



Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards

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This article highlights opportunities to amend the National Employment Standards (NES) in order to meet the new Fair Work Act 2009 (Cth) objective of promoting secure work. We set the scene by summarising the concept of insecure work, its link to weaknesses in labour regulation, and the scope and peculiarities of insecure work in Australia. We argue that statutory regulation for minimum labour standards in the NES provides a good platform for innovative policy proposals. We detail two proposals that can supplement the ideas currently in circulation and make useful contributions to addressing the important problem of insecure work in Australia. Our first proposal applies to the difficult but pressing challenge of casual work and its inferior rights and entitlements. We propose extending rights to paid personal and annual leave to casual employees. Our second proposal is more encompassing. We propose replacing current employer obligations under the NES to provide generic 'information statements' to new employees with a new obligation, modelled on requirements in most other industrialised societies, to provide a written 'statement of terms and conditions', tailored to the employment relationship between an employer and a particular employee.

Insecure work — understood as work that concentrates multiple forms of labour insecurity — has increased as a result of fragmented labour markets, and it is now widely acknowledged as a significant problem in Australia as in other comparable societies.¹ The impact of insecure work is felt most intensely by insecure workers and their households. At the same time however, negative consequences spread more widely to workers in more secure employment, who may feel the chill of unfair competition; individual businesses, which may be pressured to follow a 'low road' in their employment relations; and society as a whole, which is obliged to deal with the direct and indirect effects of worsening social and economic inequality and reduced fairness. The societal impacts of insecure work were highlighted during the COVID-19

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¹ A Kalleberg, *Precarious Lives: Job Insecurity and Well-Being in Rich Democracies*, Polity Press, Cambridge, 2018. Useful discussion for Australia can be found in B Howe, J Biddington and S Charlesworth, *Lives on Hold: Unlocking the Potential of Australia's Workforce*, Australian Council of Trade Unions, Melbourne, 16 May 2012; T Carney and J Stanford, *The Dimensions of Insecure Work: A Factbook*, The Australia Institute, Canberra, 2018; see also Senate Select Committee on Job Security, *The Job Insecurity Report*, Australian Government, Canberra, 2022 (*The Job Insecurity Report*). For the purpose of this article, we understand insecure workers as those workers who are currently in insecure work.

pandemic, when forms of insecure work, usually undertaken by vulnerable workers with limited access to sick leave and social security, acted as a major vector for transmission of the virus.²

Governments of all political complexions have sought to respond to insecure work. Most recently, the federal Labor government came to office in 2022 with an explicit commitment to delivering more secure work through changes to the national system of labour regulation.³ As initial steps to this end, a new object to ‘promote secure work’ was added into the Fair Work Act 2009 (Cth) (FW Act), which the Fair Work Commission (FWC) must consider in exercising its functions under the FW Act. Amendments were also made to the modern award objectives, which now require the FWC to consider ‘the need to improve access to secure work across the economy’ as one of two additional criteria it must take into account in ensuring that modern awards and the National Employment Standards (NES) provide a fair and relevant minimum safety net of terms and conditions.⁴ At the time of submitting the manuscript in July 2023, the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) had not yet been presented to the Parliament, but it was clear that further substantive initiatives to address insecure work, in accordance with Labor commitments, were due to unfold during the government’s first term in office.

This article contributes to the discussion by looking more closely at the challenge of promoting secure work for the national system employees covered by FW Act.⁵ It highlights opportunities to supplement the latest initiatives, focusing on the 11 NES, which constitute a central plank of minimum labour standards at the national level. The first section sets the scene by summarising the concept of insecure work, the link to weaknesses in labour regulation, and the scope and peculiarities of insecure work in Australia. The second section argues that statutory regulation for minimum labour standards is the most appropriate regulatory level for reform initiatives to promote secure work and that the NES are a particularly important platform for innovative proposals. Though long neglected, the NES were significantly amended in the last term of the previous federal Coalition government (2013–22) and are now the locus for several proposals for further change under the Labor government. The third section presents further detail on two

2 A Stewart, ‘COVID-19 and the Future of Labour Research, Policy and Regulation’ (2022) 32 *Labour and Industry* 10; J Stanford, *Shock Troops of the Pandemic: Casual and Insecure Work in COVID and Beyond*, Briefing Paper, Centre for Future Work, Sydney, 2021.

3 Anthony Albanese (2021 *Labor’s Secure Australian Jobs Plan*, Media Statement, at <<https://anthonyalbanese.com.au/labors-secure-australian-jobs-plan>> (accessed 29 November 2023).

4 The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (SJBPA) amends the object of the Fair Work Act 2009 (Cth) (FW Act) in s 3(a) to include: promoting secure work and gender equality. Both criteria are added in more detail to the Modern Award Objective in s 134(1)(aa): ‘the need to improve access to secure work across the economy’ and in s 134(1)(ab) ‘the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation’.

5 The national system covers around 85% of all employees in Australia (or just over 70% of all employed persons) — Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, Productivity Commission, Canberra, 2005, vol 1, at 78.

234 (2023) 36 Australian Journal of Labour Law

proposals, which we argue would make a substantial contribution to addressing insecure work. Our first proposal applies to the difficult challenge of casual work and what is a key dimension of insecure work viz inferior rights and entitlements. It concerns extending rights to paid personal and annual leave to casual employees. Our second proposal is more encompassing, and arguably foundational to the exercise of existing rights and entitlements since it concerns employee access to information about their employment relations. It suggests replacing current employer obligations under the NES to provide generic 'information statements' to new employees with a new obligation, modelled on requirements in many other industrialised societies, to provide a written 'statement of terms and conditions', tailored to the employment relationship between an employer and a particular employee.

I Insecure Work

Insecure work is the term favoured in public debate in Australia, but 'precarious work' or even 'bad jobs' and 'unacceptable forms of work' are familiar synonyms both here and in other nations.⁶ Whatever the label, most scholars who use the concept insist it should be *multi-dimensional*. Labour insecurity is not just a risk of losing a job (and perhaps a risk of having difficulty finding another); it also concerns forms of insecurity *within a job*. Two forms of labour insecurity sit at the heart of current labour market changes in many societies and are integral to the concept of insecure work: hours insecurity and earnings insecurity. Hours insecurity is a multi-faceted phenomenon, but it is summarily defined in an International Labour Organisation (ILO) Report as 'too few hours, too many hours, or hours that are constantly changing'.⁷ Earnings insecurity is partly to do with low rates of remuneration, but it also overlaps with the important issue of working hours when intermittency or fluctuating hours of paid work leads to irregularity of income.⁸ In addition, we note the insecurity linked to inferior rights and entitlements, which function both as an independent source of insecurity and as a pathway for the emergence of other disadvantages.

The 2012 Report of the Independent Inquiry into Insecure Work chaired by Brian Howe usefully underlines the multi-dimensional nature of the concept of insecure work. It states, insecure work is

poor quality work that provides workers with little economic security and little control over their working lives ... Indicators of insecure work include: (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

6 Precarious work is the most common synonym: See I Campbell and J Burgess, 'Patchy Progress? Two Decades of Research into Precariousness and Precarious Work in Australia' (2018) 28 *Labour and Industry* 48.

7 International Labour Organization, *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects*, 16 November 2016, Report, Geneva, 2016, at 19.

8 Earnings insecurity is defined as 'earnings that are so low that they do not provide a minimum wage or from uncertainty with respect to future earnings if, for example, work is uncertain': *ibid.* For a list of multiple forms of labour insecurity drawing on the work of Guy Standing, see at 19–20.

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.⁹

Australia is by no means the only or the worst national example of insecure work, and the extent to which it is growing as a problem in Australia is disputed.¹⁰ Nevertheless, irrespective of the details of cross-national comparisons and trends, most scholars agree that insecure work is indeed a significant problem in Australia that demands a policy response.

Insecure work represents a breach in societal expectations of a decent job. As such, it is linked to what can be regarded as weaknesses in the labour regulation system. Scholars identify the two main regulatory weaknesses as: a) poor enforcement of existing minimum standards; and b) the presence of ‘protective gaps’ in regulation.¹¹ Poor enforcement has become a familiar field for research in Australia, as evidence of widespread employer non-compliance, especially in relation to wages, accumulates across a broad range of industries.¹² Protective gaps are a less familiar topic in Australia, but they are increasingly researched internationally.¹³ Protective gaps can be new, arising out of a failure of labour regulation to keep up to date with new labour

⁹ Cited in Senate Select Committee on Job Security, *The Job Insecurity Report*, above n 1, at 1.

¹⁰ Because the basic concept of insecure work is multi-dimensional, calculating extent and trends is difficult. Some efforts rely on proxies such as estimates of non-standard workers: Carney and Stanford, above n 1; I Laß and M Wooden, ‘Trends in the Prevalence of Non-Standard Employment in Australia’ (2020) 62 *JIR* 3; M Wooden ‘Insecure Employment: Do we Really have a Crisis?’, in P Dawkins and A Payne (Eds), *Melbourne Institute Compendium 2022: Economic and Social Policy Towards Evidence-Based Policy Solutions*, University of Melbourne, Melbourne, at pp 46–59. Such efforts are useful as a starting point, but they clearly need to be extended, ideally via specially designed surveys, to take into account the presence and severity of particular labour insecurities. The latter cannot of course simply be read off from the particular types of employment. For a useful discussion of measurement issues See W Lewchuk, ‘Precarious Jobs: Where are they, and How do they Affect Well-Being?’ (2017) 28 *ELRR* 402.

¹¹ L Vosko and the Closing the Enforcement Gap Research Group (Eds), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs*, University of Toronto Press, Toronto, 2020. The concept of protective gaps is developed in D Grimshaw et al, *Reducing Precarious Work: Protective Gaps and the Role of Social Dialogue in Europe*, Research Paper, European Work and Employment Research Centre, University of Manchester, November 2016; see also J Rubery et al, ‘Challenges and Contradictions in the “Normalising” of Precarious Work’ (2018) 32 *Work, Employment and Society* 509. We focus here on just one of the four types of ‘protective gap’ distinguished by Grimshaw et al — the gap in ‘employment rights’. We treat poor enforcement as a regulatory weakness rather than a gap, and we set aside the gaps in relation to social protection and representation.

¹² T Hardy and J Howe, ‘Out of the Shadows and into the Spotlight: The Sweeping Evolution of Employment Standards Enforcement in Australia’, in L Vosko and the Closing the Enforcement Gap Research Group (Eds), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs*, University of Toronto Press, Toronto, 2020, pp 221–41; D Peetz, ‘Administrative Reform and the Institutional Framework’, in J Fleming (Ed), *A New Work Relations Architecture*, Hardie Grant Books, Richmond, 2022, pp 32–51.

¹³ Alternative terms include ‘loopholes’, ‘grey zones’, ‘exit options’ and ‘legal segmentation’. The concept of loophole is acquiring currency in Australia, as indicated in the title of the government’s latest legislation. See also ACTU, *Closing the Loopholes: Casual Work*, ACTU Research Note, May 2023, at <<https://www.actu.org.au/media/1450337/actu-research-note-casual-work-loopholes-may-23.pdf>> (accessed 21 June 2023).

market developments, such as platform work, temporary agency work (labour hire) and even regular part-time schedules,¹⁴ or they can be gaps inherited from the past, which have been either preserved or widened in the course of past efforts at deregulation or liberalisation.¹⁵ Irrespective of origins, the common effect of such gaps is to define a regulatory space within which wages and working conditions for a minority of workers fall below accepted standards.

Just as the problem of insecure work is connected to labour regulation so too is the solution. In response to regulatory weaknesses, it can be argued that policy reform should aim to strengthen protective labour regulation. One point that deserves special attention concerns the connection of insecurity to types of employment. Labour insecurities are present and may be spreading within what is called standard employment, that is full-time, ongoing waged work. But insecurities tend to be multiple and severe in certain *non-standard* types of employment, which are often characterised by a deficit of rights and entitlements that is embedded in labour regulation. In Australia, non-standard types of employment such as casual employment, bogus self-employment, ‘gig work’, labour hire, fixed-term work and even parts of permanent part-time work are frequently cited as significant sites for protective gaps, poor enforcement and increasing labour insecurity for workers.¹⁶

Amongst the varied forms of non-standard employment found in Australia, the most prominent category of insecure work is *casual employment*. It presents a pressing but difficult challenge for policy-makers as a result of four factors.

First is the fact that the category of casual employment is a peculiarity that has lengthy roots in the distinctive history of labour regulation in Australia.¹⁷ From the point of view of protective gaps, casual work represents a surprisingly wide hole inherited from the distant past. Casual workers have a basic entitlement to a minimum wage rate, with a casual loading, for each hour of labour provided for an employer, but in contrast to permanent workers, they

14 A Stewart and J Stanford, ‘Regulating Work in the Gig Economy: What are the Options?’ (2017) 28 *ELRR* 420; C Fagan et al, *In Search of Good Quality Part-time Employment*, Conditions of Work and Employment Series No 43, Conditions of Work and Employment Branch, Geneva, ILO, 2014.

15 Liberalisation is discussed in L Baccaro and C Howell, *Trajectories of Neoliberal Transformation: European Industrial Relations Since the 1970s*, Cambridge, Cambridge University Press, 2017. A key question, not considered here, concerns how protective gaps are used by employers. A stimulating analysis, couched in terms of ‘regulatory arbitrage’, of major supermarket chains in Australia is C Arup, ‘Labour Law Liberalisation and Regulatory Arbitrage’ (2020) 33 *Australian Journal of Labour Law* 183.

16 Non-standard work is not always insecure, but it offers a fertile framework for the spread of labour insecurities. See Carney and Stanford, above n 1. Casual employment, permanent part-time employment and bogus self-employment are discussed in I Campbell, F Macdonald and S Charlesworth, ‘On-Demand Work in Australia’, in M O’Sullivan et al (Eds), *Zero Hours and On-call Work in Anglo-Saxon Countries*, Springer, Berlin, 2019, pp 67–90.

17 A O’Donnell, *Inventing Unemployment: Regulating Joblessness in Twentieth-Century Australia*, Hart, Bloomsbury, 2019, pp 17–18, 112–14.

possess few additional entitlements.¹⁸ As permanent employees have slowly acquired rights and entitlements including forms of paid leave such as annual leave and sick leave, casual employees have experienced a substantial and growing deficit, with little attention from policy makers. The distinctiveness of the category inhibits opportunities for policy makers to benefit from best practice in other countries and places a premium on the need in Australia for careful analysis and policy innovation.

Second is the fact that labour insecurities for casual workers can be multi-faceted and severe. The category of casual includes diverse work arrangements, but the evidence suggests that problems of employment, hours and income insecurity are pervasive in most forms. Labour insecurities, furthermore, are not only complex but can also be severe.¹⁹ These features indicate that casual work is a pressing problem, but they create difficulties for policy makers in knowing where (short of wholesale abolition) reform should start.

Third is the fact that casual employment is the largest category of non-standard employment in Australia. Australian Bureau of Statistics (ABS) data suggest that casual employees (in their main job) amount to 2.7 million people and account for around one-fifth of the total employed workforce (or 23.5% of all employees).²⁰ In addition, many second or third jobs taken up through multiple job holding would also be casual.²¹ As well as the longevity of the category of casual employment, its size suggests that it has become central to the operations of many businesses and it may have become normalised in the minds of many employers, employees and policy makers. Added to the issue of size is the fact that casual work stands at the intersection of several other labour market problems to do with labour insecurity. For example, casual work is implicated in the discussion of labour hire, since the majority of all labour hire workers are classified as casual.²² Perhaps the biggest point of intersection is in relation to employer non-compliance. Somewhat paradoxically, given that casual employees possess few entitlements other than the entitlement to an hourly wage (with casual

18 Apart from the entitlement to an hourly wage, additional regulatory protections are summarised in Campbell, Macdonald and Charlesworth, above n 16, at pp 71–4. Recent accounts of casual work can be found in I Laß and M Wooden, ‘The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data’ (2019) 57 *BJIR* 453 (The Structure of the Wage Gap for Temporary Workers); R Markey and J McIvor, ‘Regulating Casual Employment in Australia’ (2018) 60 *JIR* 593; D Peetz and R May, ‘Casual Truths: What do the Data on Casual Employment Really Mean?’ (2022) 64 *JIR* 734, at 734–58.

19 I Campbell, ‘On-Call and Related Forms of Casual Work in New Zealand and Australia’, Conditions of Work and Employment Series No 102, Geneva, ILO, 2018 (On-Call and Related Forms of Casual Work in New Zealand and Australia).

20 Australian Bureau of Statistics (ABS), *Characteristics of Employment, Australia, August 2022*, Canberra, August 2022. ABS data use the absence of paid annual leave and paid sick leave entitlements (in the main job) as a convenient measure of casual workers.

21 ABS data suggest that 46.5% of all second jobs are casual, while 42% involve participation in small businesses and only one in 10 entail status as permanent or fixed-term waged work: ‘People with More than One Job’, in ABS, *Australian Social Trends, Sep 2009*, Cat No 4102.0, September 2009.

22 ABS, *Labour hire workers*, June 2023, at <<https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/latest-release>> (accessed 22 June 2023).

loading), many casual employees experience ‘wage theft’, that is, underpayment or non-payment of wages, starting with the omission of the casual loading and extending to numerous other forms of underpayment.²³ Wage theft is consistently reported in highly casualised industries such as hospitality, retail and cleaning, and it seems likely that a disproportionate number of those who suffer wage theft are casual employees.²⁴ These considerations reinforce the need for regulatory reform of casual work, but they imply that reform will be a substantial task, likely to impact on many parts of the economy and likely to spark uncertainty and opposition.

Fourth is the fact that the regulatory situation of casual work has become particularly tangled in recent years. For much of the history of labour regulation in Australia, the basic scope of the concept of a casual employee remained elusive. Most regulation lacked definitions, simply stating that casual employees were employees that were ‘engaged and paid as such’.²⁵ Poor regulation created substantial room for casual workers to be used for extended periods in similar ways to permanent workers, for example, with full-time regular rosters, sometimes determined months in advance. These are described as ‘permanent casuals’, but perhaps they are more accurately characterised as the ‘permanently insecure’.²⁶ Their classification as casuals, which seems at odds with common law understandings of casual as ‘informal, irregular and uncertain’, eventually prompted two key Full Court of the Federal Court decisions that determined that certain ‘regular’ casuals in mining had been misclassified and that they were therefore entitled to the rights and entitlements of permanent employees under the statutory provisions of the NES, such as paid annual leave.²⁷

23 ABS data indicate that less than half of all casual employees state that they receive the mandatory casual loading: Peetz and May, above n 18, at 744. Other forms of underpayment include employer failure to pay superannuation contributions and ‘cash-in-hand’ arrangements with informal, below-minimum wage rates: see Senate Economics References Committee, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees’ Remuneration*, Commonwealth of Australia, 2022.

24 For links between casual status and wage theft see: Senate Economics References Committee, above n 23; and Senate Select Committee on Job Security, *The Job Insecurity Report*, above n 1. Two state-based inquiries include results from online surveys that indicate a disproportionate number of casual employees who report wage theft: Education, Employment and Small Business Committee, *A Fair Day’s Pay for a Fair Day’s Work? Exposing the True Cost of Wage Theft in Queensland*, Parliament of Queensland, 2018, at 47; T Beech, *Inquiry into Wage Theft in Western Australia*, Inquiry Report, Government of Western Australia, 2019, at 91, 185. Apart from the concentration in hazardous industries, these reports suggest that casual employees are exposed to wage theft because of membership of vulnerable groups (eg, youth, temporary migrant workers), lack of information about existing rights, and a relative absence of employment rights, which leaves workers at risk of dismissal in the event of any complaint. This in turn points to the structural powerlessness of many casual employees.

25 S McCrystal, ‘Casual Employment and Labour Standards in Australia’ (2020) 4 *Revue de droit comparé du travail et de la sécurité sociale* 180, 180–3.

26 Peetz and May, above n 18, at 754. It should be stressed that the other group of casual employees, who can be called on-demand casuals, suffer significant deficits in labour security and also present challenges for policy makers — see Campbell, Macdonald and Charlesworth, above n 16.

27 *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536; 362 ALR 311; [2018] FCAFC 131; *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179; 378 ALR 585; [2020] FCAFC 84. For analysis of their impact see A Stewart et al, ‘The (Omni)bus that Broke Down: Changes to

In response to employer concerns, the federal Coalition government sought to address the effect of the Federal Court decisions through its Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021.²⁸ The central component of the legislation was the insertion of a statutory definition of casual employment into s 15A of the FW Act. The new definition treats a person as a casual employee if they accept an offer of employment 'on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'. In short, it requires that casual status should be determined on the basis of the original offer of employment and acceptance by the worker, rather than on any subsequent conduct of either party. The legislation, reinforced by a subsequent High Court decision,²⁹ overturning the two earlier Federal Court decisions, in effect widens the already large gap in protection associated with the practice of casual employment in Australia. One recent analysis argues that the legislation 'appears to have created the worst of all worlds, simultaneously entrenching the misclassification of what should be permanent employees, while creating all manner of new uncertainties as to both past and future practices'.³⁰

Casual work signals a major 'protective gap', which has been inherited from the past and then widened in certain respects in more recent years. The distinctiveness of casual employment, the multiple and often severe dimensions of labour insecurity that it involves, its importance in the workforce structure and the tangle in current regulation mean that the challenge of reform is urgent but difficult. Any regulatory reform needs to start with an alternative statutory definition that can establish acceptable boundaries for casual work and limit misuse, but it is clear that reform cannot stop at this point.

II Regulatory Reform: The National Employment Standards

Regulatory reform to promote secure work and reduce labour insecurities can proceed in different ways. Campbell usefully outlines four direct strategies for regulating what he calls 'precarious work': 1) elimination (total or partial); 2) limits in conditions of use and quantitative limits; 3) limits to worker duration in precarious work, for example, transition rules; and 4) improved wages and conditions, aimed at narrowing a deficit with standard workers, lessening precariousness or compensating for specific disabilities.³¹ Each of these

Casual Employment and the Remnants of the Coalitions Industrial Relations Agenda' (2021) 34 *AJLL* 1; McCrystal, above n 25.

28 Stewart et al, above n 27; see also S McCrystal and D Tracey, 'Industrial Legislation in Australia in 2021' (2022) 64 *JIR* 396 at 396–411.

29 *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39; [2021] HCA 23.

30 Stewart et al, above n 27, at 24, 38.

31 I Campbell, 'Trade Unions and Precarious Work: In Search of Effective Strategies', in C Kelly and J-C Tham (Eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People*, Anthem Press, London, 2021, p 93 (Trade Unions and Precarious Work).

approaches, either singly or in combination, could be fruitfully applied to the regulation of insecure work in Australia.

Apart from the issue of how to regulate, another basic issue concerns the most appropriate level in the labour regulation system for intervention. Since the turn to an ‘enterprise bargaining’ system in the early 1990s, industrial relations policy in Australia has mainly focused on rules concerning collective agreements (and rules governing trade union participation in making collective agreements). The most recent reforms introduced by the Labor government in 2022 aim to remove rigidities and broaden the scope of collective agreement making beyond the narrow confines of the single enterprise.³² The objective is laudable and action in this direction would undoubtedly improve regulation and pave the way for many workers to obtain decent wages and working conditions more easily. It is important to recognise, however, that any plausible change at the level of collective agreements in Australia is unlikely to have significant impact on the extent and severity of insecure work. Even if the reform program for bargaining were more sweeping, for example, aimed at a vastly expanded framework, with genuine and ‘inclusive’ bargaining and perhaps with more effective extension mechanisms into difficult-to-organise sectors, most insecure workers would still fall well outside bargaining.³³ In a bargaining system that continues to be oriented to single enterprises, without clear articulation to other levels, insecure workers are unlikely to benefit from changes won by collective bargaining and indeed they stand at risk of falling further behind.

A long body of scholarship stretching back to Sidney and Beatrice Webb stresses that regulation of insecure work and protection of insecure workers requires supplementing collective bargaining with ‘legal enactment’, in order to establish a *floor* of minimum labour standards for all workers dependent on employers for their livelihood.³⁴ The argument for minimum labour standards in modern societies has always been pertinent, but it has acquired new relevance in the current period, marked by the proliferation of new and old forms of insecure work. Even in northern Europe, where inclusive collective bargaining systems are dominant but problems arising from fragmented labour markets, dwindling trade union strength and increased labour insecurity (often

32 T Kennedy et al, ‘Rebuilding Worker Power in Australia through Multi-Employer Bargaining’ (2021) 31 *Labour and Industry* 225 at 225–34; K Harvey and B Redford, ‘Bargaining in the New Work Architecture’, in J Fleming (Ed), *A New Work Relations Architecture*, Hardie Grant Books, Richmond, 2022, p 152.

33 The notion of inclusive bargaining is outlined in S Hayter and J Visser, ‘Making Collective Bargaining more Inclusive — The Role of Extension’ (2021) 160 *ILR* 169 at 169–95. This provides a useful reminder that the Australian system continues to fall well short of any model of inclusive bargaining. The focus on collective bargaining in Australia is reflected in the attempts to bring low-paid workers into collective bargaining: see F Macdonald, S Charlesworth and C Brigden ‘Access to Collective Bargaining for Low-Paid Workers’, in S McCrystal, B Creighton and A Forsyth (Eds), *Collective Bargaining Under the Fair Work Act*, Federation Press, Sydney, 2018, p 206. Despite the recent enactment of several multi-employer bargaining ‘options’ in the SJBPA Act, significant practical hurdles to widespread collective bargaining remain. See A Forsyth ‘Reforming Australian Labour Law to Promote Multi-Employer Bargaining’, *ADAPT Bulletin*, 12 May 2023; S Charlesworth and F Macdonald, ‘Collective Bargaining and Low-Paid Women Workers: The Promise of Supported Bargaining’ (2023) 65 *JIR* 403.

34 S Webb and B Webb, *Industrial Democracy*, Longman Green, London, 1920.

accompanied by austerity programs that reduce social security entitlements) are growing, industrial relations policy is adjusting to give more emphasis to legal enactment and statutory minimum standards.³⁵ Most early initiatives relate to minimum wages, but reform to hours of work and efforts to narrow the deficits that affect non-standard forms of employment have also been important.³⁶

In short, regulatory reform to promote secure work needs to intervene most forcefully at the level of minimum labour standards. The traditional vehicle for establishing minimum standards in Australia has been the distinctive institution of industrial awards, determined by independent industrial tribunals, most recently the FWC.³⁷ Though awards have eroded and shifted in function in recent decades under the impact of liberalisation, they remain an important arena for maintaining and improving minimum standards.³⁸ This article, however, puts awards to one side and focuses on the alternative level of statutory regulation, and in particular on the NES.

The NES, which are specified in Part 2-2 of the FW Act, constitute a foundation layer of employee protection in the Australian system, somewhat similar to the more developed statutory protective standards in comparable countries. They have only been in existence since 2009, when they built on the much criticised Australian Fair Pay and Conditions Standard (AFPCS), introduced as an element of the Work Choices legislation.³⁹ In comparison with the AFPCS, the NES are more extensive, but the range of entitlements remains narrow, largely confined to selected working hours and leave entitlements. Moreover, they have several crucial weaknesses. Though often described as conferring basic rights and entitlements on all national system employees, the NES reproduce the protective gaps found in other forms of labour regulation. The biggest gaps apply to casual employees, who have access to most forms of *unpaid* leave specified in the NES but are excluded

35 G Bosch and C Weinkopf, 'Reducing Wage Inequality: The Role of the State in Improving Job Quality' (2017) 44 *Work Occup* 68 at 68–88.

36 S Wilson, *Living Wages and the Welfare State: The Anglo-American Social Model in Transition*, Policy Press, Bristol, 2021.

37 A Stewart, *Stewart's Guide to Employment Law*, 7th edn, Federation Press, Sydney, 2021, pp 126–146 (*Stewart's Guide to Employment Law*); See also M Bray and J Macneil, 'Still Central: Change and Continuity in Australia's Major Industrial Tribunal' (2023) 54 *Industrial Relations Journal* 359. Amongst other responsibilities, the Fair Work Commission has a statutory responsibility for establishing a panel each year to review and determine changes in minimum wages — see J Healy, A Pekarek and R Fells, 'The Belated Return of an Australian Living Wage: Reworking a "Fair Go" for the 21st Century', in T Dobbins and P Prowse (Eds), *The Living Wage: Advancing a Global Movement*, Routledge, London, 2022, p 163.

38 The argument concerning change of function is in J Buchanan and D Oliver, "'Fair Work" and the Modernization of Australian Labour Standards: A Case of Institutional Plasticity Entrenching Deepening Wage Inequality' (2016) 54 *BJIR* 790 at 790–814. For more on awards, see A Stewart and M Bray, 'Modern Awards under the Fair Work Act' (2020) 33 *AJLL* at 52. For a defence of award regulation and the role of the FWC, see J Murray, C Schaffer and B Shribman-Dellmann "'Invidious Choices"? Adapting the Fair Work Safety Net during the Pandemic' (2021) 34 *AJLL* at 60.

39 The controversial origins of the NES in the AFPCS are discussed in J Murray and R Owens, 'The Safety Net: Labour Standards in the New Era', in A Forsyth and A Stewart (Eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney, 2009, p 40; See also A Stewart, *Stewart's Guide to Employment Law*, above n 37.

from provisions such as paid annual leave, paid personal carer's and compassionate leave, entitlements to notice of termination and redundancy pay and entitlement to make-up pay for jury service. Casual employees who have been employed by their employer on a regular and systematic basis over at least 12 months and who reasonably expect this to continue can request flexible working arrangements and take unpaid parental leave. However, these conditions affect only a limited segment of the casual workforce, and meeting them involves a difficult and cumbersome process where there is employer opposition.⁴⁰ Apart from these and other gaps,⁴¹ there are also weaknesses such as the lack of substance in individual provisions and the absence of a mechanism for review and adjustment.⁴² One example of lack of substance is the provision for a Fair Work Information Statement (FWIS) to be supplied by the employer to all new employees, which is described as 'a remarkably vacuous document, presenting a basic introduction to the Australian regulatory system, but offering little information that would be useful to employees in understanding their current job'.⁴³

Partly as a result of their origins and weaknesses, the NES have, until recently, been overlooked in discussion of regulatory reform. Nevertheless, if they can be strengthened, for example, by removing or narrowing exclusions, firming up existing provisions and extending the range via additional standards, they can be a robust platform for promoting more secure work. In comparison with (federal) awards, they offer certain advantages for policy makers. For example, they apply to a larger group of workers, are relatively transparent and universal, and cannot be excluded or over-ridden by less beneficial terms and conditions in modern awards, enterprise agreements or individual contracts of employment.⁴⁴

The potential of the NES is increasingly apparent to policy makers. The previous federal Coalition government introduced changes in two main areas. First was family and domestic violence leave (FDVL), where a new NES entitlement to five days' unpaid leave was legislated in the Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth).⁴⁵ This can be seen as a useful, albeit modest, step forward in strengthening the NES by extending leave entitlements. It is of some interest by virtue of its history, which testifies to the persistence of elements of articulation amongst the different levels of labour regulation in Australia. Thus, provisions for paid

40 The exclusion of casuals from paid NES entitlements is covered graphically in a chart in the Fair Work Information Statement available on Fair Work Ombudsman (FWO) website: *The Fair Work Information Statement (FWIS)*, at <<https://www.fairwork.gov.au/employment-conditions/national-employment-standards/fair-work-information-statement#the-FWIS>> (accessed 14 September 2022).

41 Another basic gap is associated with the fact that the NES are confined to employees and miss the many workers, including the many bogus self-employed, who fall outside the boundary of employee status — see J Riley Munton, 'The Participants' in J Fleming (Ed), *A New Work Relations Architecture*, Hardie Grant Books, Richmond, 2022, p 168.

42 I Campbell and S Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33 *AJLL* 36.

43 *Ibid.*, at 49.

44 FW Act s 55.

45 S Williamson, M Foley and N Cartwright, 'Women, Work and Industrial Relations in 2018' (2019) 61 *JIR* 342 at 342–56.

FDVL appeared in enterprise agreements as a result of successful union claims after 2010.⁴⁶ After initial rejection in 2017, a FWC decision in 2018 accepted a claim for unpaid FDVL as a general award entitlement, thereby providing a platform for the Coalition government to extend its application to a larger group of employees by incorporating it into the NES. Because it was unpaid rather than paid, critics argued that the new leave entitlement did not go far enough. A renewed Australian Council of Trade Unions (ACTU) claim prompted the FWC to return to the issue, and in May 2022 it recommended a *paid* FDVL entitlement for employees other than casuals. The FWC asked the government if, as in the case of the earlier provision for unpaid FDVL, it would consider legislation.⁴⁷ As it turned out, a change of government intervened, and the proposal was left to the incoming federal Labor government, which promised a new legislated NES provision of 10 days' paid FDVL.

The second more contentious area of change associated with the previous federal Coalition government concerns casual employment. The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth), which introduced, as noted above, a statutory definition of casual employment, also produced two direct changes to the NES: i) a casual conversion provision as an eleventh standard; and ii) a requirement, attached to the provision for a FWIS, that the employer provide casual employees on commencement with a Casual Employment Information Statement (CEIS).⁴⁸ In contrast to the impact of the statutory definition, the two direct changes to the NES are relatively benign. They are open to the criticism that like several other NES provisions, they lack substance as regulatory mechanisms. Lack of substance is clear enough for the CEIS, which resembles the FWIS in providing little information of any direct assistance to casual employees. The provision for casual conversion appears more substantial, and indeed it builds on provisions already in place in collective agreements and awards. Conversion in this case entails a right for certain casual employees, who have worked for 12 months for businesses larger than 15 employees, with regular hours over at least the most recent six months, to receive a written announcement from their employer concerning whether or not they will be converted to permanent status. Grounds for the employer deciding not to offer conversion need to be 'reasonable', which in turn includes assessment of business needs.⁴⁹ The idea of conversion is sound, related to the familiar principle of acquisition of rights and entitlements over the course of job duration.⁵⁰ But two main problems tend to undermine its effectiveness as a regulatory mechanism. First, because conversion is focused on the worker rather than the work itself, aimed at providing an exit pathway from casual

46 M Baird, L McFerran and I Wright, 'An Equality Bargaining Breakthrough: Paid Domestic Violence Leave' (2014) 56 *JIR* 190 at 190–207.

47 Family and Domestic Violence Leave Review (AM2021/55) Decision [2022] FWCFB 2001, 16 May 2022.

48 McCrystal and Tracey, above n 28; Stewart et al, above n 27.

49 Stewart et al, above n 27, at 17–19; see also McCrystal and Tracey, above n 28.

50 The principle of conversion fits into Campbell's third strategy for regulating precarious work: limits to worker duration in precarious work — Campbell, 'Trade Unions and Precarious Work', above n 31.

244 (2023) 36 Australian Journal of Labour Law

status for certain workers, it does not necessarily have a significant direct impact on casual work itself. Second, even if we accept the focus on the worker rather than the work, conversion in itself offers little purchase on the structural powerlessness of many casual employees, and it is not surprising that the provision has been little used.⁵¹ Only a minority of casual employees qualify to receive an offer, and the individualised process, dependent on employer decisions, does not work as an effective counterweight to deep-seated employer preferences for casual engagement.⁵²

III Further Proposals

The election of a federal government with a policy on secure work has provided a favourable context for ongoing regulatory reform.⁵³ The Labor government has foreshadowed action on several fronts, including improving enforcement through increased penalties and criminalization of wage theft.⁵⁴ In addition, it is engaged in consultation about extending the powers of the FWC to include ‘employee-like’ forms of work so as to better protect workers in ‘new forms’ of work, such as gig work,⁵⁵ establishing a single national framework for labour hire regulation,⁵⁶ and ‘same job same pay’, which would ensure that labour hire workers are paid at least the same as directly engaged employees doing the same work.⁵⁷ With respect to the pressing and difficult challenge of casual work, Labor policy is somewhat hesitant and abbreviated, but it includes a commitment to amend the statutory definition and to ‘legislate a fair objective test to determine whether a worker can be classified

51 A recent KPMG review of the operation of the new conversion provisions found they had made little difference to conversion outcomes. Cited in ‘Little Change from Coalition’s Casual Conversion laws: KPMG’, *Workplace Express*, 8 December 2022.

52 Stewart et al, above n 27, at 18. *Workplace Express*, above n 51. For more discussion of the constrained choices of casual employees and the limits of the conversion process see Howe, Biddington and Charlesworth, above n 1, at 33; Markey and McIvor, above n 18, at 609–11; Peetz and May, above n 18, at 755.

53 Australian Labor Party, above n 3.

54 Department of Employment and Workplace Relations, *Compliance and Enforcement: Criminalising Wage Theft*, Australian Government, Canberra, 2023, at <<https://www.dewr.gov.au/2023-workplace-reform-consultations/consultations/compliance-and-enforcement-criminalising-wage-theft>> (accessed 23 June 2023).

55 N Bonyhady, ‘“Gig Work ... like a Cancer”: Labor Takes Aim at Gig Economy’, *Sydney Morning Herald*, 25 August 2022. See also Department of Employment and Workplace Relations, *Employee Like-Forms of Work Consultation Paper*, Australian Government, Canberra, 2023, at <<https://www.dewr.gov.au/2023-workplace-reform-consultations/resources/employee-forms-work-consultation-paper>> (accessed 20 June 2023).

56 See Department of Employment and Workplace Relations, *A Single National Framework for Labour Hire Regulation, which could be Implemented in Place of Existing State and Territory Schemes*, Australian Government, Canberra, 2023, at <<https://www.dewr.gov.au/2023-workplace-reform-consultations/consultations/single-national-framework-labour-hire-regulation-which-could-be-implemented-place-existing-state-and>> (accessed 20 June 2023).

57 See Department of Employment and Workplace Relations, *Closing Labour Hire Loopholes (Same Job, Same Pay)*, at <<https://www.dewr.gov.au/2023-workplace-reform-consultations/consultations/same-job-same-pay>> (accessed 20 June 2023).

as a casual, so people have a clearer pathway to permanent work'.⁵⁸ At the time of writing, the government was engaged in consultations about the content of legislation.⁵⁹

Labor Party policy includes several proposals that signal renewed attention to the potential of the NES. The government moved promptly to fulfil its promise to introduce paid FDVL, now bolstered by explicitly including casual as well as permanent employees.⁶⁰ The reach of FDVL has been further extended to all employees in Australia, including state referral and non-national system employees, with the ratification by Australia of ILO Convention Concerning Violence and Harassment in the World of Work, 2019, No 190 on 9 June 2023.⁶¹ In addition, the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth), which added new objects of promoting secure work and gender equality into the FW Act, strengthened existing NES provisions on the right to request flexible work arrangements and the right to request an extension of unpaid parental leave primarily by adding an appeals or dispute resolution process.⁶² A policy promise to include superannuation in the NES, aimed at making it easier for workers and the Fair Work Ombudsman (FWO) to pursue claims for unpaid superannuation rather than rely on the Australian Tax Office, is incorporated in the Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Cth), which received Royal Assent on 3 July 2023. The amendments guarantee a right to employer superannuation contributions as a new NES entitlement from 1 January 2024.⁶³ They also expand and strengthen employees' entitlements in the NES to flexible unpaid parental leave.⁶⁴

58 Australian Labor Party, above n 3.

59 See Department of Employment and Workplace Relations, *Stand up for Casual Workers: Legislate an Objective Test to Determine when an Employee can be Classified as Casual*, at <<https://www.dewr.gov.au/2023-workplace-reform-consultations/consultations/stand-casual-workers-legislate-objective-test-determine-when-employee-can-be-classified-casual>> (accessed 23 June 2023).

60 The Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) was passed in October 2022.

61 'FDV Leave for all by September Next Year: Govt', *Workplace Express*, 14 June 2023.

62 See FW Act ss 65B, 76B. These NES 'rights to request' now become enforceable employment rights and give the FWC the power to arbitrate any disputes arising under s 44 of the FW Act. This is a welcome first step to meet the long-standing criticisms of lack of substance in the NES provision for a right to request flexible work — see Campbell and Charlesworth, above n 42; Senate Select Committee on Work and Care, *Interim Report*, Commonwealth of Australia, Canberra, 2022. An amendment to the Secure Jobs Better Pay Bill 2022 (Cth), proposed by the Greens to extend appeal rights to the right to request an extension of unpaid parental leave, was included in the final Bill legislated on 2 December 2022 — see The Greens, 'Greens Agree to Back IR Bill Boosting Paid Parental Leave and Protections for the BOOT', Media Release, 27 November 2022.

63 See Labor's National Platform, *ALP National Platform*, at 16, at <<https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>> (accessed 8 August 2022). Making superannuation contributions a minimum entitlement under the NES is also 'intended to reinforce the Government's position that underpayment of superannuation is a form of wage theft and worker exploitation'. See Explanatory Memorandum, Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth), Parliament of Australia, 2023, at para 92.

64 The rationale for these amendments is to align the NES right to unpaid parental leave with amendments to paid parental leave entitlements under the Paid Parental Leave Act 2010

It is also useful to note NES proposals from other sources. The Work and Family Policy Roundtable advocates a right for all workers to paid leave and a statutory cap on the maximum hours of work.⁶⁵ In addition to changes to the existing right to request flexible working arrangements, the Report of the 2022 Senate Work and Care Inquiry proposed a new ‘right to disconnect’ and a new set of rostering rights, and it seems likely that both proposals will be pursued by the Greens in 2023.⁶⁶ The introduction of a statutory right for all employees to receive a written Statement of Terms and Working Conditions (STWC) concerning their job is raised in an earlier article in this journal (see more below).⁶⁷ In addition, as part of a recent Australian Institute of Employment Rights (AIER) report, Marilyn Pittard proposes several revisions to existing NES standards as well as additional forms of paid leave such as menstrual and menopause leave and additional rights such as the right to work from home.⁶⁸ Similarly, many commentators, including the Greens, varied unions, health professionals and academics, advocate a new NES provision for paid pandemic leave for all employees.⁶⁹

The recent proliferation of reform proposals testifies to the welcome renewal of attention to the NES as an arena for tackling insecure work. The remainder of this section provides detail on two proposals that we believe can be particularly useful in meeting the objective of promoting more secure work: one aimed at extending statutory paid leave entitlements to casual employees; and the other aimed at replacing the current provisions for a FWIS and a CEIS with a new NES provision that would provide information of more practical value to both employees and employers. Our aim is not to undercut

(Cth), as well as promote opportunities to share caring responsibilities between parents. Explanatory Memorandum, above n 63, at para 9–17.

65 Work+Family Policy Roundtable, *Work, Care and Family Policies: Federal Election Benchmarks 2022*, at <https://www.workandfamilypolicyroundtable.org/wp-content/uploads/2022/04/WorkFamilyBenchmarks2022_online_s-1.pdf> (accessed 20 September 2022).

66 Senate Select Committee on Work and Care, *Interim Report*, above n 62; Senate Select Committee on Work and Care, *Final Report*, Commonwealth of Australia, Canberra, 2023; A Thompson, ‘Greens to Push for “Right to Disconnect” in Next Wave of IR Changes’, *Sydney Morning Herald*, 6 December 2022.

67 Campbell and Charlesworth, above n 42. The right to a ‘Real Work Information Statement’ has also been advocated by the Grattan Institute in a recent report on the exploitation of migrant workers. To assist migrant workers understand what they should be getting paid, ‘the statement would describe in detail working conditions upon commencement’. B Coates, T Wiltshire and T Reysenbach, *Short-Changed: How to Stop the Exploitation of Migrant Workers in Australia*, Report, Grattan Institute, Melbourne, 2023 at 87. This proposal draws on a submission by the Migrant Justice Institute to the Secure Jobs Better Pay Bill Senate Inquiry in which it was proposed that ‘the FW Act should be amended to require employers to provide each worker with a statement of specific working conditions (award, wage rates, hours etc) and employer contact details (including address for service) upon commencement, and to itemise deductions on payslips’. Migrant Justice Institute, *Submission: Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, Submission 45, 2022, at 4, at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Submissions> (accessed 20 June 2023).

68 M Pittard, ‘Fair Standards and Remuneration’, in J Fleming (Ed), *A New Work Relations Architecture*, Hardie Grant Books, Richmond, 2022, p 92.

69 D Nahum and J Stanford, *Working With COVID: Insecure Jobs, Sick Pay, and Public Health*, Briefing Paper, Centre for Future Work, Canberra, 2022.

or distract from current policy initiatives; rather, we are seeking to augment these initiatives and to push the discussion forward.

Paid leave entitlements for casual employees

We suggest above that casual work is a pressing and difficult challenge, which will require careful analysis and policy innovation. Responding to the challenge demands a multi-pronged approach, which can balance different regulatory strategies. Conversion has been traditionally relied upon, but its efficacy has proven to be limited. A new statutory definition that targets misclassification is important and can achieve a partial elimination. However, even if this initiative succeeds in narrowing the extent of ‘permanent casual’ work, it will inevitably leave a large group of casual workers, including ‘on-demand casuals’, still subject to the many detriments of casual status. For this large group, there is a strong case for supplementing definitional efforts with other strategies, especially improvements in wages and conditions that serve to reduce the marked deficit in rights and entitlements compared with standard employees.

In seeking to improve wages and conditions, it is sensible to start with the NES, where the many exclusions of casual employees from rights and entitlements, especially paid leave entitlements, constitute a major protective gap. A useful prompt for closer examination and action in regard to paid leave entitlements stems from the new NES entitlement to paid FDVL (see above), which represents the first time statutory paid leave entitlements have been extended to casual employees in Australia. In incorporating casuals within the new FDVL entitlement, the government explicitly recognised that they share similar needs with other employees and that exclusion from entitlements would be unfair.⁷⁰ Indeed any exclusion of casuals would deepen the existing deficit in rights and entitlements. At the same time, it was clear in the passage of the legislative amendments that extending FDVL to casual employees was neither difficult nor controversial.⁷¹ Similar arguments can be mounted for incorporating casual employees within other paid leave entitlements from which they are currently excluded. In developing our argument, we look first at paid personal/carer’s leave, then paid annual leave and finally at select arguments against reform, including in relation to the implications for a casual loading.

70 Prior to the amending legislation, Minister Tony Burke argued it was important to offer paid FDVL universally stating ‘Casual workers are not spared from family and domestic violence,’ and further, ‘In fact, women who are experiencing family and domestic violence are more likely to be employed in casual work. We cannot leave them behind.’: cited in K Curtis, ‘Casuals, Part-timers will get Full Paid Domestic Violence Leave in New Scheme’, *Sydney Morning Herald*, 25 July 2022. As set out in the Explanatory Memorandum, the aim of the new extended FDVL provision is to ‘assist employees affected by family and domestic violence to be paid and remain in continuous employment which provides financial security, independence and increased self esteem.’: Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth), Parliament of Australia, 2022, at paras 4, 63.

71 ‘Parliament Backs 10 Days Paid FDV Leave’, *Workplace Express*, 27 October 2022.

Paid personal/carer's leave

Our proposal concerns the standard for personal/carer's leave set out in Div 7, sub-div A of the FW Act.⁷² The current aggregate NES entitlement to these two forms of leave is 10 days per annum for permanent full-time employees for each year of service, with permanent part-time employees entitled to a pro-rated amount based on the employee's ordinary hours of work, which amounts to 1/26th of an employee's ordinary hours of work per annum.⁷³ Unused personal or carer's leave accumulates from year to year. To extend this entitlement to casual employees requires amendment of the standard on paid personal or carer's leave to remove the restriction in s 95 which precludes casual employees and the restrictions in ss 96(1) and 96(2). These latter provisions exclude periods of employment as a casual employee of the employer from the amount and accrual of paid personal or carer's leave.

The exclusion of casual employees from this provision means that casual employees face a stark choice when they are ill and/or when they need to care for family members.⁷⁴ They must either sacrifice income or sacrifice their own needs and/or the needs of family members. Notifying an absence from work can have knock-on effects, producing downward fluctuations of income and opening up risks of dismissal or a diminution in allocated hours from aggrieved employers. On the other hand, continuing to work when sick not only has personal consequences but can also entail broader societal health and economic effects by threatening to increase the transmission of infectious diseases and the burden on the hospital sector, as highlighted by the COVID-19 pandemic.⁷⁵ Access for all employees to paid personal and carer's leave is also an important part of the industrial architecture for gender equality given the high proportion of casual worker-carers, overwhelmingly women, who have primary care responsibilities for dependent family or household members and yet remain unable to access any paid sick or carers leave.⁷⁶

72 Pursuant to s 97 of the FW Act, this leave is available where an employee is unfit for work because of a personal illness, or personal injury; or to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of illness or an emergency. The aggregation of sick and carer's leave has had a long history in Australian labour standards. For a brief summary, see A Chapman, 'The Continuing Resonance of Breadwinner Norms: the Australian Labour Law Experience' (2018) 34 *International Journal of Comparative Labour Law and Industrial Relations* 351 at 358.

73 FWO, *Sick and Carer's Leave and Compassionate Leave*, Fact Sheet, at <<https://www.fairwork.gov.au/sites/default/files/2023-02/sick-and-carers-leave-and-compassionate-leave-fs.pdf>> (accessed 10 June 2023). We do not explore the issue of the aggregation of sick leave and carer's leave as a single entitlement here but note this is seen as detrimental to worker carers, who often have to forgo their own sick leave entitlements to provide care, and is out of step with international best practice. See Senate Select Committee on Work and Care, *Interim Report*, above n 62, at 77–81 and Senate Select Committee on Work and Care, *Final Report*, above n 66, at 150–1.

74 Centre for Future Work, *Submission to the Senate Select Committee on Work and Care*, 2022, Submission 72, 7 and 9, at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Work_and_Care/workandcare/Submissions> (accessed 20 June 2023). See also Select Committee on Work and Care, *Final Report*, above n 73, at 6 [6.54–6.82].

75 A Ore, 'Better for Entire Country': Epidemiologists Join Growing Call to Pay Sick Leave to Casuals', *The Guardian*, 31 July 2022.

76 Centre for Future Work, *Submission to the Senate Select Committee on Work and Care*, above n 74.

The COVID-19 pandemic prompted some limited responses to extend sick leave entitlements. In the early days of the pandemic on its own initiative,⁷⁷ the FWC made determinations in April 2020 varying 99 awards to provide for two weeks of *unpaid* pandemic leave in 2020 with casuals also eligible for this unpaid leave.⁷⁸ Greater appreciation of the risks posed by growing rates of COVID-19 infection to both healthcare and aged care workers led to some temporary adjustments by the FWC in response to health and aged care union applications, to provide for *paid* pandemic leave award provisions. This temporary change for an initial period of three months was put in place for award-reliant aged care employees covered by the *Aged Care Award, Nurses Award and the Health Professionals and Support Services Award* in July 2020.⁷⁹

Paid pandemic leave in these awards applied to full-time, part-time and ‘eligible’ casual employees. To be eligible, casual employees had to have been employed on a regular and ‘systematic’ basis, which excluded many of the most vulnerable casual workers. Employees could only access paid pandemic leave if they met certain criteria such as testing positive for COVID or they had been advised to self-isolate. They also had to have either been tested for COVID or have agreed to get tested as soon as possible. Each time an employee met the criteria they were entitled to up to two weeks’ leave.⁸⁰ The leave was available in full immediately to full-time, part-time and eligible casual employees — this leave was not pro-rated and employees did not have to be employed for a certain period before accessing the leave. There was a further extension of paid pandemic leave by the FWC to 29 March 2021. Since that time however, and despite the persistence of COVID-19 infections in aged care facilities well into 2022, paid pandemic leave stopped applying and was deleted from the relevant awards and has not been reinstated. Following a decision of the FWC, unpaid pandemic leave also ceased applying in most awards in June 2022, although in July 2022 the FWC reinserted this unpaid leave entitlement into six health and aged care-related awards.⁸¹

Beyond temporary responses to the health risks posed by workers without paid leave entitlements during COVID-19, there is growing support for the

77 Described as a ‘swift, bold and relatively unusual intervention’ for the FWC, see Murray, Schaffer and Shribman-Dellmann, above n 38, at 60.

78 *Section 157(3) of the Fair Work Act 2009 (Cth) — Variation of awards on the initiative of the Commission* AM2020/12 [2020] FWCFB 1837.

79 See Murray, Schaffer and Shribman-Dellmann, above n 38, at 63. Bizarrely, while extended to eligible residential aged care employees, the *paid* pandemic leave provisions (unlike *unpaid* pandemic leave) were not extended to eligible home care workers and disability support workers under the *Social Community Home Care and Disability Services Award [MA000100]*. These groups of employees provide care and support to a wide range of clients, many of whom have chronic health conditions, which may put both clients and workers at increased risk of COVID infection.

80 See FWO, *Paid Pandemic Leave for Residential Aged Care Employees*, at <https://www.fairwork.gov.au/tools-and-resources/library/K600660_Paid-pandemic-leave-for-residential-aged-care-employees> (accessed 10 September 2022).

81 See FWO, *COVID-19 and Workplace Laws*, at <<https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-leave-and-stand-downs/unpaid-pandemic-leave-annual-leave-changes-in-awards#history-of-unpaid-pandemic-leave>> (accessed 10 September 2022).

provision of paid sick leave to casual workers in Australia more generally. Concern about the increasing problem of insecure work provided an impetus to the recent introduction of the Victorian Sick Pay Guarantee.⁸² This ‘guarantee’ is a pilot initiative of and fully funded by the Victorian government to provide sick leave to casual and contract workers for two years from 14 March 2022. The pilot drew on a six-week government consultation process undertaken in mid-2020 with workers, unions, industry and community organisations.⁸³ The Victorian government was considering the introduction of a business levy at the end of the pilot period to cover the costs of this initiative.⁸⁴ More recently, however, both the Victorian government and Victorian Opposition have suggested that the Federal government may need to ‘pick up the tab’ for the Sick Pay Guarantee program which saw \$22 million paid out to support 93,000 claims in the last year.⁸⁵ The Sick Pay Guarantee is a \$245.6 million scheme and is expected to cover an estimated 150,000 workers in the two year period. As at 13 March 2023, 60,000 casual workers had signed up to the pilot scheme.⁸⁶

The Sick Pay Guarantee is available to those Victorian casual and contract workers in jobs with high rates of casual and contract work and in which low pay and unpredictable hours is common, such as in hospitality, aged and disability care, cleaning, security and retail. The guarantee provides up to 38 hours a year of sick and carer’s pay to take time off when an eligible worker is ill or when someone they care for is ill. To be eligible, workers must have signed up and be approved before they claim sick or carer’s pay and must also be working an average of at least 7.6 hours per week. The Sick Pay Guarantee is available only for missed work and payments are made at the National Minimum Wage (NMW).⁸⁷

Examples of some casual workers gaining temporary access to paid pandemic leave and the Victorian sick pay guarantee for casual and contract workers are important in recognising the need for reform in this area. They remain, however, limited. It is necessary to move towards ongoing statutory employment entitlements for all employees, including all casuals. Paid sick leave is a basic entitlement for all employees in many countries. It is made easier of course in those countries where it is funded out of social insurance.⁸⁸ An international example of a statutory entitlement to paid sick leave for

82 Victorian Government, *Victorian Sick Pay Guarantee*, at <<https://www.vic.gov.au/sick-pay-guarantee>> (accessed 10 September 2022).

83 Victorian Government, *Secure Work Pilot Scheme Public Consultation Report*, Melbourne, 2022, at <<https://www.vic.gov.au/victorian-sick-pay-guarantee-public-consultation>> (accessed 10 October 2022).

84 S Ilanbey, ‘State Opposition, Canberra and Industry Vow to Fight Sick Pay for Casuals’, *The Age*, 14 March 2022.

85 G McCubbing, ‘Victoria Hands out \$22m in First Year of Casual Sick Pay Guarantee’, *Financial Review*, 13 March 2023.

86 H Hayes, ‘Victorian State Government Details Impact of Sick Pay Guarantee Laws’, *News.Com.Au*, 13 March 2023.

87 See Victorian Government, *About the Sick Pay Guarantee*, at <<https://www.vic.gov.au/about-sick-pay-guarantee>> (accessed 10 September 2022).

88 Such as in Europe. See, eg, S Spasova, D Bouget and B Vanhercke, *Sick Pay and Sickness Benefit Schemes in the European Union*, Background Report for the Social Protection Committee’s In-Depth Review on Sickness Benefits, European Commission, Brussels, 17 October 2016.

casual employees can be found in New Zealand.⁸⁹ In New Zealand, all employees (including part-time and casual employees) are entitled to 10 days of sick and bereavement leave per year, paid for by their employer.⁹⁰ Sick leave entitlements are also available to employees to care for their spouse, partner or dependants, such as children or an elderly parent, who may be sick or injured.⁹¹ To be eligible, employees must have six months' current continuous employment with the same employer, or if their employment is not continuous, they must have worked for the employer for six months for an average of 10 hours per week, and at least one hour in every week or 40 hours in every month.⁹² Paid sick leave is not pro-rated and so part-time and casual employees working less than full time hours are still entitled to the 10 days' sick leave a year. Sick leave is paid at the rate of pay the employee would have been paid for the scheduled time they would have worked but for illness, care for dependants or bereavement. Any unused sick leave at the end of a 12-month period can be carried over and added to their next year's entitlement up to a maximum of 20 sick days a year.

Annual leave

Casual employees are explicitly excluded from the NES on paid annual leave, set out in Div 6 of the FW Act. For other employees, the current standard provides for four weeks of paid annual leave per annum or five weeks per annum where the employee is a shiftworker. We propose the extension of paid annual leave to all (national system) employees. This could be achieved through the amendment of the standard on paid annual leave to remove the restriction in s 86 which precludes casual employees from eligibility and the restrictions in ss 87(1) and 87(2), which exclude periods of employment as a casual employee of the employer from the amount and accrual of paid annual leave.

The benefits of paid annual leave have been well-documented and together with sick leave are important determinants of worker safety health and well-being.⁹³ Longer breaks from work in the form of paid annual leave can provide both physiological and psychological benefits for workers in

89 The provision of statutory provisions for paid sick leave to all employees, including casuals, in New Zealand is long-standing, surviving the abandonment of the historical award system in that country in 1991. See in particular Campbell, 'On-Call and Related Forms of Casual Work in New Zealand and Australia', above n 19, at 45. The New Zealand Holidays Act 2003 (NZ) was amended by the Holidays (Increasing Sick Leave) Amendment Bill 2021 (NZ) to increase the sick leave entitlement for all employees from five days to 10 days per annum.

90 See also Employment New Zealand, *Sick Leave and Bereavement Leave*, at <<https://www.employment.govt.nz/assets/Uploads/tools-and-resources/flowcharts/Sick-and-Bereavement-leave.pdf>> (accessed 17 September 2022). We note in Australia that paid compassionate leave (bereavement leave) is a separate leave entitlement to personal or carer's leave. It is also not available to casual employees and is limited to a single continuous two-day period or two separate periods of one day each for a particular permissible occasion. See Div 7, s 106 and s 105(2) of the FW Act.

91 See Employment New Zealand, *Leave and Holidays*, at <<https://www.employment.govt.nz/leave-and-holidays/>> (accessed 30 November 2023).

92 See Employment New Zealand, *Sick Leave Entitlements*, at <<https://www.employment.govt.nz/leave-and-holidays/sick-leave/sick-leave-entitlements/>> (accessed 17 September 2022).

93 N Skinner and B Pocock, 'Paid Annual Leave in Australia: Who Gets it, Who Takes it and Implications for Work-Life Interference'(2013) 55 *JIR* 681; S Tamers et al, 'Envisioning

opportunities for rest and recovery from work.⁹⁴ In many households, access to paid annual leave is also crucial in terms of managing school holidays for dependent children. Indeed the need for workers to concurrently manage work and care responsibilities has become a major challenge in the world of work due to in large part to workforce demographic shifts, which have depleted unpaid care resources available to households with increasing numbers of women now in paid work. Yet in Australia, many of those who remain ineligible for annual leave because of casual status are arguably the workers who need it the most because of their caring responsibilities.

Paid annual leave is a basic right for all employees in many industrialised countries. In European Union (EU) countries, for example, national labour standards in respect of annual leave, including for temporary workers, are bound by the Working Time Directive (Council Directive 2003/88/EC), which provides for a period of paid leave of at least four weeks for *all* workers. While national regulation can set conditions for the entitlement and granting of annual leave, the scope and quantum of paid annual leave cannot be reduced except where the employment relationship is terminated. It is on this basis that paid annual leave is also available to casual employees in the UK pursuant to the UK Working Time Regulations 1988 which transposed the EU Working Time Directive into national law.

The UK provides a useful precedent for Australia to consider in the statutory entitlement of casual employees to paid annual leave under the Working Time Regulations 1988 and the Employment Rights Act 1996.⁹⁵ In the UK most workers and all employees⁹⁶ are entitled to 5.6 weeks holiday pay per annum from the first day of employment. Workers can access the holiday entitlement they have built up since starting their job but are required to give their employer notice or may be directed by their employer to take their leave at certain times, including in business close down periods. The amount of pay for full-time, part-time, fixed-term as well as casual and zero hour workers is calculated based on the number and type of hours of work and the worker's pay rate for those hours.⁹⁷ Where a worker has no fixed or regular hours, their 5.6 weeks holiday pay is based on their average usual pay for the

the Future of Work to Safeguard the Safety, Health, and Well-Being of the Workforce: A Perspective from the CDC's National Institute for Occupational Safety and Health' (2020) 63 *Am J Ind Med* 1065.

94 M van Hooff et al, 'Workdays, in-between Workdays and the Weekend: A Diary Study on Effort and Recovery' (2007) 80 *Int Arch Occup Environ Health* 599.

95 We note however, the UK government has recently published a consultation paper with one option proposing just four weeks of the 5.6 weeks of holiday pay be paid at the normal rate of pay as per the EU Working time Directive with the additional 1.6 weeks paid at the base rate of pay only. See Department of Business and Trade (UK), 'Retained EU Employment Law: Consultation on Reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations', Consultation Paper, 2023, at 20, at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156206/retained-eu-employment-law-consultation.pdf> (accessed 20 June 2023).

96 For the relevant definitions of 'worker' and 'employee', see generally Government UK, *Employment Status*, at <<https://www.gov.uk/employment-status/worker>>; and <<https://www.gov.uk/employment-status/employee>> (accessed 28 November 2023).

97 See Government UK, *Holiday Entitlement*, at <<https://www.gov.uk/holiday-entitlement-rights/holiday-pay-the-basics>> (accessed 14 October 2022).

preceding year.⁹⁸ Unlike in New Zealand, employers in the UK are not supposed to include a loading for holiday pay in a worker's hourly rate (known as 'rolled-up holiday pay'),⁹⁹ where casual workers are employed on an intermittent basis.¹⁰⁰ However, in many instances, standard employer practice for casual and zero hours workers is to pay a loading of 12.07% on the worker's hourly pay rate.¹⁰¹

In New Zealand, a statutory entitlement to four weeks of paid annual holidays (or paid annual leave) is also available to all employees including casual employees on a pro rata basis under the Holidays Act 2003 (NZ).¹⁰² The entitlement to paid annual leave accrues from the first day of employment but will be affected by any changes to the employee's work pattern.¹⁰³ Where an employee is employed for less than 12 months or if their working pattern is so intermittent that it is not possible or practical to provide four weeks annual leave, employees can agree to be paid 8% of their annual gross earnings as annual leave via a loading on their wages on a pay as you go basis.¹⁰⁴ Annual leave is paid at the rate of the greater of an employee's (i) ordinary weekly pay at the start of their leave, which includes overtime and other allowances; or (ii) average weekly earnings for the 12-month period before the leave is taken.¹⁰⁵

98 See Government UK, *Guidance: Calculating Holiday Pay for Workers without Fixed Hours or Pay*, at <[https://www.gov.uk/government/publications/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay-2](https://www.gov.uk/government/publications/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay-2)> (accessed 28 October 2022). If a worker is regularly paid overtime, commission or bonus payments, these payments must be included for at least four weeks of the 5.6 week annual entitlement. See UK Advisory, Conciliation and Arbitration Service (ACAS), *Holiday Entitlement: Calculating Holiday Pay*, at <<https://www.acas.org.uk/checking-holiday-entitlement/calculating-holiday-pay>> (accessed 28 October 2022).

99 See above n 97.

100 Three linked 2006 European Court of Justice (ECJ) decisions determined that the European Union (EU) Working Time Directive (2003/88/EC) meant payment for holidays should be made when the worker take their holidays. See PLC Employment, *Robinson-Steele v RD Retail Services; Clarke v Frank Staddon Ltd; Caulfield and others v Hanson Clay Products Ltd (formerly Marshalls Clay Products Ltd) C-131/04 and C-257/04 (Opinion of Advocate General Stix-Hackl)*, at <[https://uk.practicallaw.thomsonreuters.com/5-365-6965?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-365-6965?transitionType=Default&contextData=(sc.Default)&firstPage=true)> (accessed 14 October 2022). While rolled up pay was not found in of itself to be unlawful, these ECJ decisions held that there must be a system in place to ensure workers can take the leave they are entitled to under the Directive. However, the UK did not put in place any legislation in respect of these decisions.

101 See Davidson and Morris Employment Team, *Rolled Up Holiday Pay (Employer FAQs)*, at <<https://www.davidsonmorris.com/rolled-up-holiday-pay/#:~:text=Is%20rolled%20up%20holiday%20pay%20legal%20in%20the%20UK%3F,do%20continue%20to%20use%20it>> (accessed 28 October 2022).

102 See Employment New Zealand, *Minimum Leave and Holidays Entitlements*, at <<https://www.employment.govt.nz/leave-and-holidays/minimum-leave-and-holidays-entitlements/>> (accessed 28 November 2023). See also Ministry of Business, Innovation and Employment, *Leave and Holidays: A Guide to Employees' Legal Entitlements*, New Zealand Government, April 2019, at <<https://www.employment.govt.nz/assets/Uploads/tools-and-resources/publications/leave-holiday-guide-employees-legal-entitlements.pdf>> (accessed 14 October 2022).

103 See Ministry of Business, Innovation and Employment, above n 102, at 3–5.

104 See *ibid*, at 4. Employees must agree to this loading in lieu of payment of annual leave in their employment agreement and the 8% must be an identifiable amount in time and wage records: see also at 8.

105 See *ibid*, at 4.

Arguments against extending paid leave entitlements to casual employees

Our proposal aims at improving working conditions by reducing the deficit in rights and entitlements affecting casual employees in comparison with the mainstream of employees.¹⁰⁶

Some commentators raise questions about this approach. Mark Wooden objects that the Victorian government scheme for sick leave entitlements provides an ‘extra benefit’ without any offsetting reduction in pay, making casual work more attractive to employees and thereby working to boost the aggregate number of casual employees in the economy.¹⁰⁷ This objection seems based, however, on a misunderstanding of the dynamics of casual employment, which is less to do with employee choices and more to do with employer preferences and institutional factors such as regulatory weaknesses.¹⁰⁸

The Workplace Relations Minister Tony Burke, from an opposing viewpoint, also expresses scepticism about the value of improving sick leave entitlements for casuals, arguing that it is more important to ‘promote secure work and get more people into secure jobs than just redefining everything about casual employment’.¹⁰⁹ In response to this objection, we would stress that it should not be a question of choosing one approach over the other. Improvement of working conditions for casuals is best seen not as an alternative but as a *supplement* to the more direct change that can be achieved by narrowing the statutory definition of casual work. It allows a general approach that would realise more security for the broader group of casual employees that would not be affected by any alteration in the statutory definition. Moreover, it provides a straightforward and convenient starting point in the present.

Perhaps the major objection to our proposal concerns its implications for the casual loading. It is sometimes argued that any efforts to increase paid leave entitlements for casual employees must entail a commensurate reduction in the casual loading. We do not agree. The casual loading has a long and distinctive history in Australia. Originally established as compensation for the intermittency of casual work, it is true that it is generally interpreted in recent decades as compensation for exclusion from certain benefits developed for permanent employees, such as paid leave.¹¹⁰ However, this does not mean that it cannot be retained and reinterpreted as compensation for the many other disadvantages of casual employment. As the FWC warns in a 2017 consideration, the loading does not compensate for the many ‘detriments’ associated with casual employment.¹¹¹ The Select Senate Committee on Work

106 Campbell, ‘Trade Unions and Precarious Work’, above n 31.

107 Wooden, ‘Insecure Employment’, above n 10, at p 58.

108 Campbell, ‘On-Call and Related Forms of Casual Work in New Zealand and Australia’, above n 19, at 19.

109 Cited in A Thompson, ‘A Precarious Balancing Act for Casuals’, *The Age*, 15 October 2022.

110 O’Donnell, above n 17.

111 *4 Yearly Review of Modern Awards — Casual Employment and Part-time Employment (AM2014/196 and AM2014/197)*, [2017] FWCFB 3541, 5 July 2017, at [366], at <<https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2017fwcfb3541.pdf>> (accessed 28 November 2023).

and Care also found that ‘the casual loading, where it is paid, does not fully compensate for the many conditions lost, including basic job insecurity, different forms of leave, training, promotion, and career opportunities’.¹¹²

Furthermore, it is important to examine how the casual loading operates in practice. Evidence suggests that many casual employees, consistent with their greater vulnerability to employer non-compliance, do not in fact receive the casual loading.¹¹³ A recent re-analysis of the last set of ABS Employee Earnings, Benefits and Trade Union Membership survey data in which ‘leave-deprived’ respondents were asked about whether they received a casual loading, found that over the period from 2009–13, an average of 49% of casual respondents stated they received this loading, while 33% stated they did not, with another 19% being unsure if they did or not.¹¹⁴ Another Australian study found that comparing the hourly wages of casual and non-casual employees in the same 10 occupations with the highest density of casual employees shows there is only a modest casual wage premium in most of these occupations of around 4–5%, well below the 25% loading that should apply to casual employees.¹¹⁵ Similarly, a longitudinal analysis of Household, Income and Labour Dynamics in Australia panel data shows that casual employees towards the bottom of the wage distribution suffer a marked ‘wage penalty’ in comparison with equivalent permanent employees.¹¹⁶ Inga Laß and Mark Wooden suggest that this penalty may be due to a number of factors, including ‘considerable non-compliance on the part of employers of low-wage casual labour’, as well as the fact that casual employees are less likely than non-casual employees to be paid above the minimum wage rates specified in awards.¹¹⁷ The latter suggestion reminds us that casual employees are often stuck at lower job classifications than their permanent counterparts, who might be expected to have access to some career progression and increased pay over time via skills classification and wage structures in awards. Laß and Wooden also found that low-paid casual employees more often face fluctuating earnings and involuntary job loss,¹¹⁸ pointing to both the income and job insecurity experienced by many casuals.

The evidence points to wage injustices faced by many casual employees. Proposals to eliminate the casual loadings in exchange for paid leave rights would, in this context, threaten to compound the wage injustice. David Peetz

112 Select Senate Committee on Work and Care, *Interim Report*, above n 62, at 8.112.

113 Peetz and May, above n 18; Laß and Wooden, ‘The Structure of the Wage Gap for Temporary Workers’, above n 18.

114 Peetz and May, above n 18, at 743–4.

115 Australian Council of Trade Unions, *The Myth of the Casual Wage Premium*, Melbourne, 2018, at: <https://actuorgau.azurewebsites.net/media/media/1034177/a4_ctr_casual-loading.pdf> (accessed 3 June 2023). This study draws on work analysing data from the 2016 ABS Survey of Employee Earnings and Hours summarised in J Healy and D Nicholson, ‘The Costs of a Casual Job are now Outweighing any Pay Benefits’, *The Conversation*, 4 September 2017, at <<https://theconversation.com/the-costs-of-a-casual-job-are-now-outweighing-any-pay-benefits-82207>> (accessed 3 July 2023).

116 Laß and Wooden, ‘The Structure of the Wage Gap for Temporary Workers’, above n 18; see also I Watson, ‘Contented Workers in Inferior Jobs? Re-Assessing Casual Employment in Australia’ (2005) 47 *JIR* 371.

117 Laß and Wooden, ‘The Structure of the Wage Gap for Temporary Workers’, above n 18, at 473–4.

118 *Ibid*, at 474.

256 (2023) 36 Australian Journal of Labour Law

and Robyn May propose ‘grandfathering’ the current loading for existing casual employees and ensuring a continued loading for casual employees in respect of working time unpredictability.¹¹⁹ These are sensible suggestions, which could be broadened to take into account the penalties suffered by casual employees in respect to detriments such as income, job and broader working time insecurity, along with poorer access to training and career progression.

STWC

Our second proposal is more encompassing. It builds on a proposal outlined in an earlier article,¹²⁰ and it concerns replacing the existing NES provisions for a FWIS¹²¹ and a CEIS¹²² with a new STWC that is designed to be relevant to the employment relationship between an employer and a particular employee.

This proposal also concerns an important protective gap inherited from the past. It addresses a major omission in the Australian system, which lacks any legal requirement for employees to be informed of the details of their job. Neither the FWIS nor the newer CEIS are effective substitutes for such a requirement.¹²³ Our proposal would apply to all employees, but its positive impact is likely to be greatest for insecure workers, who are most likely to lack information voluntarily provided by their employer and to lack awareness of their employment rights and entitlements. The information gap for insecure workers tends to amplify their labour insecurities in practice, including through opening space for employer non-compliance. Conversely, plugging the information gap can function indirectly to address the problem of insecure work by using a pathway of increased knowledge to raise worker bargaining power. Though indirect, this can nevertheless remedy one significant source of employee powerlessness and contribute to reducing insecurities and promoting secure work.

Worker knowledge of employment rights is crucial to the exercise of employment rights. There is a robust scholarship on the important role worker knowledge plays in both the compliance and enforcement of labour rights.¹²⁴ As Jill Murray and Rosemary Owens observed in 2009, ‘the effectiveness of any safety net is in large part predicated upon all parties who are governed by the system being able to know and understand their rights’.¹²⁵ The lack of worker awareness about their specific employment rights, with the partial exception of the right to a minimum wage, has been identified in numerous

119 Peetz and May, above n 18, at 755.

120 Campbell and Charlesworth, above n 42.

121 FW Act s 125.

122 Ibid, at s 207.

123 Current versions of the FWIS and CEIS are available on the FWO’s website, at <[fairwork.gov.au/employment-conditions/national-employment-standards/fair-work-information-statement](https://www.fairwork.gov.au/employment-conditions/national-employment-standards/fair-work-information-statement)>; <<https://www.fairwork.gov.au/sites/default/files/migration/724/casual-employment-information-statement.pdf>>(accessed 30 November 2023). As part of the reforms to fixed-term contracts in the SIBP Act, a further Fixed-Term Contract Information Statement is currently in development by the FWO. It is unclear whether this will have any more substance.

124 Grimshaw et al, above n 11.

125 Murray and Owens, above n 39, at 68.

Australian reports on worker exploitation in industries as diverse as horticulture and hospitality¹²⁶ and as a key contributor to precarity for vulnerable groups of workers such as recent migrants and refugees.¹²⁷ Worker lack of knowledge about their labour rights and entitlements has been found in a number of federal government inquiries and studies to underpin the breaching of those rights by employers.¹²⁸

Our proposal is for an amendment to the NES to introduce a new information document for employees, which we term a STWC. This requirement is not novel but corresponds to the approach taken in many other jurisdictions. In New Zealand, for example, employers are required to provide an individual ‘written employment agreement’ to every employee which includes the description of the work to be performed, wages, working time schedules, including the nature of employment if it is fixed term, the number of agreed hours, start and finish times, days of the week the employee will work, the wage rates or salary payable and leave rights along with other rights.¹²⁹ As Employment New Zealand puts it:

A well written employment agreement helps the employee and employer to know what is expected from them and what they’re entitled to. This means misunderstandings are less likely to happen and if a problem does come up then the employee and employer can go to the employment agreement to clarify things.¹³⁰

New Zealand also provides an employment ‘agreement-builder’ for employees to customise written employment agreements to ensure that the mandatory as well as recommended provisions relevant to the individual employee are included.¹³¹

Another example is the UK, where employers are required to provide employees with a written statement of employment particulars on their first day of employment. This principal statement, which is not an employment contract,¹³² covers similar matters to those specified in New Zealand. It also

126 See, eg, E Underhill and M Rimmer, ‘Layered Vulnerability: Temporary Migrants in Australian Horticulture’ (2016) 58 *JIR* 608 at 608–26; E Ferris and S Ross, ‘Decaffeinated Resistance: Social Constructions of Wage Theft in Melbourne’s Hospitality Industry’ (2023) 56 *Journal of Criminology* 42 at 42–58.

127 See, eg, B Farbenblum and L Berg, ‘Migrant Workers’ Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman’ (2017) 23 *Australian Journal of Human Rights* 310 at 310–31; L Berg, S Dehm and A Vogl, ‘Refugees and Asylum Seekers as Workers: Radical Temporariness and Labour Exploitation in Australia’ (2022) 45 *UNSWLJ* 35 at 35–69.

128 See, eg: Senate Select Committee on Job Security, *The Job Insecurity Report*, above n 1; Senate Economics References Committee, above n 23; as well as studies focusing on young workers and migrants such as WEstjustice, *Ignorance is NOT bliss*, September 2021, Footscray; and Coates, Wiltshire and Reysenbach, above n 67.

129 Ministry of Business, Innovation and Employment, *Things an Employment Agreement Must Contain*, New Zealand Government, at <<https://www.employment.govt.nz/starting-employment/employment-agreements/things-an-agreement-must-contain/>> (accessed 3 November 2022).

130 Ministry of Business, Innovation and Employment, *Employment Agreements*, New Zealand Government, at <<https://www.employment.govt.nz/starting-employment/employment-agreements/>> (accessed 3 November 2022).

131 Ministry of Business, Innovation and Employment, *Employment Agreement Builder*, New Zealand Government, at <<https://www.employment.govt.nz/starting-employment/employment-agreements/employment-agreement-builder/>> (accessed 3 November 2022).

132 Government UK, *Employment Contracts*, at <<https://www.gov.uk/employment-contracts->

provides information about any applicable probation period and obligatory training. A wider written statement, which must also be given to employees within two months of the start of employment, includes information about pensions and pension schemes, collective agreements, any rights to non-compulsory training provided by the employer and disciplinary and grievance procedures.¹³³ The UK also provides a template to assist employers.¹³⁴

The UK provisions reflect the 1991 EU Written Statement Directive (91/533/EEC), which imposed obligations on all EU states to ensure that every worker is provided with a written statement containing information on the essential elements of the contract or employment relationship (plus any change in these essential elements).¹³⁵ A newer and stronger EU Directive on Transparent and Predictable Working Conditions (EU/2019/1152) — which replaced the 1991 Directive — aims to raise employment standards through the provision of more transparent and predictable work conditions to all workers.¹³⁶ EU member states are required to transpose the new Directive into national law by August 2022 and to ensure every worker — widely defined to include those outside an employer-employee relationship — is provided with a written statement which also includes the usual place of work, details of any probation period, the employer’s training policy and employer obligations with respect to mandatory training.¹³⁷ For workers with unpredictable work patterns, the written statement should also set out the number of guaranteed paid hours per week, the remuneration for hours worked over the guaranteed hours, the hours or days within which the worker may be required to work, and the minimum amount of advance notice provided to workers about working hours.

In Australia, our proposal is that a STWC be provided to all employees. This Statement should communicate information in writing concerning the specific job, including features of interest to the employee such as job title (and classification), wage rates, working-time conditions including applicable premia for overtime and unsocial hours of work, type of employment and the name of the relevant regulatory instrument (for example, award, enterprise agreement).¹³⁸ That is, it should include the details adhering to the job in

and-conditions/written-statement-of-employment-particulars>(accessed 29 October 2022).

133 Ibid.

134 ACAS, *Templates for Written Statements*, at <<https://www.acas.org.uk/templates-for-written-statements>> (accessed 29 October 2022).

135 M Kiss, *Ensuring More Transparent and Predictable Working Conditions*, Briefing: EU Legislation in Progress, August 2019, at 2, at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628269/EPRS_BRI\(2018\)628269_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/628269/EPRS_BRI(2018)628269_EN.pdf)> (accessed 27 October 2022).

136 *Social Europe: More Transparent and Predictable Working Conditions for Workers in EU*, Press Release, Brussels, 1 August 2022, at <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4765> (accessed 27 October 2022).

137 German advice to employers on this Directive: K Bemelmans and L de Ruijter, ‘Transparent and Predictable Working Conditions’ [2022] 148 *Quoted*, at <<https://www.loyensloeff.com/globalassets/02.-publications-pdf/01.-internal/2022/quoted-148.pdf>> (accessed 27 October 2022).

138 Campbell and Charlesworth, above n 42, at 49.

which the employee is working or is newly employed. It should include for each employee:

- the name of the relevant award or, if applicable, the enterprise agreement under which the employee is engaged;
- the name of the employer or business entity employing the employee;
- the employee's name;
- the job title and award/enterprise agreement classification applicable to the employee;
- the type of employment contract: full-time, part-time, fixed-term or casual;
- the currently applicable rates of pay and applicable premia for unsocial hours & overtime;
- other applicable award working time provisions such as minimum engagements;
- where the employee is employed as casual, the definition of casual employment as well as conversion rights and protections;
- chart of the applicable NES with links to detailed provisions on the FWO website;
- the right to be provided with pay slips,¹³⁹ with details of the employee's pay for each pay period (both gross and net) including hours worked and applicable rates of pay, details of employer superannuation contributions and the name of the fund to which payments were made;¹⁴⁰ and
- other employee protections such as those on the current FWIS noted above, including rights to freedom from discrimination, bullying or harassment, sexual harassment, coercion, misrepresentation, sham contracting and undue influence or pressure.

The STWC should be provided on commencement to employees and to all employees engaged by an employer on an annual basis. Given the large number of award-reliant employees,¹⁴¹ and the industries in which they are predominantly employed,¹⁴² the STWC should be provided after each annual NMW decision, which flows on to awards, so that the applicable rates of pay can be updated. The FWO already provides this information annually for each award on 1 July after the annual NMW decision. These pay summaries include the applicable rates of pay for casual and permanent workers with applicable

139 See FW Act s 536; Fair Work Regulations 2009 (Cth) regs 3.45, 3.46.

140 The FWO provides a pay slip template for employers: see FWO, *Paying Wages*, at <<https://www.fairwork.gov.au/pay-and-wages/paying-wages>> (accessed 10 October 2022).

141 In its 2023 Minimum Wage decision, the Fair Work Commission found that 2,370,000 (20.5%) of employees had their pay set by awards: *The Annual Wage Review Decision* [2023] FWCFB 3500 at [48].

142 *Ibid*, at [50]. Award-reliant employees are covered disproportionately by a small number of modern awards in industries in which insecure work is rife, including retail, social and community services, hospitality and fast food.

premia for unsocial hours and overtime for each pay classification — all readily accessible on the FWO website.¹⁴³

The regulatory burden on employers of this proposal is minor. It merely replaces their existing obligations in respect of the FWIS and the CEIS with an alternative statement. It uses the information employers are currently obliged to provide in respect of pay slips under the Fair Work Regulations 2009 (Cth). More broadly, it draws on information that the employer should have already assembled in order to ensure a legal employment relationship with the employee. By accessing a STWC template prepared by the FWO, and information already on the FWO website on wages and conditions and other rights, such as under the NES and awards, Australian employers could easily build, as do their British and New Zealand counterparts, an individual Statement relevant to each job their employees occupy or to which they are appointed. Employer groups in Australia often lament the complexity of Australia’s labour laws and on occasions blame the complexity of awards for underpayments or other breaches of labour rights.¹⁴⁴ A new STWC may assist employers by improving their knowledge of employee rights and entitlements, thereby acting as a barrier to any inadvertent underpayments or breach of rights.

Finally, it is important to raise the issue of enforcement of the FWIS and our proposed STWC. The FWO is the Australian body that enforces employer compliance with the NES. In its public reports on enforcement action there is little indication that failure by employers to provide employees with the FWIS has been included in FWO enforcement action.¹⁴⁵ Yet, in its range of enforcement activity and in much of the litigation undertaken by the FWO, the failure to observe other standards, such as annual leave entitlements, is a relatively common reported breach.¹⁴⁶ Employer compliance with the obligation to provide the proposed STWC to all employees on commencement and annually thereafter would need to be proactively enforced by the FWO. Indeed failure to do so could incur additional penalties where other common breaches in respect of wage rates and leave entitlements are found, on the basis that if these rates and applicable premia were set out in the STWC, employers would be expected to be well aware of their award and NES obligations.

143 See, eg, the pay guide summary for the *General Retail Award* on the FWO website: FWO, *Pay Guide*, at <<https://services.fairwork.gov.au/download/payguides.html?file=general-retail-industry-award-ma000004-pay-guide.docx>> (accessed 8 October 2022).

144 See, eg: Employer Advisors, ‘Underpayments Blamed on Complex Awards System’, Blog Post, 17 June 2018, at <<https://www.employeradvisors.com.au/underpayments-blamed-on-complex-awards-system-employer-advisors/>> (accessed 8 October 2022); L White, ‘Modern Awards: Are Changes “Inevitable” for Australian Employers?’, *Human Resources Director*, at <<https://www.hcamag.com.au/specialisation/employment-law/modern-awards-are-changes-inevitable-for-australian-employers/408743>> (accessed 8 October 2022).

145 See FWO, *Workplace Investigations*, at <<https://www.fairwork.gov.au/about-us/compliance-and-enforcement/workplace-investigations>>; FWO, *Litigation*, at <<https://www.fairwork.gov.au/about-us/compliance-and-enforcement/litigation>> (accessed 6 October 2022).

146 For examples, see: *Fair Work Ombudsman v Westbridge Constructions (Vic) Pty Ltd* [2022] FedCFamC2G 421 (2 June 2022); *Fair Work Ombudsman v Corinthian Capital Pty Ltd* [2022] FedCFamC2G 309 (29 April 2022).

IV Concluding Comments

This article has three main aims: first, to push forward the discussion of insecure work in Australia; second, to reinforce the renewed attention on the NES as a platform for promoting secure work; and third to advance two proposals for NES changes that can be useful in encouraging more secure work.

We suggest, particularly after the recent and successful passage of the Fair Work Legislation Amendment (Secure Jobs, Better Pay Act) 2022 (Cth), which has inserted promoting secure work as an object of the FW Act, that the political context in Australia is favourable for further regulatory action to address the major problem of insecure work. The previous Coalition government made some tentative steps in this direction, and as we noted above, the federal Labor government, with support from the Greens and several cross-benchers, aims to take concerted action in 2023 to more fully realise its policy commitment to address insecure work. It is increasingly appreciated that effective action on insecure work cannot be confined to adjusting the rules of bargaining but instead needs careful attention to statutory minimum standards and ways of closing protective gaps. This appreciation in turn draws attention to one of the two fundamental planks of the Australian employment rights safety net, the NES. A welcome increase in proposals to strengthen the NES have entered into public circulation, and we contribute to the discussion with details on two proposals that can supplement existing policy proposals and help in meeting the objective of promoting secure work. The first concerns extending rights to paid personal/carer's and annual leave to casual employees, thereby improving working conditions for casual employees and reducing the deficit with the working conditions of standard employees. The second aims at providing employees with information about their employment entitlement and rights in their particular job through a tailored STWC, thereby assisting insecure workers to claim rights and entitlements.