terms of Reference

Extent and nature of insecure or precarious employment (TOR (a))

Precarious or insecure work is occurring via other forms of engagement than employment, hence we interpret the scope of the inquiry to refer to the phenomenon as it relates to the broader category of 'work'; that is, in the broader, vernacular sense, of 'employment' rather than the narrower legal sense of the term.

There is no generally accepted definition of precarious or insecure work. Kalleberg and Vallas define precarious work as, "work that is *uncertain*, *unstable*, and *insecure* and in which employees bear the risks of work (as opposed to businesses or the government) and receive limited social benefits and statutory protections".[9] In a separate article, Kalleberg further articulates some elements of work precarity, for example, job stability, labour market insecurity, cognitive job insecurity (a person's perceived likelihood of losing employment) and lack of adequate relevant welfare support, for example, adequate unemployment benefits and access to retraining.[10]

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[7] Ibid p 125
[8] Ibid at pp 125-126.
[9] Arne L. Kalleberg and Steven P. Vallas, eds., 'Probing Precarious Work: Theory, Research, and Politics', in *Research in the Sociology of Work*, vol. 31 (Emerald Publishing Limited, 2017), 1–30, https://doi.org/10.1108/S0277-283320170000031017, p1.
[10] Arne L. Kalleberg. (2018). Precarious Lives: Job Insecurity and Well-Being in Rich Democracies. Medford, MA: Polity Press.

A paper produced by the International Labour Organization (ILO)'s Bureau for Workers 'Activities defines precarious work in a similar fashion and incorporates also the relevance of low pay:

> *In the most general sense, precarious work is a means for employers to shift risks and responsibilities on to workers. It is work performed in the formal and informal economy and is characterized by variable levels and degrees of objective (legal status) and subjective (feeling) characteristics of uncertainty and insecurity. Although a precarious job can have many faces, it is usually defined by uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with employment, low pay, and substantial legal and practical obstacles to joining a trade union and bargaining collectively.11*

Hence, precarious work has both subjective and objective elements, and relates to the form of engagement, risk burden, level of work rights and protections, and the broader context of social protections in which work is performed. As the element of low wages highlights, precarious work is poor quality, 'sub-standard work', in either the absolute or relative sense, and is inextricably linked to inequality. Precarious, low wage, or intermittent work causes income and wealth inequality and poverty, and 'low' wages and 'poverty' are themselves both defined by inequality. They are constituted by their relationship to relative standards, viz., the mean or general standards; that is, low compared to market wages, average wages, the cost of living, or levels of income provided by the norm of standard employment. 'Poverty' is defined relative to mean income, for example, by the accepted standards of the two poverty lines of 50% of mean income and 60% of mean income. As housing and living costs relate to mean income, these poverty lines represent points at which income ceases to cover these costs and is likely to cause hardship.[12]

Precarious work is also related to social position. People's vulnerability to precarious work and thus the precariousness of work itself varies according to age, gender, family responsibilities, occupation, industry, welfare and labour market protections.[13]

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[11] ILO Bureau for Workers' Activities, Policies and Regulations to Combat Precarious Employment, 2011 < https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_179787.pdf>;

[12] See ACOSS & UNSW, Poverty in Australia, accessed February 2021 <http://povertyandinequality.acoss.org.au/poverty/#:~:text=Poverty%20can%20be%20defined%20in,to%20measure%20poverty%20in%20Australia.&text=We%20use%20two%20poverty%20lines,regarded%20as%20living%20in%20poverty>.

[13] See, e.g. Greenhalgh, Leonard. 'Job Insecurity: Toward Conceptual Clarity', *Academy of Management Review*. 1984. Vol. 9, No. 3. 43/1-448;Kalleberg, Arne L. 'Precarious Work, Insecure Workers: Employment Relations in Transition'. *American Sociological Review* 74, no. 1 (February 2009): 1–22.

The concepts of precarious work and insecure work clearly overlap. The Australian Council of Trade Unions (ACTU) defines insecure work as "poor quality work that provides workers with little economic security and little control over their working lives" and indicators of insecure work as including "i) unpredictable, fluctuating pay (ii) inferior rights and entitlements, including limited or no access to paid leave (iii) irregular and unpredictable working hours, or working hours that, although regular, are too long or too few and/or non-social or fragmented; (iv) lack of security and/or uncertainty over the length of the job; and (v) lack of voice at work on wages, conditions and work organisation."[14]

Insecure and precarious work can also be thought of as substandard work that falls short of the International Labour Organization's (ILO) notion of 'decent work'. The ILO first proposed the concept of decent work in 1999 in a report of the ILO's Director General.[15] and it can be described as follows: "Decent work sums up the aspirations of people in their working lives – their aspirations for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality".[16] It entails "not just the creation of jobs, but the creation of jobs of acceptable quality… It could relate to different forms of work, and also to different conditions of work, as well as feelings of value and satisfaction."[17] The Decent Work Agenda is now the ILO's primary goal; namely, to "promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity."[18] As the ILO notes, "The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market."[19] The ILO's Decent Work Agenda includes four main values corresponding to four strategic objectives: "the promotion of rights at work; quality employment; social protection and social security; and social dialogue."[20]

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[14] ACTU, The future of work in Australia: dealing with insecurity and risk: An ACTU options paper on measures to promote job and income security, 2011, p3, <https://www.actu.org.au/media/125289/Future%20of%20work%20industrial%20options%20paper.pdf>.
[15] International Labour Organization. (1999). *Decent work. Report of the Director General*. Report I-AI, International Labour Conference, 87th Meeting, Geneva (June).
[16] Perulli, Adalberto, and Tiziano Treu, eds. *Sustainable Development, Global Trade and Social Rights*. Studies in Employment and Social Policy, volume 51. Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V, 2018, Part V; Di Ruggiero, Erica, Joanna E. Cohen, Donald C. Cole, and Lisa Forman. 'Competing Conceptualizations of Decent Work at the Intersection of Health, Social and Economic Discourses'. *Social Science & Medicine* 133 (May 2015): pp120–27, p120.
[17] International Labour Organization. (1999). *Decent work. Report of the Director General*. Report I-AI, International Labour Conference, 87th Meeting, Geneva (June).
[18] Ibid.
[19] Ibid.
[20] Ibid.

We note that, while the existence of the ILO's Decent Work Agenda implies an international consensus, progress globally on improving working conditions has somewhat stalled.[21] In the Australian context, we note that when the ground-breaking Independent Inquiry on Insecure Work, commissioned by the ACTU, released its report, *Lives on Hold*, in May 2012, the gig economy did not yet exist in Australia. That report warned that insecure work had been rising for decades and that by that time, on one definition, 40% of the Australian workforce was in insecure work, that casual employment had grown exponentially, and new ways of evading standard employment protections would emerge. Just five months later, in October 2012, Uber launched in Australia, operating illegally, in defiance of taxi regulations and on a low-pay business model that promoted precarious work. Around Australia, Governments have moved to legislate to accommodate and legalise Uber's activities but are yet to address the sub-standard conditions of gig workers in any substantive way.

According to Kalleberg and Vallas, the global rise in precarious and insecure work is driven by four main factors: *de-unionisation*, *financialisation* of the economy and firms, *globalisation* and *digitalisation*. De-unionisation has undermined workers organising protection. Financialisation has eroded the value of workers and other stakeholders to the firm relative to shareholders, and globalisation has increased competition between workers on opposite sides of the world and mobilised capital, especially in manufacturing industries. Digitalisation has enabled technology and practices that aid all of these trends and created an on-demand economy of precarious independent contractors.[22]

According to Stone et al., the falling proportion of workers able to access the entitlements and protections of standard employment reflects a "breakdown in regulation", with workers "increasingly experiencing the debilitating social, political, and psychological effects of growing economic insecurity and inequality".[23] Recent events in America remind us of the threat that growing inequality, social division and discontentment pose to democracy.

We make the following observations about the prevalence and nature of insecure and precarious work in Australia, focusing primarily on a number of categories in which working arrangements are more precarious than standard, permanent full-time employment. In each section, we provide (to the extent that information is publicly available) information on the extent of each form of engagement,

[21] Di Ruggiero, Erica, Joanna E. Cohen, Donald C. Cole, and Lisa Forman. 'Competing Conceptualizations of Decent Work at the Intersection of Health, Social and Economic Discourses'. *Social Science & Medicine* 133 (May 2015): pp.120–27, p120.
[22] Kalleberg, Arne L., and Steven P. Vallas, eds. 'Probing Precarious Work: Theory, Research, and Politics'. In *Research in the Sociology of Work*, 31:1–30. Emerald Publishing Limited, 2017, p5.
[23] Stone, Katherine V.W., and Harry Arthurs. *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*. New York, UNITED STATES: Russell Sage Foundation, 2013, p1.

and a brief analysis of the legal rules that constitute precarity for this category of work. We also note the particular Charter rights that are compromised by each category of work. Some of these categories overlap. These categories are:

- Casual employees;
- Under-employed casual and part-time workers;
- Fixed term contract workers;
- Dependent 'independent contractors';
- Workers hired through intermediaries (i.e. labour hire) as casuals or on 'Odco' contracts; and
- Gig workers.

Additionally, we would also like to draw attention to the ways in which immigration law and its enforcement contribute to precarious and insecure work conditions in Australia. The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), one of the eight ILO fundamental conventions that establish universal principles and rights at work, requires states to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination. However, to quote Dr. Laurie Berg, immigration conditions attached to various Australian temporary visas with work rights "reconfigure[s] the relationship between non-citizens and their employers, building precariousness into the working conditions of temporary and unauthorised migrant workers".[24] Examples of immigration restrictions and conditions placed on visa holders and the ways in which these immigration restrictions shape employment relationships and produce precarious and insecure conditions are discussed below in the sections on casual employees and the risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis.

Casual employees

Once upon a time (in the days when industrial awards were made as a consequence of the settlement of industrial disputes between industry-based trade unions and all employers engaging workers in an occupational group), casual employment was restricted to the engagement of workers for short shifts, and on a temporary basis. In recent decades, however, casual employment has boomed, especially in some sectors (such as retail and hospitality). According to the ABS, in August 2020, there were 2.3 million casual employees in Australia. This was 22% of employees, down from

[24] Berg, L. 2015. *Migrant Rights at Work: Law's precariousness at the intersection of immigration and labour*. Taylor & Francis Group: Oxfordshire, p.8.

2.6 million (24%) in February 2020. Of this total, 69% (or 1,593.8 million) were part-time casuals. Some 720,000 employees were employed full-time as casuals. The main definition used by the ABS to determine whether an employee is a casual employee is whether the employee has access to paid leave entitlements. According to the ABS:

> *Casual workers accounted for around two-thirds of people who lost a job early in the COVID-19 period…Total employment fell from around 13 million to 12.2 million between February and May 2020, with two thirds of the fall occurring in casual employment. Employment in casual jobs fell from 2.6 million to 2.1 million between February and May 2020. Prior to the COVID period, casuals accounted for around 25 per cent of all employees. This fell to around 20 per cent in May. Between May and August, casual employment rose to 2.3 million, a recovery of around 37.2 per cent of the earlier fall.*[25]

By November 2020, casual employment had recovered further to 2,485,100 or 23.1% of all employees.[26] As the economy continues to recover from the pandemic-induced recession, casual employment may be expected to return to pre-Covid levels.

Legal characterisation and protection of casual employment

The essential characteristic of casual work in Australia is that the employer and employee make no advance commitment to continue in a relationship. The employer can offer, and the employee accept, work engagements at will. This definition has developed in a body of case law and was accepted most recently in *Workpac Pty Ltd v Skene* (2018) 264 FCR 536; [2018] FCAFC 131 and *Workpac Pty Ltd v Rossato* [2020] FCAFC 94.[27] Notwithstanding this common law definition, the practice has developed of engaging 'permanent casuals' – workers who accept employment for significant numbers of hours each week, on regular rosters, on the basis that they are paid as casuals. It is a practice that has been accepted in many quarters because employees engaged as casuals are generally entitled to a 25 per cent loading on the pay rates stipulated in an applicable award or enterprise agreement, and this loading is taken to be sufficient to compensate for a range of entitlements that permanent employees enjoy, but casuals do not. These include entitlements under

[25] ABS, *Casuals hardest hit by job losses in 2020*, Media Release, 11 December 2020 < https://www.abs.gov.au/media-centre/media-releases/casuals-hardest-hit-job-losses-2020>.
[26] ABS, Labour Force, Australia, Detailed, Quarterly [6291.0.55.001], Table 13, November 2020
[27] Note that the *Rossato* decision is on appeal to the High Court of Australia.

the National Employment Standards (NES) to paid annual leave, paid personal/carer's leave, minimum notice upon termination of employment, severance pay in a case of redundancy.

The *Fair Work Act 2009* (Cth) presently contemplates the concept of a casual who works on 'a regular and systematic basis', with 'a reasonable expectation of continuing employment by the employer'[28] and affords them access to unfair dismissal protection after meeting the minimum employment period. At common law, an employee whose work arrangement bore these characteristics would not be a casual employee at all. This was the essential problem in the *Workpac* cases noted above. Employees engaged on permanent rosters determined well in advance were found not to be casuals at all, and were held to be entitled to the leave entitlements in the NES.

Although the casual loading is a form of compensation for the various leave entitlements that permanent employees enjoy, casuals nevertheless experience precarity in other respects. For example, the unsuccessful discrimination case, *State of New South Wales v Amery*,[29] brought by casual school teachers (many of whom had worked for decades on a casual basis), illustrated that long term casual engagement leads to poorer career prospects, in terms of both salary and conditions. The notion that a leave loading cashes out certain entitlements is also problematic. As we saw during the pandemic in 2020, many workers engaged as casuals continued to attend for work while suffering flu-like symptoms, because they had no paid leave to cover absences, and they were susceptible to dismissal for failing to attend for work. The public health risks of wide-spread casual employment are clear. Notwithstanding the views expressed by ministers and other politicians at the time, casual workers in lowly paid occupations do not generally earn enough through their casual loading to set aside their own private sick leave funds.

Casual employment and temporary migrant workers

The vast majority of workers holding international student visas and Working Holiday Maker (WHM) visas are employed on a casual basis. It may also be that some of these workers prefer flexible hours to accommodate study or travel plans. It is also clear that immigration policy plays a role in channelling these workers into casual roles. For example, visas associated with the Working Holiday Maker program limit workers to six months with a single employer (condition 8547). The WHM program allows participants to extend their initial 1-year visa for a second and third year by completing

[28] See Fair Work Act s 384(2).
[29] (2006) 230 CLR 174.

3 months of work approved industries and areas.[30] This is designed to incentivise workers to obtain work in sectors experiencing shortages of labour such as seasonal agriculture in rural areas. It also results in temporary visa holders being encouraged to work in sectors with high rates of casualisation and long-standing concerns about precarious and insecure working conditions such as horticulture and viticulture. By way of illustration, these two sectors have been identified by the Fair Work Ombudsman as linked to high rates of 'employee and community concerns about non-compliance with Australian workplace laws'.[31]

Another example is condition 8104, which limits the holders of Student visa (subclass 500) to working 40 hours per fortnight. The rules associated with condition 8104 are complex and poorly understood, and do not reflect the reality of work in low-paid positions and sectors. Recent high-profile cases involving temporary visa holders in franchises such as 7-Eleven and Dominos also indicate that some employers pressure casual workers to breach condition 8104 and then use the threat of visa cancellation and deportation to violate the rights of these workers by paying under the casual rate and providing working conditions in breach of the Fair Work Act.[32]

The designation as casual employees of most Pacific workers in Australia under the Seasonal Worker Programme provides further indication that categorisation of workers as "casual" in some cases bears no relationship to the reality of their employment relationship. It is a condition of the Temporary Work (International Relations) visa (subclass 403, Seasonal Worker stream) that workers must continue to be employed by their approved sponsor and can only change sponsor with the approval of the Department of Home Affairs (condition 8577).[33] The approved sponsor may be a direct employer, or it may be a labour hire company that provides SWP labour to other businesses. Most SWP workers also borrow money from their sponsor to cover the upfront costs of migration (such as the worker-paid portion of international flights and transit accommodation). This money is then repaid by deductions taken directly from the workers' wages. In this context, the employment relationship cannot properly be considered to involve "no advance commitment".

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[30] These are plant and animal cultivation in regional Australia; fishing and pearling in regional Australia; tree farming and felling in regional Australia; mining in regional Australia; construction in regional Australia; bushfire recovery work in declared bushfire affected areas only, after 31 July 2019; critical COVID-19 work in the healthcare and medical sectors anywhere in Australia, after 31 January 2020. Available at: <https://immi.homeaffairs.gov.au/what-we-do/whm-program/specified-work-conditions/specified-work-417>.

[31] Fair Work Ombudsman. 2013. *Harvest Trail Inquiry.* FWO: Sydney.

[32] Reilly, A. et. al. 2017. *International Students and the Fair Work Ombudsman*. University of Adelaide: Adelaide. p. 30-31.

[33] Australia, Department of Home Affairs. 2020. 'Check visa details and conditions: Temporary Work (International Relations) visa (subclass 403, Seasonal Worker stream)'. Available at: https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/see-your-visa-conditions?product=403-60#

Is all casual work precarious or insecure?

Survey results show that a proportion of casual employees prefer that mode of engagement.[34] A small proportion of casual work, for example in the mining and resources sector, is undoubtedly high paid compared to average wages, even if, within most occupational groupings, casual employees earn less than their permanent counterparts, despite the casual loading.[35] Whilst some would prefer permanent employment, others would not and are not reliant on their casual job as primary income. Casual employees working for more than 6 months in a small business and more than twelve months in a large one on a regular and systematic basis also have access to unfair dismissal protection. As explained above, precarity is not merely a matter of legal rights but is also related to the broader social context and subjective experience of work. Does this mean that not all casual employment is insecure or precarious?

The answer is that all non-standard employment, including casual employment, contains objective aspects of precarity and insecurity. For example, by definition, casual employees lack various forms of paid leave and typically redundancy and notice rights and working time security. Subjective and social/contextual aspects of precarity tend to be conceptualised in the social science literature as additional indicators of precarity and factors that affect the degree of precarity/insecurity, not countervailing factors that transform objectively insecure jobs into secure ones. This distinction comes into relief when observing that workers' circumstances invariably change and the worker, for example, working a casual job for extra pay today, may find themselves reliant on that position tomorrow.

The Charter Rights at risk in casual work

The principal Charter rights at risk in casual work is the right to job security. As the experience of job loss during the pandemic in 2020 demonstrated, casually engaged staff were the first to lose work. (See Comments on Terms of Reference Section (b) below.) A lack of protection from unfair dismissal weakens other employment protections (such as award-determined wages, the right to freedom of

[34] See Markey, Raymond, and Joseph McIvor. 'Regulating Casual Employment in Australia'. *Journal of Industrial Relations* 60, no. 5 (1 November 2018): pp593–618, p612.
[35] Ibid., p605.

association and collective bargaining, and protection from discrimination and harassment), because employees know that if they exercise these rights or raise complaints about these matters, they may lose their jobs without recourse to any review of their dismissal. The only 'casual' employees entitled to bring an unfair dismissal claim are those who are not truly casual employees at all: long term 'casuals' who have worked regularly and systematically for the minimum employment period stipulated in s 383 of the Fair Work Act and have an expectation of continued employment.

Proposed Amendments the Fair Work Act

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* presently before Parliament attempts to deal with some of the problems that have arisen from the use of casual engagements to replace what is effectively permanent employment. Measures in the Bill include inserting a statutory definition into the *Fair Work Act* (proposed s 15A), and providing for a new NES right for employees engaged as casuals to convert to permanent employment status, if they are in fact not really casuals at all.

As it stands, the proposal is directed at providing certainty for employers by enabling them to determine the status of their employees without any risk of later complaints that they were in fact permanent staff with leave entitlements. It does not assist employees who are presently engaged as casuals, nor does it discourage the continued growth of casual employment at the expense of secure employment in Australia. Indeed, the proposed statutory definition for casual employment is likely to increase the use of the casual classification of work. The weakness in the proposed statutory definition is that an employee's status is to be determined only on the basis of the original offer made to the employee, and cannot take account of 'any subsequent conduct of the parties': s 15A(4). The terminology of 'offer and acceptance' adopts the language of classical contract law. A contract is made when one party (here the employer) makes an offer on sufficiently certain terms that is accepted on those terms by the other party (here the employee). The reference to ignoring 'subsequent conduct' invokes the contract law doctrine that subsequent conduct of parties is not permitted into evidence in determining the terms of the parties' original agreement.

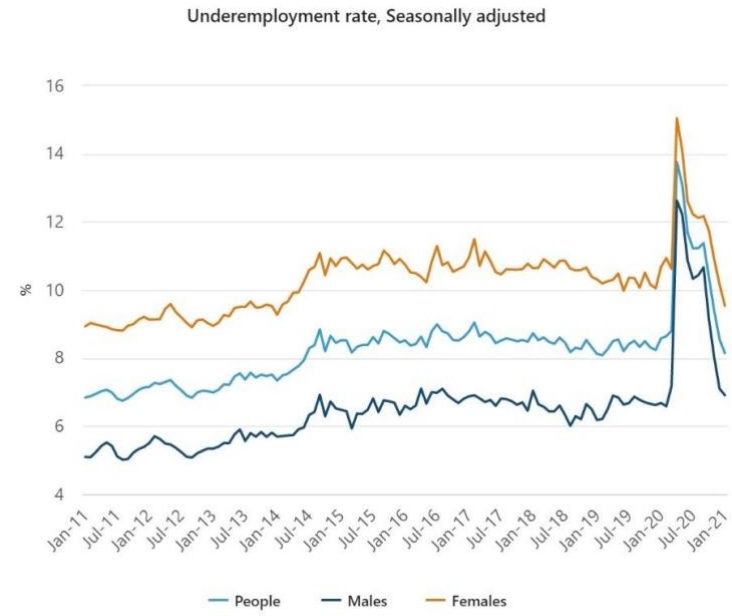
In the field of employment, recourse to evidence of the conduct of the parties has been particularly important where employers have used standard form contract documentation without paying regard to whether the terms of the document reflect the actual arrangements made with employees. It has also assisted courts to determine disputes in cases where employers (often on legal advice) have drafted contract terms strategically to avoid characterisation of the contract as one of employment, even when they have no intention of applying those terms during the management of the relationship (notable

examples are *Autoclenz Ltd v Belcher* [2011] UKSC 41; *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98; and in Australia, *ACE Insurance v Trifunovski* [2013] FCAFC 3). The temptation for employers to engage in such stratagems is already recognized in the sham contracting provisions in the Fair Work Act, ss 357-359. These provisions were originally introduced into federal legislation by the Howard Government at the time the Work Choices laws and *Independent Contractors Act 2006* (Cth) were enacted, demonstrating that Australian governments of all persuasions have been alert to the risks of permitting mischaracterisation of employment relationships as independent contracts. As presently drafted, however, the sham contracting provisions in ss 357-359 deal only with sham independent contracts. The present drafting of proposed s 15A creates the risk of 'sham casual contracts'.

The casual conversion opportunity provided in the Bill is unlikely to be of great practical benefit to casual employees who do wish to convert, because of the highly prescriptive rules placed around the timing for offers and requests, and the lack of any clear enforceability of this right.

Under-employed part-time and casual employees

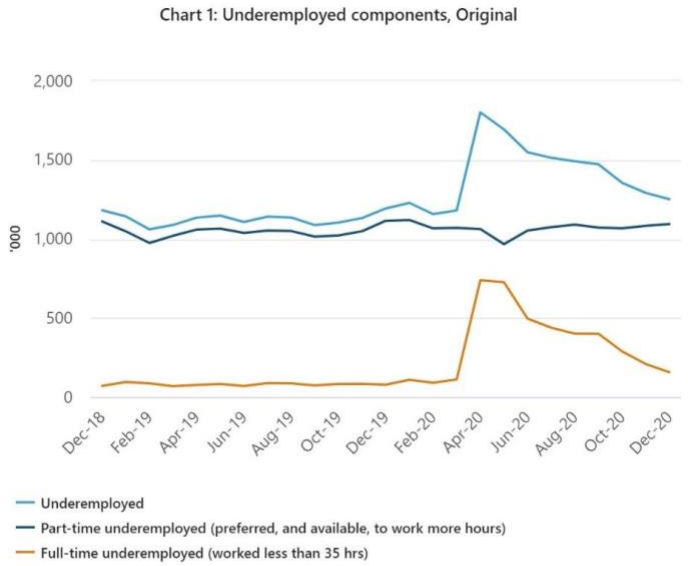
A principal concern of casual employees, and also many part-time employees, is that they are unable to secure a living wage because they do not have sufficient guaranteed hours of employment. These kinds of workers may be even more disadvantages after the passage of the Omnibus bill and the 'additional hours' arrangements. Underemployment rates remain significant in Australia. They rose sharply during the pandemic and have declined somewhat as the economy emerges from the pandemic induced recession.



[36]

Female employees remain the most affected by levels of underemployment, as do part-time employees. The number of underemployed part-time employees has remained relatively constant over recent years, but the raw number remains high: more than 1,000,000 part-time employees would prefer to work more hours, as demonstrated in the chart below.

[36] ABS, Labour Force, Australia, January 2021, released 18 February 2021.



Source: Labour Force, Australia Table 24 and Labour Force, Australia, Detailed Datacube EM2a
Source: Australian Bureau of Statistics, Underemployment: Reduced hours or prefers more hours

Fixed term contracts

It has become increasingly common for employers to engage staff on a rolling series of fixed terms contracts. Sometimes, this practice is legitimate because the hirer's own contract for the provision of service is for a defined project, due for completion within a fixed term. Often, however, this form of engagement is used in an attempt to avoid permitting employees to accrue entitlements related to tenure in a job, for example, rights to unfair dismissal protection. This is an instance of legal regulation driving perverse practical outcomes. A law designed to enhance job security (and all the broad economic benefits to society that come with job security for working citizens) becomes the driver for a practice that undermines those benefits. Workers who cannot be sure whether their job will continue from one month or year to the next cannot make the kinds of medium- and long-term plans that contribute to a stable economy.

The exact extent of fixed-term contract employees in Australia is not known, as the ABS no longer publishes figures on this employment sub-group. A recent discussion paper by the McKell Institute noted:

> *Determining the exact number of fixed-term employees is complex, as following the conclusion of the Forms of Employment (FoE) reports, the ABS no longer directly reports on fixed-term contracts, rather, grouping permanent and fixed term employees together under full-time or part-time categories. However, the final FoE report in 2013 found that 4% of employees were on fixed-term*

> *contracts[xiii]. While this may seem like a small figure, it is still approximately 250,000 employees, a number that is likely to have grown since 2013.*[37]

Over the duration of the FoE reports, the percentage of fixed-term contracts remained at approximately 4% overall. However, as the Australian Council of Trade Unions (ACTU) revealed, the majority of these fixed term contracts are heavily concentrated in a few sectors, the three biggest being: education (38%), health care and social assistance (16%), and public administration and safety (13%).xiv This is problematic because individuals in these industries face higher levels of insecurity compared to those in other industries. Although they may be working set hours with paid leave entitlements, when their contract comes to an end their employer is under no obligation to keep them. This benefits the employer over the employee as they are able to dismiss an employee after the contract is up with essentially no risk of unfair dismissal claims. Fixed-term contracts also have a greater impact on female employees. The Gender Pay Gap Taskforce report revealed that:

> *When there are a significant number of employees on fixed-term contracts, as opposed to ongoing employment, women will often form the majority of those employees. This creates an inequity in job security and reduces opportunities for career development and increased earnings.*[38]

By way of international comparison, Australia ranks third from the bottom out of OECD countries in terms of restrictions on hiring temporary workers, as the below chart indicates.[39]

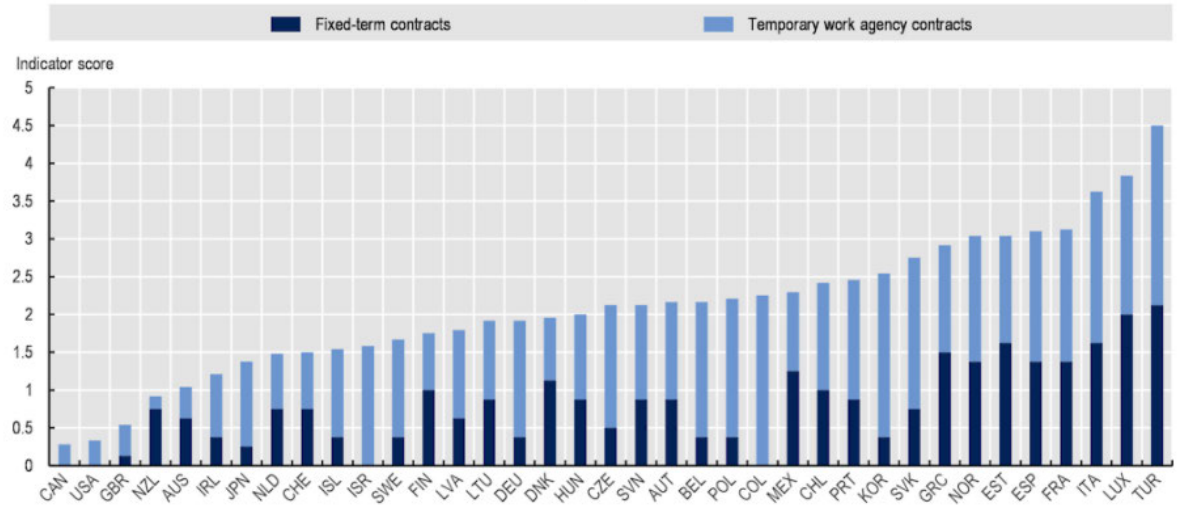
[37] Lillian Alexander, *Understanding Insecure Work in Australia*, The McKell Institute Queensland, available at < https://mckellinstitute.org.au/app/uploads/McKell-Institute-Queensland-Understanding-Insecure-Work-in-Australia-1-2.pdf>, p5.

[38] Peach, L. & Harris, C.. (2013). Gender Pay Gap Taskforce Report: Recommendations on calculating, interpreting and communicating the gender pay gap. Australia: Workplace Gender Equality Agency, pp5-6.

[39] See OECD, *OECD Employment Outlook 2020 : Worker Security and the COVID-19 Crisis*, available at <https://www.oecd-ilibrary.org/sites/af9c7d85-en/index.html?itemId=/content/component/af9c7d85-en#section-d1e24760>, figure 3.9.

Figure 3.11. **The OECD indicators: Strictness of regulation of hiring temporary workers**

2019



Note: Range of indicator scores: 0-6. These aggregate indicators assign the same weight to fixed-term contracts and temporary work agency contracts.

Source: *OECD Employment Protection Legislation Database*, http://oe.cd/epl.

In Sweden, 12th from the bottom in the above selection of OECD countries, employers are restricted from employing an employee for more than two years in any five on fixed term contracts. Any longer and, generally, the employee automatically becomes permanent.[40] In France, which is towards the upper end in terms of fixed-term contract protections amongst OECD states, fixed term contracts may only be used in strictly defined circumstances, generally with a maximum duration of 18 months, extendable to 24 months in defined circumstances.[41]

Dependent 'independent contractors'

The application of the common law test for employment often leaves poorly paid and highly precarious workers on the 'independent contractor' side of the bifurcation between a contract 'of service' (employment) and a contract 'for services'. This is because several elements of the

[40] Swedish Association of Teachers and Researchers, *Fixed Term Contracts in the Employment Protection Act (LAS)*, 8 December 2020 <https://sulf.se/en/work-salary-and-benefits/fixed-period-employment/fixed-term-contracts-in-las/>. Lag (1982:80) om anställningsskydd, 5 §.

[41] House, H. et al (Eds.) Getting the Deal Through – Labour & Employment 2019 – France Morgan Lewis Law Business Research, p118, available at <https://www.morganlewis.com/-/media/files/special-topics/gtdt/2019/lepg-global-workforce-gtdt-2019-france.pdf>.

multifactorial or 'multiple indicia' test used by the courts to distinguish employment from independent contracting focus on easily manipulated factors. For example, the ownership of assets used in the business is treated as a factor favouring a finding that the worker is an independent contractor. This means that hirers who also thrust onto the worker the costs and obligations of funding the purchase or lease of equipment, the costs of its maintenance, and the risk of depreciation, will avoid being held responsible as employers in other respects, even where they enjoy in all practical senses the exclusive services of the worker. Contracts which confer a liberty on the worker to take assignments from other hirers also do so to escape a conclusion that workers are providing exclusive service as employees. Contracts which require the worker to incorporate as a single shareholder, sole director company in order to create an incorporated legal person with whom the hirer can contract for the services of the worker are also typical of deliberate stratagems to avoid a direct contract of employment between the hirer and the worker. In short, the present common law test has proven easy to 'game'. It is our contention that all workers, whether or not their contractual arrangements conform with the legal definition of employment, should enjoy the benefit of the Charter rights – to the extent appropriate to their particular engagement.

All should enjoy safe and healthy working conditions. All should enjoy rights to decent remuneration for their work. All should be entitled to bargain collectively with the hirers of their labour. All should enjoy protection from capricious termination of their work contracts. All should have access to convenient and affordable dispute resolution services. Presently, none of these Charter rights are secured for dependent contractors.

The ABS estimates that there were more than a million independent contractors in Australia in August 2020. Of these, two-thirds reported that they had authority over their own work and one-third said they did not. This suggests that nearly 390,000 so-called independent contractors were in fact not genuine independent contractors – and the number may be much higher.

6333.0 Characteristics of Employment, Australia, August 2020	
Table 11.1 Independent contractors by whether had authority over own work, industry and occupation	
	Independent Contractors

	Had authority over own work	Did not have authority over own work	Total - Independent Contractors
Industry of main job	**'000**	**'000**	**'000**
Agriculture, forestry and fishing	21.7	10.5	32.2
Mining	0.8	3.1	3.9
Manufacturing	30.4	11.1	41.5
Electricity, gas, water and waste services	4.0	0.4	4.4
Construction	184.7	93.7	278.4
Wholesale trade	10.9	3.7	14.6
Retail trade	14.4	7.4	21.8
Accommodation and food services	9.6	5.1	14.8
Transport, postal and warehousing	36.8	53.6	90.3
Information media and telecommunications	8.9	7.5	16.4
Financial and insurance services	11.1	7.9	19.0

Rental, hiring and real estate services	11.2	8.0	19.2
Professional, scientific and technical services	117.0	50.9	168.0
Administrative and support services	47.6	26.7	74.2
Public administration and safety	3.8	6.9	10.7
Education and training	25.1	24.0	49.2
Health care and social assistance	50.1	45.6	95.6
Arts and recreation services	14.3	8.9	23.1
Other services	34.3	11.0	45.3
Total	636.9	385.8	1,022.7

Source: *Characteristics of Employment*, Australia [Table 11]. Weekly earnings of employees classified by full-time/part-time workers, employment characteristics, fixed-term/independent contracts. Reference period: August 2020.[42]

[42] ABS, Characteristics of Employment, August 2020.

Workers hired through intermediaries

Labour hire workers engaged as casuals by labour hire agencies

According to the ABS, in August 2020, 3% of employees reported being registered with a labour hire firm or employment agency. Of these, 33% reported they were paid by a labour hire firm or employment agency. The occupations with the highest proportion of employees who were paid by a labour hire firm or employment agency were:

- Machinery operators and drivers (4%); and
- Labourers (2%).[43]

In various other countries, the use of agency work is time-restricted. In the United Kingdom, for example, after 12 weeks, agency workers are entitled to the same rights as if they were directly employed, with respect to a range of entitlements including pay, working hours and leave, and pensions.[44] Under the Equal Treatment principle of the EU Employment Directive on Temporary Agency Workers of 2008, "The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."[45] In Australia, however, there is currently no legislative right to convert from labour hire to direct employment with the host, nor any legislative requirement that agency workers receive equivalent pay and conditions to their permanent counterparts.

Labour hire is an arrangement whereby workers are engaged by one enterprise (the labour hire agency) and 'lent' or hired to another enterprise (the host employer). Under Australian common law principles, labour hire workers are generally treated as either employees of, or independent contractors to, the labour hire agency and not the host, even in circumstances where they are placed with the host employer for indefinite periods of time, on rostering arrangements indistinguishable from those of the host employer's directly hired employees.

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[43] ABS, Working Arrangements, August 2020.
[44] UK Advisory, Conciliation and Arbitration Service, *Agency Workers* <https://www.acas.org.uk/agency-workers/understanding-your-employment-rights-as-an-agency-worker> (accessed 15 March 2021).
[45] See Article 5(1), *Temporary Agency Work Directive* 2008/104/EC.

On one view, the Australian solution to labour hire clarified early uncertainties around the respective obligations of labour hire agencies and host employers to the workers in their businesses. In the United Kingdom, the common law position of labour hire workers is that they are not employees of either the agency or the host.[46] Although the workers are in a contractual arrangement with the labour hire agency, the contract is not one of employment because according to the English view, it does not satisfy the control test for employment. The labour hire agency is not seen to have sufficient control over the worker to satisfy the common law test of employment. Although the host employer *does* exercise day-to-day control over the worker, the host is not in any kind of direct contractual relationship with the worker, so cannot be party to an employment contract.

In *Dacas v Brook Street Bureau (UK) Ltd*[47], the English Court of Appeal attempted to resolve this conundrum by finding that in a case involving a long-term placement with a host, the labour hire worker had become party to an implied employment contract with the host. This solution was subsequently abandoned in *James v Greenwich London Borough Council*,[48] and the matter of labour hire was resolved instead by the adoption of a European Directive, the *Agency Workers' Directive* 2008.[49]

The Australian solution to the common law conundrum is to find that the labour hire agency enjoys a residual right to control the worker (hence the contract can be one of employment), and then delegates that right to control to the host employer under the commercial labour hire contract.[50] While this is a convenient solution that ensures that many Australian labour hire workers do have an employer to call upon to meet their entitlements under the National Employment Standards (NES) and modern awards, it is a solution which nevertheless leaves those employees vulnerable in many other respects.

First, the labour hire worker is generally engaged as a casual employee (or an independent contractor – see below), because the terms of the commercial contract with the host employer mean that the labour hire agency can justify an argument that they cannot guarantee continuing employment for the workers (casual employment is defined under the common law as an employment relationship

[46] See David Cabrelli, *Employment Law in Context* 2nd ed (Oxford, OUP, 2016), 133-135.
[47] [2004] EWCA Civ 217.
[48] [2008] EWCA Civ 35.
[49] 2008/104/EC (OJ 2008 L 327/9).
[50] See, for example, Staff Aid Services v Bianchi (2004) 133 IR 29; Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd [2004] SAIRComm 13; Drake Personnel Ltd & Ors v Commissioner of State Revenue (2000) 2 VR 365.

in which the parties have not given any commitment to ongoing work).[51] As casual employees, the workers will generally have no entitlements to personal/carer's leave or annual leave.[52]

Secondly, the worker's salary and other terms and conditions of work will be set by the labour hire agency, and will not necessarily match the pay and conditions of any directly employed staff of the host employer. This is a consequence of the fact that with very limited exceptions, enterprise bargaining in Australia is permitted only at single business level. Unless the enterprise bargain at the host employer contains a clause whereby the host employer has agreed that they must pay contract staff at the same rates as directly hired employees,[53] the host can avoid paying enterprise bargain rates of pay and conditions to labour hire staff. The ability to avoid the rates of pay determined in union collective bargaining is doubtless one of the key attractions of the contemporary practice of using labour hire staff as a substitute for a permanent workforce.

Finally, the triangular nature of the relationship means that labour hire staff will not enjoy the same protections against unfair and even unlawful dismissal as directly employed staff. This particular vulnerability is well-illustrated by the case of *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd*.[54] Mr Costello accepted an offer of employment at Bridgestone, but by way of a labour hire arrangement with Allstaff, a labour hire agency with an office on Bridgestone's premises. The usual arrangements was that after a successful 'probation' period with the labour hire agency, staff would transition to permanent employment with the host employer. Costello believed he was on track to become a permanent direct employee of Bridgestone when he suffered an injury (unrelated to work) and was off work for a number of weeks. When he attempted to return to work at Bridgestone, he was told he had been replaced. If Mr Costello had been a direct employee of Bridgestone, he would have enjoyed protection from dismissal for temporary absence from work for illness or injury, and would have been entitled to apply for reinstatement to his job.[55] Allstaff remained willing to find him a placement with another of its clients at a different location, so Costello was not able to bring any legal claim for the loss of what he considered to be his job at Bridgestone. This is clearly another incentive for host employers to use labour hire. They can avoid their statutory responsibilities for providing secure employment for staff.

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[51] See Workpac Pty Ltd v Skene [2018] FCAFC 131; Workpac Pty Ltd v Rossato [2020] FCAFC 84.
[52] But see *Workpac Pty Ltd v Skene* [2018] FCAFC 131; *Workpac Pty Ltd v Rossato* [2020] FCAFC 84, where labour hire employees who were rostered on 12 months in advance were found not to be casual employees for the purposes of the NES entitlements to leave.
[53] See for example *Asurco Contracting Pty Ltd v CFMEU* (2010) 197 IR 365.
[54] [2004] SAIRComm 13.
[55] This right is currently protected by the *Fair Work Act 2009* (Cth) s 352. The case was brought under an earlier version of this protection, under South Australian law.

Labour Hire workers engaged on 'Odco' contracts.

Many labour hire workers are not engaged as employees at all. Those who are engaged as independent contractors cannot even claim the entitlements afforded by the National Employment Standards or modern awards. A recent case decided by a full bench of the Federal Court of Australia (and presently on appeal to the High Court) illustrates this.

In *CFMMEU v Personnel Contracting Pty Ltd*,[56] a 22-yearold backpacker engaged as a builders' labourer to clean up work sites was held to be an independent contractor. He was paid only 75 per cent of the wages he would have earned under the relevant modern award for this work. Although all members of the Court expressed concern about this finding, they took the view that they were constrained by an earlier decision of the Court of Appeal in Western Australia that had considered this particular standard form contract used by the labour hire agency for many years.[57] Chief Justice Allsop said that, unconstrained by authority, he would have found that the worker was a casual employee of the labour hire enterprise.[58]

The contract employed by many labour hire agencies for the purposes of avoiding any finding that the workers are employees is commonly known as the 'Odco' contract, from the case of *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (the 'Troubleshooters' Case).[59] This case involved a challenge by a trade union to a contract whereby a labour hire agency signed up skilled building trades people for placement on construction sites. In the circumstances of that case, where the workers were in most cases experienced trades people with their own businesses, it was uncontentious that the court should take at face value the terms of the contract forswearing any employment relationship between the agency and the workers.

Subsequent decisions testing the use of the Odco contract for engaging low-skilled workers have sometimes found that the terms of the formal contract do not reflect the reality of the relationship.[60] In that case, the workers will be found to be employees, but they will still most likely be found to be casual employees of the labour hire agency. The risk of entering into Odco-style contracts that do not

[56] [2020] FCAFC 122.
[57] Personnel Contracting Pty Ltd t/as Tricord Personnel v CFMEU [2004] WASCA 312; 141 IR 31.
[58] [2020] FCAFC 122, [31]. See also Lee J at [181].
[59] (1991) 29 FCR 104.
[60] See, for example, Country Metropolitan Agency Contracting Services Pty Ltd v Slater (2003) 124 IR 293; FWO v Metro Northern Enterprises Pty Ltd [2013] FCCA 216; FWO v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37.

reflect the real arrangements between the parties now includes that the arrangement will be found to be a sham, attracting penalties under the *Fair Work Act 2009* (Cth).[61]

'Gig workers' (workers hired through digital platforms to undertake tasks, on a piece-work basis)

Data on the extent of 'gig economy' employment in Australia is patchy. The ABS does not publish data on the extent of employment via internet platforms, which is a relatively recent form of employment. The Victorian platform economy inquiry commissioned a national survey of gig economy work, concluding as follows:

A substantial minority of adults in Australia (7.1%) indicate that they currently participate or have recently participated in digital platform work and a further 6.0% have done so in the past. This level of participation is broadly consistent with recent surveys conducted in the UK, The Netherlands, Germany, France and Spain. The substantial level of participation in digital platform work revealed in the survey supports the view that 'non-standard' forms of work are becoming more common in Australia. This reality may require more attention in the design and administration of routine data collection on labour market participation in Australia.[62]

To date, no Australian appellate level court decision has considered the true status of workers engaged through digital platforms (such as Uber) to undertake tasks on a piece work basis. An application to the Federal Court for judicial review of a Fair Work Commission deciding that an UberEats delivery rider was not an employee for the purposes of the *Fair Work Act's* unfair dismissal protections was aborted when the parties settled the matter in December 2020.[63] Following this settlement, it has been reported that Uber Eats has varied its contracts with riders.

The contract under consideration by the Fair Work Commission and then the Federal Court of Australia attempted to characterise the arrangement between the platform and the worker as a commercial contract for the provision of telecommunications services.[64] This characterisation of the

[61] See *Fair Work Act 2009* (Cth) s 357-59
[62] *Report of the Inquiry into the Victorian On-Demand Workforce*, Industrial Relations Victoria, June 2020, p14.
[63] See *Amita Gupta v Portier Pacific Pty Ltd; Uvber Australia Pty Ltd, t/as Uber Eats* [2020] FWCFB 1698 (21 April 2020). See the transpcript of the Federal Court proceedings – Federal Court Registry No NSD 566 of 2020, o/N H-1358227.
[64] The terms of the contracts described in *Uber BV et al v Aslam et al* (2017) UKEAT/0056/17/DA in the United Kingdom, *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 and *Michail Kaseris v Rasier Pacific VOF* [2017] FWC 6610 in Australia; and *Heller v UberTechnologies Inc,* 2019 ONCA 1 in Canada appear to be identical.

relationship has not been accepted in the United Kingdom, notwithstanding the words of the formal contract. The UK Employment Tribunal said the contract documentation relied on 'fictions, twisted language and even brand new terminology [which] merits . . . a degree of scepticism'.[65] The Fair Work Commission's decisions have not been so condemnatory of the contract. In an early case, Uber's characterisation of the contract was largely accepted.[66] In later decisions, the Commission has accepted that the standard Uber contract was a contract for the performance of work, but in most cases, the driver has been held to be an independent contractor according to the multiple indicia test.[67] Factors in this test that weigh against drivers being employees tend to be that they choose their working hours, can refuse to accept jobs, provide their own vehicles, mobile phones and pay for their own data, and can work for other platforms. The fact that the platforms dictate prices for the work and leave no room for genuine negotiation is given little weight in this calculus.

The new Uber Eats contract now describes the worker as a 'self-employed contractor'.[68] It emphasises those indicia that tell against a worker being an employee – the worker chooses if and when to work,[69] and may work for competing businesses.[70] Somewhat disingenuously it states that riders 'have the right to request a higher delivery fee' than the one fixed by the platform.[71] One can only assume that this has been added to the contract to create the illusion that fees can be negotiated. A 'right to request' is a very weak right indeed, particularly in the hands of an itinerant food delivery cyclist with no market power.

The platform operators are clearly engaged in a deliberate strategy to avoid their hiring arrangements being characterised as employment, because they want to avoid attracting any of the obligations that our legal system ascribes to employers. For example, the contract issued by Hungry Panda (another food delivery service) describes its workers as 'sole traders' and not only permits workers to provide services on rival platforms, but stipulates that if they are working in Victoria they *must* derive at least 20 percent of their gross annual income from providing services to other organisations. This stipulation appears to address the risk that any independent contractor in Victoria who earns more than 80 percent of their income from a single employer may be deemed to be a worker for the purposes of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)

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[65] Aslam, Farrer & Ors v Uber BV, Uber London and Uber Britannia Ltd, Case Nos 2202551/2015 (12 October 2016) [87],upheld in Uber BV et al v Aslam et al [2021] UKSC 5.
[66] Michail Kaseris v Rasier Pacific VOF [2017] FWC 6610, [51].
[67] Janaka Namal Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579, [25]. See also Rajab Suliman v Rasier Pacific Pty Ltd [2019] FWC 4807 (12 July 2019).
[68] Uber Eats – Delivery Person Agreement (Australia), clause 4(a).
[69] Clause 5.1(a).
[70] Clause 4(d)(i).
[71] Clause 7.1(c).

section 3(b) and Schedule 1, Clause 8. This provision allows Work Safe Victoria to publish guidelines on when an independent contractor should be deemed to be a worker. The 80 percent rule was published in a guideline effective from 1 July 2014.

The above summary of the legal characterisation of labour hire and gig worker demonstrates that our legal system and the way we define employment have contributed to the rise in forms of precarious work. The focus on the direct contractual relationship between the hirer and the worker means that – with some exceptions[72] – enterprises that exert actual control over the worker and profit from their labour can escape liability for obligations to provide decent pay and safe working conditions by engaging workers through an intermediary. The reliance on the common law definition of employment, which is a creature of the industrial conditions of the 20th century, has left a gap in protection for workers engaged through intermediaries and particularly through digital platforms, because it is easy for those organisations to disclaim control of the worker. Many of the other standard indicia used to test whether a contract is one 'of service' (employment) or 'for services' (an independent contract) are easily manipulated. A contract may state that a worker in not engaged exclusively, but still offer more hours of work than a human being can reasonably manage in a day.

One of the standard indicia is the ownership and maintenance of assets used in the work. Gig workers are generally required to provide their own vehicles and communication devices and pay for their own telecommunications services. This fact is said to weigh in favour of a finding against employment, and yet in practice all it means is that they must bear more of the expense and risk of their work. The obligation to provide equipment and bear the costs of the business in the absence of any ability to set one's own prices is not a true indicator of entrepreneurial work. It is another marker of oppression and exploitation.

The risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis (TOR (b))

At the time of writing, there have been over 119 million confirmed cases of Covid-19 and over 2.6 Million Covid-19-related deaths globally.[73] Australia has had 29,112 confirmed cases and 909

[72] In some industries, such as the textile clothing and footwear industry, supply chain regulation has imposed liability on head contractors when subcontractors have failed to meet employment obligations to workers.
[73] as at 14 March 2021: see World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard*.

deaths.[74] The Reserve Bank of Australia previously noted the pandemic represents "the largest shock to the global economy in many decades" and that labour markets "have been severely disrupted".[75] The ILO estimates that, in 2020, 8.8 per cent of global working hours have been lost compared to the benchmark of the fourth quarter of 2019, equivalent to 255 million full-time jobs, approximately four times as many than during the 2009 Global Financial Crisis.[76] With the development of Covid-19 vaccines, the RBA's latest monetary statement notes the global outlook for growth has improved but the recovery is likely to be "bumpy and uneven, and dependent both on the health situation and ongoing fiscal and monetary support".[77] Over 900,000 Australians remain unemployed, 220,000 more than at the start of the pandemic, and raised levels of unemployment are likely for some years.[78] Yet, at the same time, household and business profits have increased. The impact of the end of the JobKeeper program in March 2021 is likely to be detrimental to employment and consumption.

In Australia, as around the world, this crisis has both highlighted and exacerbated precarious and insecure work. As a June 2020 Policy Briefing to the United Nations by the ILO and other UN agencies notes, "The world of work before the pandemic was riddled with inequalities and problems"[79] and globally, as "with so many aspects of this pandemic, the impacts are falling disproportionately on those who were already in precarious circumstances and who can least absorb the additional blow."[80] The pandemic has both exacerbated existing precariousness and insecurity and highlighted new dimensions. Around the world, "multidimensional poverty and inequality are likely to increase significantly" and women are disproportionately impacted.[81] We see these global patterns reflected in Australia. This includes that:

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[74] as at 14 March 2021: see World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard*, data table.
[75] Reserve Bank of Australia, *Statement on Monetary Policy,* August 2020, p1; Fair Work Commission, *President's Statement: The Fair Work Commission's Coronavirus (COVID-19) update – Draft Award Flexibility Schedule*, 31 August 2020, at [3].
[76] International Labour Organization, *ILO Monitor: COVID-19 and the world of work*. *Seventh edition. Updated estimates and analysis*, 25 January 2021, available at <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_767028.pdf>.
[77] Reserve Bank of Australia, *Statement on Monetary Policy,* February 2020, p1.
[78] Ibid.
[79] United Nations Sustainable Development Group, Policy Brief: The World of Work and COVID-19, June 2020, available at <https://unsdg.un.org/resources/policy-brief-world-work-and-covid-19>, p5.
[80] Ibid, p2.
[81] Ibid, p8.

- women and also often young people are overrepresented in the service sectors most hit by the pandemic, which also have high rates of casualisation, such as retail trade (37.2%), accommodation and food services (63.6%), arts and recreation services (36.7%);[82]
- health care and social assistance sector workers, of whom 78% are women[83] are particularly vulnerable and disproportionately impacted. Wages in this sector tend to be low and conditions poor and such workers are particularly exposed to health risks; and
- unpaid care work, again the majority of which is performed by women, has increased during the pandemic, particularly due to the closure of schools and facilities.

The table below shows the percentage of employees in each listed industry that are casual.

November, 2020	**[000]**	**[000]**	**Column 1**
Industry	**All employees with paid leave**	**All employees without paid leave**	**% of all employees who are casual**
Agriculture	85.1	67.7	44.3
Mining	214.1	44.4	17.2
Manufacturing	606.4	131.7	17.8
Electricity, gas & water	128.6	15.1	10.5
Construction	613.2	161.2	20.8
Wholesale	271	40.9	13.1

[82] See table below and footnote 82 (EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards (Pivot Table)).
[83] ABS 6291.0.55.003 – EQ06 – Employed persons by Industry group of main job (ANZSIC), Sex, State and Territory, November 1984 onwards, data for November 2020, created from Pivot Table EQ06.

Retail	750.1	444.2	37.2
Accommodation & Food services	265.2	464.1	63.6
Transport, Postal services and Warehousing	393.5	134.4	25.5
Information, media & Telecommunications	149.1	15.8	9.6
Financial & Insurance Services	410.2	24.4	5.6
Rental, Hiring and Real Estate	127.5	24.4	16.1
Professional, Scientific & technical Services	773.5	101.2	11.6
Administration & Support Services	206	101.4	33.0
Public Administration & Safety	781.2	82.4	9.5
Education & Training	880.3	170.9	16.3
Health care & Social Assistance	1278.2	320.1	20.0
Arts & recreation	118.8	69	36.7
Other services	243.9	71.9	22.8
All industries	8296.1	2485.1	23.1

Source:EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards (Pivot Table).

In Australia, a strong link has appeared between precarious employment and increased transmission of the SARS-CoV-2 virus, including through multiple job holding and poor working conditions, particularly in aged care and security services. Disemployment has disproportionately affected casual employees and women, whilst the Federal response and recovery plan was and is highly gendered towards supporting blue collar male jobs in the resources and construction industry. This led to descriptions of a 'pink recession' and a 'blue collar response'.[84]

There are other ways in which the pandemic exposed the disproportionate impact of precarious work on women. Women's disproportionate burden of child rearing and care responsibilities is linked to the gender pay gap, lack of paid parental leave and lack of access to affordable childcare (the higher paid partner is less likely to take unpaid leave, for example). Women's higher uptake of casual employment is linked to a lack of available permanent jobs with family-friendly employee-oriented flexibility. The general picture is one of poor-quality part-time jobs, especially for women, and the continuation of different labour participation rates for men and women.[85]

The pandemic showed the greater potential for accommodating workers' request to work from home as well as the vast social potential of universal, free early childhood education and care, as is already standard in some other countries. Despite the introduction of the childcare subsidy system in 2018, Australian households still spend amongst the highest proportion of household income on childcare in the developed world. Low government spending on childcare not only keeps the private cost high but wages in the female-dominated sector low.[86]

The crisis also exposed the reality of socially 'essential' jobs many of which were undervalued. These include supermarket jobs and jobs in teaching, nursing, child-care, and aged-care.[87]

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[84] Nick Bonyhady, 'Blue collar jobs not enough to fix "pink recession", Sally McManus says', *The Sydney Morning Herald*, June 16, 2020.
[85] Pocock, Barbara, Sara Charlesworth, and Janine Chapman. 'Work-family and Work-life Pressures in Australia: Advancing Gender Equality in "Good Times"?' Edited by Abigail Gregory, Susan Milner, and Jan Windebank. *International Journal of Sociology and Social Policy* 33, no. 9/10 (1 January 2013): pp594–612.
[86] Celina Ribeiro, 'Free childcare has been amazing': Australian parents hope pandemic may pave way for reform', *The Guardian*, 10 May 2020.
[87] Kaine, S. 'Australian Industrial Relations and COVID-19', *Journal of Australian Political Economy* (2020), No. 85, pp. 130-7.

The decision by the Federal Government to exclude all temporary visa holders from the JobKeeper subsidy also highlighted the precarious conditions in which low-wage workers within this group are employed in Australia. A survey of 6,051 temporary visa holders (the majority of whom were international students) conducted by UTS and UNSW found that in the period 1 March to July 2020, 70% of those employed had lost their jobs or most of their hours/shifts, 40% had been afraid they would become homeless (and 1 in 7 international students had indeed become homeless) and that 28% had been unable to pay for meals or food.[88] While a portion of international students rely on some form of family support to meet living expenses, these results demonstrate that prior to COVID low-wage temporary visa holders were unable to save enough from their employment to provide for more than a few weeks of expenses following the loss of regular incomes.

Epidemiologists are indicating that even with vaccines, ongoing infections and seasonal outbreaks of SARS-CoV-2, the virus that causes COVID-19, are likely.[89] Scientists have also shown that de-forestation and habitat destruction are a major driver behind global pandemics such as SARS-CoV (which caused SARS in 2003), and SARS-CoV-2 and hence new disease outbreaks are likely so long as these human activities continue.[90] Given the exacerbation of precarity caused by Covid-19 and the role of precarious work in its spread in Australia, addressing precarious and insecure work should be a part of the nation's pandemic preparedness and response strategy.

The effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies (TOR (e))

The *Fair Work Act 2009* has not successfully promoted secure work. It has not secured the rights of precarious workers. The Act has not kept pace with the creativity of businesses in structuring labour arrangement to minimise labour costs or avoid obligations under the Act. What follows is a critique with suggested remedies for:

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[88] Berg, L. and Farbenblum, B. et. al. 2020. *As if We Weren't Humans: The abandonment of temporary migrants in Australia during COVID-19*.
[89] See Megan Scudellari, 'How the pandemic might play out in 2021 and beyond', *Nature*, News Feature, 5 August 2020.
[90] Jonathan Watts, 'Promiscuous treatment of nature' will lead to more pandemics – scientists', *The Guardian*, 7 May 2020; Frutos, Roger, Marc Lopez Roig, Jordi Serra-Cobo, and Christian A. Devaux. 'COVID-19: The Conjunction of Events Leading to the Coronavirus Pandemic and Lessons to Learn for Future Threats'. *Frontiers in Medicine* 7 (2020).

- the narrow application of the Act to employment relationships;
- the limit of bargaining to the enterprise level;
- the poor regulation of casual work; and
- the need for easier and cheaper access to enforcement of rights.

The Fair Work Act only applies to workers in an employment relationship

The Act provides terms and conditions for employees only.[91] Access to the terms and conditions in the NES, in modern awards, and in enterprise agreements are predicated on the existence of the employment relationship.[92]

The Act does not explicitly define an 'employee'. Common law principles determine whether a worker is an employee under the Act. This has adverse consequences for precarious workers.

Labour Hire workers – different employers

Our comments above under Term of Reference Section (a) explain the way in which the development of legal principles in Australian employment law has contributed to the construction of precarity for labour hire workers, especially those hired through intermediaries and engaged on 'Odco contracts".[93]

At common law, in order for an employment relationship to exist, the worker must provide services pursuant to a contract. If no contract exists between the parties, there can be no employment relationship. This explains why a labour hire worker, sent by an agency to work for a client, cannot ordinarily be an employee of that client. The only contract the worker has (in most circumstances) is with the labour hire agency. This has consequences for the labour hire employees:[94]

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[91] See Fair Work Act 2009 s 43.
[92] ibid.
[93] This submission at pp29-30.
[94] A good analysis of the problems experienced by labour hire agency workers is Chapter 5 of the Senate Committee Report on *Corporate Avoidance of the Fair Work Act*, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report>.

- Labour Hire workers cannot bargain for an enterprise agreement with the host employer or participate in bargaining for such an agreement. This is despite the fact that client generally controls the work they perform, the conditions under which it is performed, and the location where it is performed;
- Labour Hire workers are often employed on a casual basis. It is not uncommon for them to work side by side with direct employees who perform the same work for superior pay and conditions;
- Labour hire workers cannot bring an unfair dismissal claim against the host employer, even where the host employer holds the power to decide whether the worker will continue their job at the host employer; and
- The general protections are an ineffective remedy if adverse action is taken against them by an employee of the host employer. The definition of adverse action is predicated on either a direct employer/employee or principal to independent contractor relationship, rather than labour hire agency worker to the host.[95]

Gig economy and the employment relationship

The common law test of an employment relationship is a multi-factorial. [96] The factors include: the right to control how the work is done, the extent of the worker's integration into the other party's business, methods of payment, who is responsible for providing essential tools or equipment, the worker's freedom to work for others and their ability to delegate or sub-contract tasks.

The case law has little consistency. The factors are not predictive, and it is not entirely clear which factors a judicial or quasi-judicial officer will regard as determinative. The indeterminacy of the multi factorial test, and fact that the conferral of rights under the Fair Work Act is dependent on an employment relationship has created an incentive for businesses, including those using so called "disruptive technologies", to characterise their workforce as independent contractors. The difficulties of applying the multi factor test to gig work arrangements are examined in some detail in our comments

[95] Fair Work Act 2009 at s 342.
[96] *Stevens v. Brodribb Sawmilling Company Pty Ltd* [1986] 160 CLR 16 (13 February 1986).

on Term of Reference (a) above, under the heading *'Gig Workers (workers hired through digital platforms to tasks on a piece work basis).*[97]

With the exception of the Fair Work Commission's decision in *Klooger v Foodora Australia Pty Ltd*,[98] no gig worker has, to this point, been found to be an employee in any Australian jurisdiction. The *Klooger* case was exceptional, because the worker in that case undertook supervisory duties for the employer. The approach of the Full Bench of the Fair Work Commission in *Gupta*[99] *is* typical*.* In *Gupta,* the Full Bench found some of the factors where characteristic of an employee, others were neutral. They found her capacity to control her working hours, the lack of exclusivity when performing work, and the fact that Ms Gupta was not required to wear a uniform or bear Uber logos on her vehicle as determinative. On that basis the Commission found Ms Gupta was not in an employment relationship. She was found to be an independent contractor.

Any regulation which is founded on first establishing that the worker is an employee according to the common law test will not successfully address precarious work because it can, relatively easily, be avoided. A more broad-based test to confer an entitlement to labour rights is necessary if we are serious about mitigating the effects of precarious work.

Proposed remedy: PCSBU and worker-based regulation.

Australia's work health and safety (WHS) laws provide a good example and demonstrate an effort to extend protection beyond the confines of the employment relationship.[100] The harmonised WHS Acts in most jurisdictions apply to any 'worker', defined broadly as anyone carrying out work in any capacity, who has been engaged by a 'person conducting a business or undertaking' (PCBU), or whose work is directed or influenced by a PCBU.[101] This approach could provide a model for labour law rights that avoids the arcane process of applying the multi factor test or determining whether the client in which a labour hire worker is engaged, or his direct employer, have the most "control" over their work.

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[97] See pp20-22 of this submission.
[98] [2018] FWC 6836.
[99] See above at note 63.
[100] Stewart and Stamford, 'Regulating work in the gig economy: What are the options?' *The Economic and Labour Relations Review* 2017, Vol. 28(3) pp.420–437.
[101] ibid.

The merits of conferring labour rights on a broader class are illustrated by the recent UK Supreme Court decision in *Uber BV v. Aslam*[102] which found, under the U.K.'s *National Minimum Rights Act 1998* that an Uber driver was entitled to rights under that Act because they came within the broader statutory definition of "worker".

The Act limits bargaining to the enterprise level

With few exceptions the only bargaining that occurs under the Fair Work Act is enterprise bargaining.[103] Concentration of bargaining at the 'single business' enterprise level encourages those employers who wish to escape any obligation to bargain collectively with well-represented employees to fragment their labour force by using employing labour through separate labour hire subsidiaries, independent labour hire outfits, or extensive subcontracting networks. The low paid bargaining provisions in the Fair Work Act ss 241-246 have been largely unsuccessful in providing access to collectively bargained outcomes for lowly paid workers.[104] This has consequences for the terms and conditions of precarious workers.

Although the Act permits multi-enterprise agreements in very limited circumstances, employees engaged in multi-enterprise agreements are not able to take 'protected industrial action' in support of their claims.[105] This means the capacity of franchisees or economically dependent businesses to bargain effectively is strictly limited and forces these businesses to compete with each other on labour costs. The locus of economic power and control lies with the head contractor. In a highly competitive environment, this puts a downward pressure on terms and conditions and exacerbates the tendency of businesses to engage labour on a precarious basis.

Proposed remedy: Industry and supply chain bargaining

[102] [2021] UKSC 5, handed down on 19 February 2021; The issue in question in that proceeding was whether an Uber driver was a "worker" for the purposes of the *National Minimum Wage Act 1998. A "*worker" is defined as "an individual who has entered into or works under a contract of employment or any other contract…whereby the individual undertakes to do…any work or services under a contract."
[103] s172 of the Fair Work Act.
[104] See F. Macdonald et al, 'Access to Collective Bargaining for Law Paid Workers' in S McCrystal et al (eds) *Collective Bargaining under the Fair Work Act* (Federation Press, 2018), 206, 225-227.
[105] See Fair Work Act ss 172(3), 413(2).

The downward economic pressure on sub-contractors in a supply chain could be ameliorated in a number of ways:

- The introduction of mandatory contractual tracking mechanisms which create liability and legal responsibility for fair working conditions throughout the supply chain; and/or
- The introduction of industry and supply chain bargaining whereby multi-employer agreements could regulate a supply chain.

Industry / sector bargaining

The Fair Work Act preserves a focus on single enterprise bargaining, with few exceptions. It both denies protection to industrial action undertaken in support of multi-employer bargaining and provides for the grant of an injunction to stop or prevent it.[106] The shift towards single enterprise bargaining began in Australia in the 1990s and to some extent, earlier. At that time, it was thought shifting bargaining to the single enterprise level would increase productivity by giving individual workplaces the incentive to find productivity-improving changes in return for wage premiums. Prior to the change, multi-enterprise agreements were possible and collective agreements were commonly extended to entire sectors or industries as awards, and award minimums set high general standards close to the mean.

Tseng and Wooden argue the evidence of productivity improvements due to the shift to enterprise bargaining is hard to find and, such that it does exist, is unconvincing.[107] As Joe Isaac has shown, since the shift to enterprise-bargaining, wage rises have fallen behind productivity increases.[108] The productivity-enhancing effects of high general standards were probably underappreciated at the time of the shift to single-enterprise-only bargaining. As Isaacs argues, industry bargaining "takes wages out of competition and forces the less efficient firms, rather than being subsidised by lower wages, to operate at greater efficiency in order to survive, thus raising productivity".[109]

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[106] B. Creighton and A. Stewart, *Labour Law* (5th ed, 2010), at para. 22.40.
[107] See Yi-Ping Tseng and Mark Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey* (Working Paper No 8/01, Melbourne Institute Working Paper No. 8/01, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, July 2001).
[108] Joe Isaac, 'Why Are Australian Wages Lagging and What Can Be Done About It?', *The Australian Economic Review*, Volume 1(52), June 2018, pp175-190, at p176.
[109] Joe Isaac, 'Why Are Australian Wages Lagging and What Can Be Done About It?', *The Australian Economic Review*, Volume 1(52), June 2018, pp175-190, at p182.

The shift to single-enterprise-only bargaining relegated awards to minimum (low) 'safety net' standards at the bottom and expanded inequality between mean and minimum incomes. It pulled the floor out from beneath workers, who increasingly had to bargain defensively to maintain the wages and conditions that they already had, lest they fall back to the lower award conditions. This process is unfolding dramatically today, with shrinking collective bargaining coverage, record low levels of agreement making and employer-led terminations of agreements, leaving workers to fall back to lower standards in 'safety net' awards. ***Arguably, the single-enterprise only bargaining system incentivises employers through market pressure, to engage in a race to the bottom on wages.***

The restrictions on multi-employer bargaining in the Fair Work Act are inconsistent with the Charter right to fairness and balance in industrial bargaining and international law. At international law, the level at which collective agreements are negotiated is to be determined by the parties to the negotiation".[110] As the ILO Committee states, "the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law..."[111] (See also Article 4, Convention No.98). Taking wages and basic conditions out of competition is supported by the notion that "labour is not a commodity", a foundational principle of the ILO.[112] and does much to de-commodify labour.

Industry bargaining has the potential not just to benefit workers but also employers. For workers and society, it means higher and better conditions and less inequality. For employers, industry bargaining means higher productivity and innovation and thus a comparative advantage against low wage cost competition from abroad. Industry-wide bargaining with the usual disincentives on striking during the life of agreements also allows for greater long-term industrial peace. Where broad, industry settlements are made to the satisfaction of both capital and labour, there is the potential to depoliticise industrial relations and provide for more long-term thinking and more stable conditions for investment.

Industry bargaining with broad collective agreement coverage and both strong unions and employer organisations would do much to solve the 'wack a mole' problem in regulating industrial relations. As the various examples in this submission show, regulatory bodies endlessly trail behind new ways to exploit loopholes, closing one loophole only to see another open up. This provides an

[110]Renee Burns and Keith Harvey, Collective Bargaining: Delivering for the Public Interest? The Ron McCallum Debate 2018 Discussion Paper, Australian Institute of Employment Rights, 2018, available at <https://www.aierights.com.au/wp-content/uploads/2018/10/Ron-McCallum-Debate-2018-discussion-paper.pdf>, p8.
[111] Ibid.
[112] See the 1944 Declaration of Philadelphia, incorporated in the ILO's constitution: ILO, *Constitution of the International Labour Organization* and *Standing Orders of the International Labour Conference* (26th Session).

unfair competitive disadvantage to firms doing the right thing and a persistent class of workers left behind by the industrial relations system. Industry bargaining would make it much harder for exploitative operators and business models based on low wages and regulatory arbitrage to enter and survive in the market. In countries where more centralised collective bargaining exists, the social partners have proved more responsive to developments in the labour market.

Casual employment is poorly regulated

The Fair Work Act and casual employment

We address some of the problems with the legal categorisation of casual employees in our Comments on Terms of Reference Section (a) above under the heading "Legal characterisation and protection of casual employment".[113]

Skene and Rossato[114]

The Act contains no statutory definition of casual employment. The foreseeable consequences of this deficiency reached its apogee in the Full Court of the Federal Court decisions in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (Rossato) and *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (Skene).

Skene and Rossato worked full time on a roster set twelve months in advance. Despite signing written contracts that designated them as "casual" and being paid the loading, the Court found that Skene and Rossato were ongoing employees entitled to accrued and untaken annual, personal, and compassionate leave entitlements under their relevant enterprise agreement. Leave to appeal has been granted to both these cases to the High Court. In the meantime, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020,* presently under consideration by a Senate Committee, has proposed a legislative solution. As noted above in Section (a) we submit the Bill's proposed solution will exacerbate the growth of casual employment.

[113] See pp13-14 of this submission.
[114] See also earlier discussion of these cases on pp13-14 of this submission.

Limited statutory rights of casual employees

The expression "*casual employee*" is used extensively in the Act but is not presently defined. Modern Awards contain banal circular reasoning in place of a definition. For example, clause 11.1 of the *General Retail Modern Award 2020* provides that: "A casual employee is an employee engaged as such". Casual workers are entitled to a casual loading, typically set at 25 percent, to compensate them for the nature of their employment and their ineligibility for the leave elements of the NES. [115] "Casual employment" is used in National Employment Standards (NES) provisions in Pt.2-2. In most cases, casual employees are excluded from the operation of the NES:

- s.65: not entitled to make a request under the section for flexible working arrangements unless the employee is a "*long term casual employee*";
- s.67(2): excluded from parental leave and related entitlements;
- s.86: excluded from paid annual leave;
- s.95: excluded from paid personal/carer's leave;
- s.106: excluded from payment for compassionate leave;
- s.111(1)(b): excluded from payment for an absence from work because of jury service;
- s.116: if not rostered to work on a public holiday, they are not entitled to payment for the holiday under s.116; and
- s.123: casual employees are excluded from the entitlement to notice of termination or payment in lieu and redundancy pay.

Casual employees are entitled to some NES benefits:

- s.65: a long-term casual employee is entitled to make a request for flexible working arrangements;
- s.67(2): casual employees are entitled to unpaid pre-adoption leave entitlement in s.85 and the unpaid no safe job leave entitlement in s.82A;
- s.67(2): a long-term casual employee is entitled to unpaid parental leave and associated entitlements; and

[115] [2017] FWCFB 3541 Full Bench decision on the 4-yearly review of modern awards – casual and part time employment at para [71].

- s.114: the entitlement to be absent from work on a public holiday, and the associated right to refuse a request to work on a public holiday if the request is unreasonable or the refusal is reasonable, apply to casual employees (as s.114(3)(e) makes clear).

Under ss534(1) and 789(1), Casual employees are also excluded from the notification and consultation requirements relating to certain terminations of employment. They are also effectively excluded from the unfair dismissal regime except where the employment of the casual employee was "*on a regular and systematic basis*" and during the period of service as a casual employee the employee "*had a reasonable expectation of continuing employment by the employer on a regular and systematic basis*".

The 4-yearly review of modern awards[116] introduced a right to request conversion to full time employment after a qualifying period of twelve months where they could continue working a pattern of hours as a full or part time employee. The grounds for refusal included "reasonable grounds based on fact which are known or reasonably foreseeable".

An elaboration on the effect of the proposed Fair Work Amendment (Supporting Australia's jobs and Economic Recovery) Bill 2010 are addressed in our response to Term of Reference (a).[117]

Proposed Remedy – a statutory definition of casual employment, gradual accrual of NES rights for casual workers, a more robust right of conversion

Research suggests that many casual workers do not receive the full 25 percent loading and, in many cases, the 25 percent does not adequately compensate the workers for their forgone rights[118] . The regulation of casual work in Australia needs reform. The Fair Work Act 2009 should be amended to:

- include a statutory definition of casual employment so that informality, uncertainty and irregularity of engagement determine both the character and use of casual employment.

[116] ibid.
[117] see this submission at pp17-18.
[118] see ACTU, *The Myth of the casual wage premium* (2018), available at <https://www.actu.org.au/media/1034177/a4_ctr_casual-loading.pdf>.

- A gradual deeming mechanism should be developed so that casual employees accrue rights and entitlements to the NES[119];
- A more robust right to conversion to full time be developed in which the right of refusal can be subjected to arbitral review.

Enforcement and recovery

The recent reports and prosecutions for "wage theft" suggest that underpayments of wages and entitlements are at staggering levels. A 2019 KPMG report put the annual figure for wage theft at more than $1.35 billion and estimated as much as 13 percent of the total workforce has been affected – more than a million people.[120]

The consequences of ineffective enforcement and recovery mechanisms for precarious workers have been made clear in examples of wage theft from workers in industries with some of the most precarious working conditions: 7-Eleven workers, school cleaners, temporary migrant workers (including those completing farm work for a second working-holiday visa) and hospitality workers.

The scale of this problem is illustrated by two examples. First, the National Temporary Migrant Worker Survey conducted in 2017 found that almost 30% of the 4,322 temporary visa holders surveyed earned $12 or less per hour (far below the $22.13 that was then the legal minimum wage for a casual worker under most industry Awards.[121] Second, during its Harvest Trial Inquiry into conditions in the horticulture and viticulture industries in Australia, the Fair Work Ombudsman directly investigated 444 growers and 194 labour hire contractors Australia-wide. The Inquiry recovered more than $1m for 2503 workers who were underpaid but concluded that: "As Fair Work Inspectors were unable to assess and determine the full extent of underpayments in many cases due to issues such as poor record-keeping, cash payments and a transient workforce, the FWO believes the full extent of worker underpayments is significantly higher than this."[122] These examples provide evidence the

[119] Rawling Michael, 'Regulating Precarious Work in Australia: A Preliminary Assessment', (2015) 40 *Alternative Law Journal* 252.
[120] Lachlan Williams, '*Like torture': Australia's wage theft epidemic runs deeper than recent headlines*', *New Daily*, 21 February 2020, available at <https://thenewdaily.com.au/finance/work/2020/02/21/wage-theft-analysis/>.
[121] Berg, L., and Farbenblum B. 2017. *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey.* Available at <https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5a11ff31ec212df525ad231d/1511128887089/Wage+theft+in+Australia+Report_final_web.pdf>.
[122] Fair Work Ombudsman, *Harvest Trail Inquiry* (2013), Sydney, p4.

current system of detection, recovery and enforcement need reform. Access to justice for vulnerable and precarious workers is an important piece in any reform designed to enhance their rights.

Court based systems of recovery and enforcement alone will not provide effective enforcement of labour rights for low paid precarious workers who can be dismissed on short notice. These should be supplemented by:

- Low cost, “do it yourself” and procedurally simple processes in the Federal Circuit and State Magistrates Courts;
- Mandatory access to the Fair Work Commission to conciliate underpayment proceedings;
- The availability and distribution of legal assistance funding for precarious workers who have been the victim of wage theft;
- Incentives for private practices to perform pro bono in this area;
- Assistance provided for self-represented applicants; and
- Capacity for union officers/employees to represent these workers without the requirement to seek leave.

Accident compensation schemes, payroll, federal and state and territory taxes (TOR (f))

In light of the Charter right to a ‘Safe and Healthy Workplace’, we comment here on the availability of adequate accident compensation schemes in Australia, for those workers who fall outside of state-based workers’ compensation schemes.

Access to adequate protection from workplace injury or illness is a particular concern for those categories of precarious workers who are not presently covered by state-based workers’ compensation schemes. During the course of 2020 we saw an alarming number of on demand food delivery cyclists killed on our roads, and many people were shocked to learn that these workers do not presently enjoy the coverage of workers’ compensation schemes, notwithstanding that all state schemes cover a broader group of workers than just ‘employees’ according to the common law definition. Unfortunately, it appears that although all state schemes cover a range of workers who fall outside of the common law definition of employment, none of the workers’ compensation schemes

has a sufficiently broad extended definition of 'deemed' or 'presumed' worker to cover on demand workers.[123]

By way of illustration, the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Section 5 and Schedule 1 deems certain persons to be workers. Two clauses in this Schedule are relevant to digitally mediated work. Clause 2 – Other contractors – provides that a contractor is a worker for the purpose of workers' compensation coverage if the contractor performs work worth more than $10, and is not performing that work as part of any trade or business regularly carried on by the contractor in their own name, or does not subcontract the work or hire their own employees to perform the work. On its face, this provision could cover the typical rideshare or food delivery cyclist, except that it has regularly been interpreted in the light of the same common law multi factor test that distinguishes an employee working under a contract of service from a genuine independent contractor.

A regularly cited case concerning the contractor provision in the NSW legislation, *Malivanek v Ring Group Pty Ltd* ('*Malivanek*')[124] sets out a range of factors determining whether a worker is the kind of contractor covered by Clause 2. Among these factors are the provision of tangible assets for undertaking the work. On demand drivers and cyclists provide their own vehicles, mobile phones and data plans in order to undertake the work, so this factor tends towards excluding them from coverage. In *McLean v Shoalhaven City Council* [125]it was held that a contract driver who performed delivery work for a local council was not a deemed worker under this provision, because his contract was for the hire of a truck with a driver. The characterization of a contract (for a truck with a driver, rather than for a driver with a truck) can be arbitrary and manipulable. It would be preferable to stipulate with certainty that ride share and food delivery drivers were deemed workers, without relying on the present contractor clause.

Another example of the inadequacy of the NSW legislation is reflected in the treatment of taxi-drivers, as opposed to hire car drivers who own or lease their own vehicles, Clause 10 of Schedule 1 provides that drivers of hire vehicles or vessels under contracts of bailment (such as taxi drivers) are deemed workers. This provision does not include drivers who own or lease their own vehicles, so this

[123] For the various state Acts governing workers' compensation, see Workers' Compensation Act 1987 (NSW) and Workplace Injury Management and Workers' Compensation Act 1998 (NSW); Workers Compensation Act 1958 (Vic) and Workplace Injury Rehabilitation and Compensation Act 2013 (Vic); Return to Work Act 2014 (SA); Workers' Compensation and Rehabilitation Act 2003 (Qld); Workers' Compensation and Injury Management Act 1981 (WA); Workers Rehabilitation and Compensation Act 1988 (Tas).
[124] [2014] NSWWCCPD 4, [235]-[243].
[125] [2015] NSWWCC 186.

provision, as it presently stands, would not cover on demand drivers who own their own vehicles, even though the work they perform is the same as the work undertaken by taxi drivers.

The lack of adequate workers' compensation coverage is an urgent problem. Reports of workers killed or injured in the course of this kind of delivery work are alarmingly frequent. In September 2020 two young men, Dede Fredy and Xiaojun Chen, were killed doing this kind of work (Nick Bonyhady and Tom Rabe 'Rider deaths reveal risky safety practices' *Sydney Morning Herald*, 3-4 October 2020, 24). In November three more cyclists were killed while making deliveries. It is clear that without legislative insistence, the platforms themselves will seek to avoid participation in statutory workers' compensation schemes. The contract terms that riders for the food delivery service called 'Hungry Panda' are required to sign, (noted above in Section (a) under 'Gig Workers') demonstrate the lengths that the platforms will go to in order to avoid liability for paying premiums and meeting obligations under workers' compensation schemes, (in this case the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) section 3(b) and Schedule 1, Clause 8). It appears that some food delivery platforms are responding to the public outcry about deaths on the road by proposing mandatory 'sickness and accident' insurance policies for workers, funded by the workers themselves or from a specific levy on deliveries. The work undertaken by these workers is paid at very low rates, so it is unreasonable to expect that the workers themselves will take out appropriate insurance coverage. Group insurance managed through the platforms engaging them is an economically efficient solution, and there is no reason that the platforms ought not to participate in general workers' compensation schemes to provide this kind of coverage.

Although workers' compensation schemes are presently State-based, we would encourage the federal government to seek to influence the adoption of measures to ensure that all vulnerable workers are covered by workers' compensation schemes, by promoting a harmonised approach, in the same way as the model Work Health and Safety legislation was developed.

The interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy (TOR (G))

As large economic actors in the economy, the State and Federal Governments have a significant role in affecting working conditions and market standards directly through their employment arrangements and means of engagement of their own workforces. They can also have a role in setting labour standards indirectly through their role as large buyers of goods and services.

The state and federal public services are in fact the largest employers in Australia, employing almost 2 million people combined, some 18% of the workforce.[126] The Federal, NSW and Victorian and Queensland State Governments are the three largest individual employers in the country, with the NSW State Government employing approximately 485,000 people, the Victorian Government employing 381,200 and Queensland 341,600. The Federal Government employs 242,000.[127] By comparison, the three largest private employers are Woolworths (215,000 employees), Coles (118,000 employees) and Wesfarmers (105,000 employees).[128]

These numbers, however, understate the true size of government workforces. Governments at all levels have been increasingly contracting out work via triangular labour hire agency arrangements that do not show up in employee counts. For example, Freedom of Information documents obtained by the ABC reveal the Australian Defence Force, which nominally employs some 17,400 public servants, engages almost twice as many people – a further 28,600 personnel – as private contractors via labour hire arrangements. The ABC investigation estimated Federal spending on private labour arrangements to have reached $5Billion per annum and that not even the Finance Department knows the full extent of the practice.[129]

The ABC investigation notes these 'private servants' sit along public servants doing the same jobs with the same titles but as casual employees, sometimes for years. The extensive use of labour hire reduces the number of secure jobs in the public service as a whole. The investigation found that the practice also raises issues of transparency, nepotism, service quality and issues preserving meritocratic advancement within the public service, with reports of nepotism and cronyism. The report also raises concerns the practice may be illegal, outside the limits of the Commonwealth Public Service Act and the constitution.

The Community and Public Sector Union's submission to the Senate Select Committee on the Future of Work and Workers states that the union observes Federal Government agencies to be routinely overlooking the restrictions in the Public Service Act on the use of irregular and intermittent workers and that there is a growing use of casual and fixed-term employment arrangements via direct

[126] ABS 6291.0.55.001, Labour Force, Australia as at June 2020: ABS - 2019-20 Employment and Earnings, Public Sector, Australia, 2019-20.
[127] ABS, *Employment and Earnings*, Public Sector, Australia, 2019-20 Financial Year, released 12 November 2020.
[128] See Annual Reports FY 2020 for Coles, p13, and Woolworths, p2, and FY 2019 Wesfarmers, p15; See also Forbes Magazine, *Global 500*, 2019 < https://fortune.com/global500/2019/>, accessed March 2021.
[129] Markus Mannheim, 'Federal Government spending $5 billion per year on contractors as gig economy grows inside public service', *ABC News*, 9 September 2020.

employment. The union notes 9.8 percent of the APS were then non-ongoing, up from 7.4 percent in 2007.[130]

Government at all levels should instead prefer direct employment and eliminate the use of labour hire, including for temporary assignments. It should revisit restrictive caps on direct staffing levels that incentivise the use of labour hire and instead place caps on spending on consultants and outsourcing.

A further way that government can promote job security via its economic power is as a major purchaser of goods and services in the economy. Procurement guidelines that preference suppliers with good labour standards will promote more secure market standards. In 2017, for example, the Victorian Government introduced a new supplier code of conduct to promote ethical, sustainable and socially responsible procurement.[131] Unfortunately, the Federal Government has not yet followed suit and the Victorian Code, whilst referencing compliance with labour and human rights standards, unfortunately does not preference secure employment arrangements. Hence, procurement decisions are not yet incentivised in this way. With the omission, government is incentivising insecure arrangements by promoting a race to the bottom between suppliers to compete on low labour costs.

Conclusion

In view of our observations in the sections above, we make the following recommendations to the Committee:

Recommendation 1 – expand basic employment rights to all workers

Any legal system that only confers labour rights on workers in an employment relationship will not effectively deal with the problem of precarious work. Hence, a broader class must be entitled to labour rights. The operation of the WHS Act ,which applies to workers engaged by a person conducting a business or undertaking, for example, provides an example of a broader class for this purpose.

The AIER recommends that all workers who provide services to businesses other than their own genuinely owner-operated business should enjoy statutory protection of certain essential entitlements, set out in the Charter. These include:

[130] Available at <https://www.aph.gov.au/DocumentStore.ashx?id=2b084af0-61d0-46cc-9f3d-260033a57cf7&subId=564120>.
[131] See Victorian Government Supplier Code of Conduct Fact Sheet, accessed March 2021.

- Decent pay and conditions of work;
- Safe and healthy working conditions;
- Collective bargaining rights;
- Entitlements to be consulted on matters affecting work;
- Protection from capricious termination of work contracts;
- Access to rehabilitation services, compensation, and return to work rights in cases of workplace illness or accidents; and
- Access to effective and affordable dispute resolution.

These essential entitlements should not be dependent upon a finding that the worker is an employee according to the present common law 'multifactorial' test.

Responsibility for ensuring respect for these rights should lie with all persons conducting businesses or undertakings, and not only those entities in a direct contractual relationship with the worker. Host employers of labour hire workers in particular should share responsibility for ensuring respect for the entitlements of labour hire workers.

Recommendation 2 – remove hurdles to bargaining beyond the single enterprise

Single enterprise bargaining has failed precarious workers. It is more likely the terms and conditions of precarious workers would be improved should the system facilitate bargaining beyond the single enterprise, consistent with our international obligations. Hence, the AIER recommends removing all hurdles in the Fair Work Act regime to bargaining beyond the single enterprise.

Recommendation 3 – reform casual employment

A new regime is required for the regulation of casual work including:

- a statutory definition of casual employment so that informality, uncertainty and irregularity of engagement determine both the character and use of casual employment.
- A gradual deeming mechanism should be developed so that casual employees accrue rights and entitlements to the NES;

- A more robust right to conversion to full time be developed in which the right of refusal can be subjected to arbitral review.

Recommendation 4 – supplement court-based recovery and enforcement

Court based systems of recovery and enforcement alone will not provide effective enforcement of labour rights for low paid precarious workers who can be dismissed on short notice. These should be supplemented by:

- Low cost, "do it yourself" and procedurally simple processes in the Federal Circuit and State Magistrates Courts;
- Mandatory access to the Fair Work Commission to conciliate underpayment proceedings;
- The availability and distribution of legal assistance funding for precarious workers who have been the victim of wage theft;
- Incentives for private practices to perform pro bono in this area;
- Assistance provided for self-represented applicants; and
- Capacity for union officers/employees to represent these workers without the requirement to seek leave.

Recommendation 5 – Inquire into the impact of immigration policies on employment and working conditions

Unlike many other countries around the world, Australia has a long-standing and firm commitment to equality of treatment and non-discrimination between citizens and non-citizens with respect to labour rights and entitlements. This commitment reflects the fundamental principles established by the ILO in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) as well as the reality that differential treatment has negative consequences for the employment standards across the entire workforce. Although the Fair Work Act, the powers of the Fair Work Ombudsman, and related worker protection legislation applies to all workers in Australia, aspects of Australian immigration policy undermine the practical realisation of equality of treatment between workers. Conditions placed on work rights attached to different temporary visa categories play a direct role in creating and perpetuating the precarious and insecure employment experiences of large numbers of non-citizen workers. ***The AIER calls on the Senate Select Committee on Job Security or a newly formed Committee to hold an inquiry into the impact of immigration policies on employment and***

working conditions across the Australian economy with a view to instigating a process of immigration policy reform to address these impacts.

Recommendation 6 – avoid insecure and precarious work in government's direct and indirect workforces and supply chains

The AIER calls on the Committee to recommend that Australian Governments at all levels revise their employment and procurement policies to promote secure, decent work in their direct and indirect workforces and supply chains, for example, by minimising outsourcing and the use of temporary work arrangements and suppliers with labour standards lower than their own.

A New Workplace Relations Architecture

Finally, we note that the AIER anticipates undertaking an extensive project in coming months to propose a new architecture for Australia's legal regulation of working relationships, to ensure that all workers dependent upon a job for their livelihood can expect to enjoy these entitlements, and all enterprises benefiting from the exploitation of others' labour are held to these standards.

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Australian Institute of Employment Rights

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