

SecureJobs.

better future

The future of work in Australia: dealing with insecurity and risk

An ACTU options paper on measures to promote job and income security



About this options paper

This paper has been prepared by the ACTU following extensive consultations with Australian unions about the incidence, drivers and potential solutions to the problem of insecure work. The paper draws on existing union experiences and policy as well as international experience.

As part of the Secure Jobs. Better Future. campaign, the ACTU has commissioned an independent inquiry to examine insecure work. This paper is intended to inform submissions to and the deliberations of the inquiry, discussions within unions and public debate.

For more information on the inquiry and the campaign, go to www.securejobs.org.au

The Working Australia Papers are an initiative of the ACTU to give working people a stronger voice about social and economic policy. Although low and middle income Australians ultimately bear the costs of poor policy decisions made in relation to tax, infrastructure, retirement incomes, welfare and services, their voice is too often absent from national debates about these issues.

The Australian Council of Trade Unions is the nation's peak body for organised labour, representing Australian workers and their families.

Contact details:

Tel: 1300 362 223

Email: info@securejobs.org.au

www.securejobs.org.au

Contents

Introduction	1
1. The challenge	3
1.1 The rise in insecure work	3
1.2 The impacts of insecure work.....	10
2. Drivers of insecure work	13
3. Securing better jobs	16
3.1 Existing ACTU priorities.....	16
(i) Work and family.....	16
(ii) Contractors.....	17
(iii) Improvements to the bargaining system.....	17
(iv) Procurement and the expenditure of public funds.....	18
3.2 Other options for addressing insecure work - general.....	18
(i) Improving wages, rights and conditions	18
(ii) Limiting non-standard employment to where it is necessary, fair and appropriate.....	20
(iii) Improve minimum standards on working hours	27
(iv) Better enforcement of existing rights.....	27
(v) Labour hire	28
Appendix: Summary of options for addressing job and income insecurity	29

Introduction

Over the past few decades, Australia has experienced strong and sustained economic growth. Today, the Australian economy continues to perform relatively strongly, especially when compared to many other developed nations. At the same time, the Fair Work Act has restored many rights at work and is promoting fairer and more productive workplaces.

But not all working Australians are sharing in the benefits of Australia's economic prosperity. Many working families are feeling a growing sense of economic insecurity, in the form of unpredictable incomes, rising costs of living and increasing financial commitments and levels of household debt. Australia has a largely deregulated and trade-exposed economy and industries have experienced ongoing waves of change. This compounds the sense of insecurity felt by workers and their families.

A defining feature - as well as a driver - of this growing economic insecurity is the rising number of poor quality, insecure jobs. Increasing numbers of workers are engaged in work that is unpredictable, uncertain and that undermines what ordinary Australians need to feel secure in their lives and communities.

A primary school teacher is engaged on rolling one year fixed contracts with no income over the long summer break and no guarantee of work the following year. A labour hire worker in a warehouse in Melbourne has performed the same work as his workmate beside him for six months but still receives lower pay, inferior entitlements and no job security. A home care worker is engaged on a part-time basis but with no predictability as to weekly hours of work or income.

At first glance, these workers share little in common. But their experiences of work are all being shaped by the same powerful and concerning trend within Australian society. This is the shift of the costs and risks associated with employment from employers onto workers. Workers have experienced this shift through a loss of job security and predictable incomes, attacks of entitlements such as sick leave, minimum engagements and penalty rates, and a loss of control and predictability over hours of work. This risk transfer is being experienced, in different forms and to varying degrees, across all industries and occupations, public and private.

Making matters worse, these changes within the workplace are accompanied by a broader transfer of risk from government and business to Australian households. This trend, which has been occurring over recent decades, is being felt by working families in the form of less certain incomes, rising fixed household costs (housing, education, health, childcare, transport energy and food) and the shouldering more and more household debt.¹

The risk shifting from businesses and governments onto workers has effects far beyond the workplace and even the household. It also damages communities and the social fabric of Australian society. Financial insecurity and uncertainty over working hours has a debilitating effect on workers' capacity to find time for relationships and for rest time, leisure and activities outside work. Without knowing when they will next work, workers struggle to stay connected with their communities and to participate in activities such as getting involved in their children's school or playing in the local sports team.

The rise of insecure work presents significant challenges to Australian workers and their unions. Unions are faced with the challenge of responding to the massive transformations that have occurred in the world of work and developing workplace standards that meet the legitimate aspirations of Australian workers to decent and secure jobs and that are appropriate for a modern, prosperous, internationally competitive market economy.

The ACTU has committed to making these issues, and in particular the erosion of job and income security, a priority over the coming years.

This paper is intended to begin discussion on this important topic by identifying possible industrial and policy responses that may go some way towards reducing job and income security.

The challenge

There is no universally accepted definition of insecure or precarious work. Through discussions with affiliates and their members about their experiences, the ACTU has developed the following working definition.

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 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.

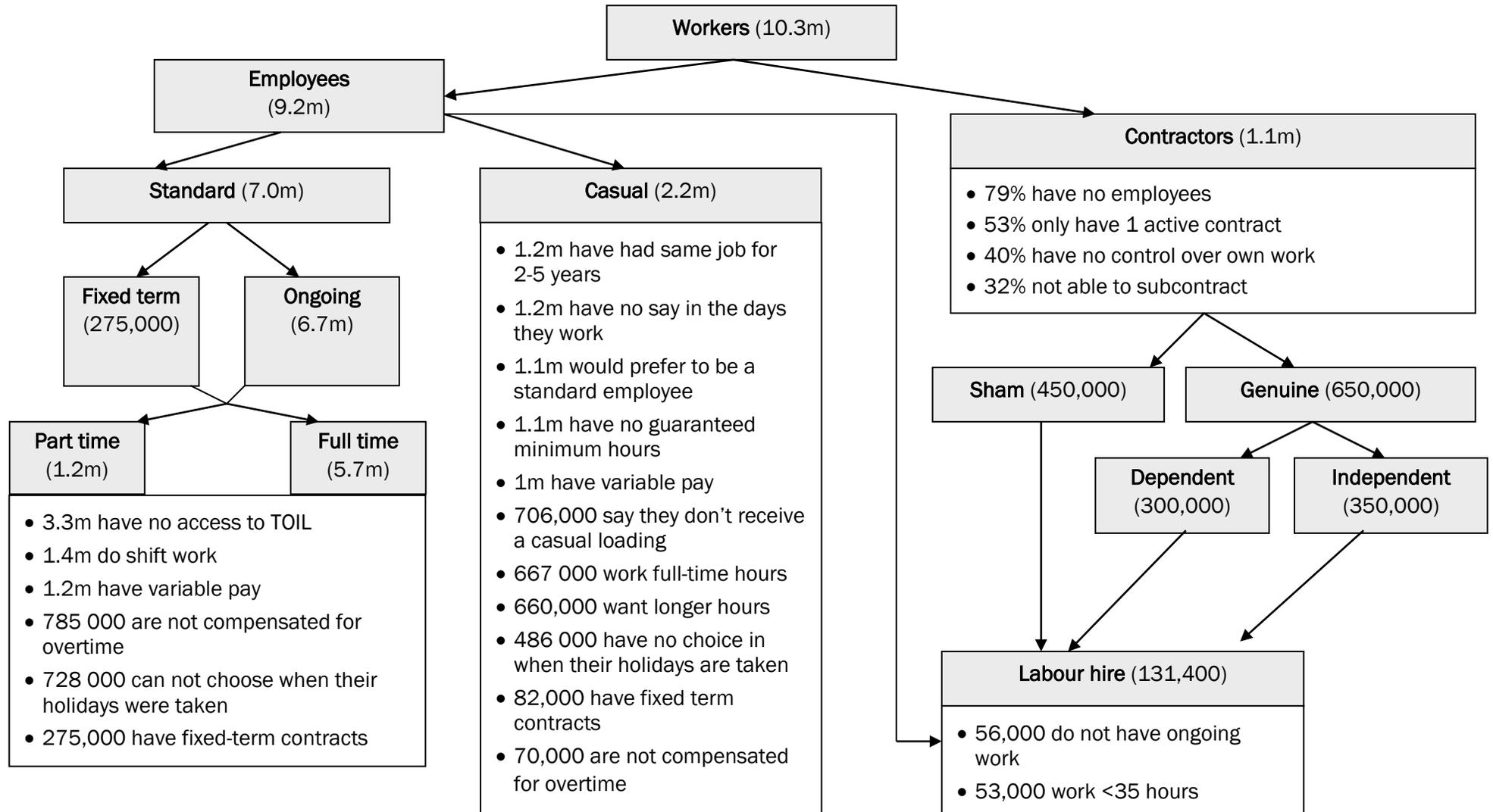
Insecure work can be experienced by all workers. However it is often associated with certain forms of employment, including casual work, fixed-term work, seasonal work, contracting and labour hire. It is also increasingly a problem faced by workers employed part-time and workers in non-traditional workplaces, such as home-based outworkers.

Insecure work has profound implications for the quality of working life. It is often accompanied by other negatives, such as low pay, less access to opportunities for training and skill development, a lack of voice in the workplace and a higher risk of occupational illnesses and injury. People in insecure work are less likely to be aware of and to enforce their rights and entitlements. Insecure work is often experienced by those in our workforce with the least bargaining power. This includes those with lower skills, young workers, women, Indigenous workers, migrant workers and persons with disabilities.

1.1 The rise in insecure work

While it can be difficult to precisely quantify the extent of 'insecure work' in Australia, ABS data can help us understand who might be at risk (see Figure 1).

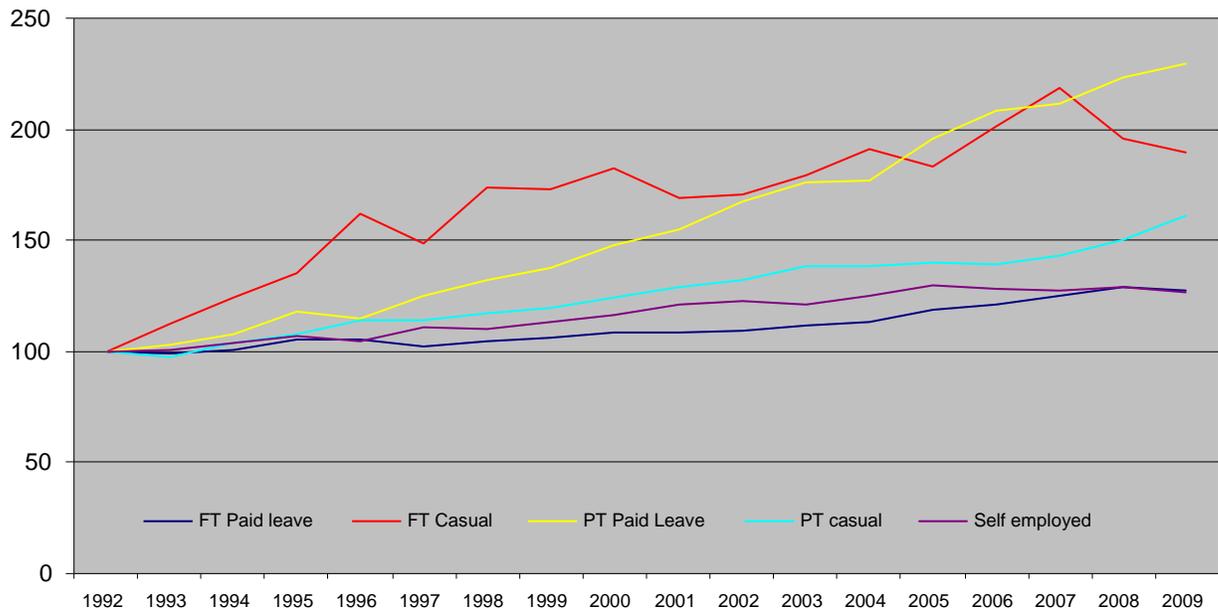
Figure 1: Forms of employment in Australia



Source: ABS cat 6359.0 (Nov 08, Nov 10); 6310.0 (Aug 10); 6342.0 (Nov 09); 6265.0 (Sep 10).

While insecurity can be experienced by all workers, it is often experienced by workers in non standard or contingent employment: casual workers, fixed-term workers, seasonal workers, contractors and labour hire workers. Over the past few decades, these types of work have grown at a much faster rate than full time standard employment. The greatest growth has been in full time casual and part-time employment (Figure 2).

Figure 2: Growth in non-standard forms of employment, 1992 – 2009, Base Index = 100 (ABS 2011). Note: self-employed are owner-managers of incorporated and unincorporated enterprises.



Today, only around 60 percent of workers engaged in the Australian labour market are engaged in full or part-time ongoing employment. Twenty per cent of workers are in casual employment and another 10 per cent are engaged as independent contractors.

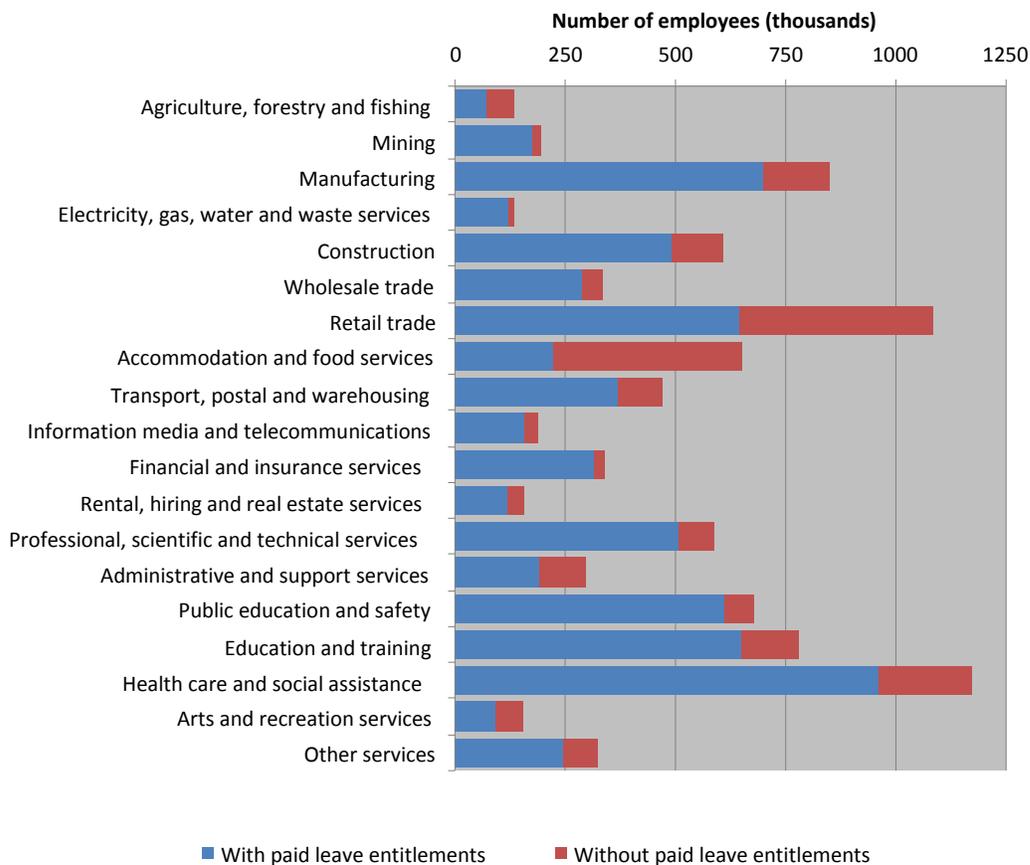
Of course, the existence of a diversity of work arrangements is not itself problematic and not all workers engaged in these types of work experience insecurity at work. Many workers choose to work under these types of arrangements and have good quality, rewarding jobs. However the evidence suggests that many ‘non-standard’ jobs are poorer quality jobs.²

Almost one quarter of all employees in Australia (24% or just over 2 million workers) are engaged in **casual employment**.³ This means that one in four employees in Australia now has no entitlement to many of the benefits that we generally associate with employment, such as

paid annual or personal leave or payment or notice of termination or redundancy. The proportion of Australian employees engaged in casual work has grown significantly over the past decades: from 15.8% in 1984 to around 27.7% in 2004, before declining slightly and remaining relatively stable at around a quarter of all employees since then.⁴

Casual employees continues to be heavily concentrated in several industries: retail (20% of all casuals) and accommodation and food services (19% of all casuals). Casual density is highest in accommodation and food (where 65% of all employees are casual), followed by agriculture, forestry and fishing (47%); retail (40%) and arts and recreation services (with around 39% of all employees casual)(see Figure 4).⁵ However it is important to note that casualisation has not been limited to these areas of the economy: nearly all industries have seen a strong growth in casual density over the past few decades.⁶

Figure 3: Casuals by industry, 2010



There is a strong relationship between casual employment, age and gender. Casual employment is most common among young workers, with 21% of all casual workers aged between 15-19 years and just under 60 percent of all casual workers under 35 years of age.⁷ Women are much more likely to be in casual employment than men: with 27.6% of all female employees are casual compared to 20.4% of male employees. Most workers in Australia who work part-time (55 percent) work in casual employment. Just over 30% of casual employees work full-time hours.⁸

Over half of all casual employees are 'permanent casuals' in that they have long-term, ongoing and regular employment but, by virtue of being a casual, have none of the basic entitlements associated with ongoing employment. Over half of all casuals have been employed in their current job for over a year and over 15% of casuals have been in their job for more than 5 years.⁹ ABS data shows that more than half of all casual employees would prefer ongoing work.¹⁰

Fixed-term employment accounts for just under 4% of all employees, but it is heavily concentrated in just a few sectors: education (134,300 workers or 38% of all workers on fixed term contracts), public administration and safety (45,900 or 13%) and health care and social assistance (56,500 or 16%).¹¹ Fixed-term employees generally have similar wages and conditions to ongoing employees, with the important exception of job security. In addition, many workers on fixed-term contracts face difficulties accessing similar training and career opportunities to their permanent counterparts.

Over one million workers in Australia (1.1 million people or 10% of the workforce) are **independent contractors**. Most independent contractors work in the construction industry (340,800 workers), followed by the professional, scientific and technical services industry (159,800 workers), administrative and support services (96,800 workers) and transport, postal and warehousing industry (82,900 workers). They account for 32.7 per cent, 18.6 per cent, 22.5 percent and 14 per cent of the labour force in each of these respective industries.¹²

Many contractors are vulnerable to exploitation. They are more likely to work very long hours than employees and have no minimum wage, minimum conditions, or protections from unfair dismissal, because they are not covered by the Fair Work Act and do not have access to Fair

Work Australia. Many contractors, though independent by law, are in reality economically dependent on a single client. The number of **dependent contractors** in the workforce is difficult to estimate. From ABS statistics, however, we know that around 40% of all contractors (441,500 workers) are dependent contractors in that they have no authority over their own work..¹³ Dependent contracting is a particular problem in industries such as road transport and construction.

A significant number of contractors are engaged in **sham contracting** arrangements, whereby an employment relationship is misrepresented or disguised as a contracting one. Research by the CFMEU has recently estimated that between 26 and 46% of all contractors in the construction industry (between 92,000 and 168,000 workers) are engaged in sham contracting.¹⁴

Many workers engaged in **labour-hire arrangements** are at risk of insecure work. In many cases this is due to the triangular nature of these arrangements, with ambiguity over responsibilities having serious implications for workers' access to rights and entitlements. There is no obligation upon employers to provide labour hire workers with wages and conditions of work to labour hire workers that are equal to those provided to a directly employed worker. Many labour-hire workers are employed on a casual or contracting basis, with associated problems of low pay, no job security, inferior conditions of employment and an absence of skill development and training.¹⁵

Accurate and recent data on the extent of labour hire arrangements in Australia is not readily available. ABS data indicates that, in 2008, around 576,700 or 5% of Australian workers obtained their jobs through labour hire firms/ employment agencies, but only a quarter of these (132,641 workers) were paid directly by the labour hire firm. The ABS, however, is likely to under-estimate the number of labour hire workers.¹⁶ While estimates vary, labour hire workers constitute between 2 and 4 percent of all workers in Australia, and are concentrated in manufacturing, property and business services and health and community services.¹⁷ Evidence suggests the incidence of labour hire has increased significantly in the past decades, with the Productivity Commission estimating in 2005 that the number of labour hire workers in Australia had increased from 33,000 in 1990 to 190,000 in 2002 – a rate of growth of 15.7 per cent a year.¹⁸ The significance of labour hire should also be understood in terms of the number of workplaces engaging labour hire, which has also risen

significantly.¹⁹ Moreover, while labour hire continues to be concentrated in particular industries, it is increasingly being used across all industries and occupations.²⁰

A further group of workers that are at high risk of insecure work are workers that perform **work outside premises conventionally considered to be workplaces**. This practice is increasingly common, and is fuelled by the outsourcing by firms of functions once done in-house. Home-based outwork is particularly common in the textile, clothing and footwear industry, where it accounts for the majority of Australian clothing manufacturing. It is also increasingly common in sectors such as telemarketing. The location of work heightens the risk of worker exploitation and of the presence of insecure work arrangements. For example, while, by law, textile, clothing and footwear outworkers are now entitled to most of the key protections and benefits as workers in a factory, in reality these are rarely enforced. Many outworkers receive a piece rate payment equal to as little as \$4 an hour. In addition to low wages, outworkers face irregular work (due to the seasonal nature of the clothing industry); a lack of job security; no superannuation and inadequate protection and compensation in the case of occupational injuries and illnesses. Many outworkers are engaged on sham contracting arrangements. Home-based work is also increasingly common in areas such as telemarketing.

- Workers also experience insecure work in the form of **working time insecurity**. For many workers, this takes the form of too few or irregular hours of work. There are over 850 000 workers in Australia working part-time hours who would like to work more.²¹ Working time insecurity in the form of irregular or fragmented hours is common in industries and sectors such as retail, hospitality and health services, where employers have sought to enhance flexibility and reduce costs by reducing or removing restrictions on working time arrangements: widening the span of ordinary hours, averaging working hours, removing or reducing penalty payments for extended or unsociable hours, and reducing minimum periods of engagement. Lack of predictability of scheduling (on a daily and weekly basis) has further eroded job quality. These types of insecurities are particularly experienced by casual workers and, in some sectors, increasingly also by part-time employees. ABS data also shows that 37 percent of all employees working part-time hours have no guaranteed minimum number of hours of work²² and that many casual workers face insecurity in the form of too few hours, with 29 percent of all casuals wanting to work more hours than they current work.²³ Casuals also experience significant variability in working hours, with

35% of casual workers in jobs where hours varied weekly.²⁴ For casuals, lack of control over working hours is often exacerbated by a reluctance to refuse shifts, even at short notice or inconvenient times, for fear of rising future work prospects.

Working time insecurity is also experienced in the form of **excessive hours**. Australia outranks 22 OECD countries for the average hours worked by full time workers.²⁵ Extremely long working hours (50 hours or more per week) have become increasingly common for full-time workers, especially among males. In 2011, over 1.8 million workers (15.9 percent of all employed persons) report usually working 50 hours or more a week. This includes 22.9 percent of male workers (1.4 million workers) and 7.5 percent of female workers (391,900 workers).²⁶ Research conducted by the Workplace Research Centre at the University of Sydney has also found that a pervasive long-hours culture exists in Australian workplaces.²⁷ According to ABS data, around 60 percent of full time employees who usually worked very long hours would prefer to work fewer hours.²⁸ One in five of Australian workers (21% or 2.2. million) would prefer to work fewer hours.²⁹

A further group of insecure workers are those that experience **fluctuating pay/ income**. There are two main causes of unpredictable pay. The first is through working irregular hours: this is interwoven with working time insecurity above. The second main cause of income insecurity is where workers have a significant proportion of their pay at risk, in terms of being contingent upon individual, group or organizational performance. While the extent of variable pay is difficult to determine in Australia, ABS data indicates that 25 percent of employees have earnings/income that varies from on pay period to the next. This includes 19 percent of employees working full-time hours and 41 percent of employees working part-time hours.³⁰

1.2 The impacts of insecure work

Insecure work has a negative impact on workers and their families, on communities and on the Australian economy. It also has serious cost implications for governments.

For workers, insecure work means lower pay and fewer rights and entitlements at work. Casual employees, for example, are more likely to be award-reliant and earn, on average, lower pay than permanent employees.³¹ It also means unpredictable and fluctuating pay which makes it difficult to predict earnings and to borrow money. Insecure work also involves

reduced control over working arrangements and hours, which is particularly difficult for workers with caring responsibilities. Evidence also suggests that many workers in insecure work, such as those engaged in casual employment and labour hire workers, are less likely to have access to skill and career development opportunities and are at greater risk of occupational injuries and illnesses.³² Workers in insecure work are less likely to be aware of their rights or to be willing or able to enforce them.

Insecure work also has a powerful and negative effect on the quality of work for all workers, through contributing to intensifying competition in the workplace and exerting downward pressure on wages and conditions of employment.

The effects of insecure work are felt beyond the workplace. There is growing research documenting the impact of insecure work on the psychological and physical well-being of workers.³³ Low and unpredictable incomes can place significant pressure on families and contribute to a more stressful home environment as families struggle to meet household expenses. Insufficient hours of work can mean that workers must hold down two or more jobs at the same time. Lack of control over working hours can also prevent workers from fully engaging with the other aspects of their lives that depend on their work schedules being relatively predictable, and undermine periods traditionally reserved for leisure, family and other obligations.

Insecure work has negative effects on communities and on civil society. Without control and predictability of working hours, many workers struggle to stay connected with their friends and communities. They find it hard to engage in social activities outside work, and to participate in their communities.

While insecure work may deliver short-term cost savings for employers, it undermines the **longer term productivity** of Australian workplaces through reduced investment in training and skill development, lower levels of employee commitment and higher labour turnover, and lower occupational health and safety standards.³⁴ Insecure work also undermines employers who do the right thing and provide decent quality, secure jobs by creating competition based incentives to reduce the quality and security of work.

Insecure work imposes high costs on **governments**. There are significant cost implications for governments where workers are not able to accrue significant levels of superannuation and must rely on pension arrangements. Job insecurity and under-employment may also effectively shift costs from employers to the state through increasing the number of people reliant on social security arrangements such as Newstart allowance. There are also potentially significant indirect costs to governments arising from the negative effects of insecure work on people's health and wellbeing.³⁵ In the case of sham contracting and other illegal types of work engagement, there are significant losses to Commonwealth revenue as a result of tax evasion. The CFMEU's research has estimated that, in the construction industry alone, sham contracting leads to a public revenue loss of between \$58m and \$2.275b per annum.³⁶

Drivers of insecure work

Since the 1990s, intensified global competition have driven labour market reforms directed at increasing labour market 'flexibility'. These policies have facilitated greater employer control over how, and the ways through which, labour is engaged. The scope for employers to access labour without obligation³⁷ and to shift many of the costs and risks associated with employment onto workers has significantly increased. Outsourcing of services and other functions by all levels of government which periodic contracts has been a significant contributor. This risk transfer has been achieved through practices such as casualisation, sub-contracting and outsourcing. It has also been done through the weakening of protections afforded to workers in 'standard' employment relationships, such as minimum periods of engagement and penalty rates.

It is important to note that there are no distinctive features of the Australian economy that necessitate high levels of job and income insecurity. Other developed countries have experienced similar structural changes and dynamics but without the accompanying dramatic increase in levels of insecure work, suggesting that such outcomes are far from inevitable or unavoidable.³⁸ Moreover, arguments that attribute the high level of insecure work to structural shifts in the Australian economy, those as the growth in industries such as retail and hospitality, fail to recognise that job and income insecurity has grown significantly across nearly all industries and occupations.

For employers, insecure work is perceived to deliver **cost savings** through avoidance of expenses associated with ongoing direct employment, such as paid leave, workers' compensation, long service leave and superannuation. It can also mean fewer administrative obligations and greater flexibility in hiring and firing workers. Insecure work also provides employers with greater **numerical and working-time flexibility** as employers are able to reduce fixed costs while maintaining the capacity to meet peaks in production or demand. This is often done through maintaining a minimal core of permanent workers (and management staff) which can then be supplemented by the use of non-standard workers (casuals, contractors, fixed-term and labour workers). Any short-term cost savings, however,

often come at the cost of longer term productivity achieved through having a stable, committed and skilled workforce.

There are also **less tangible benefits** to employers by engaging workers in insecure work arrangements. Workers engaged in insecure work are less likely to be aware of, or to enforce, their rights. With no job security, they are more likely to accept poor conditions and to remain silent over issues of concern within the workplace. Engagement of workers in insecure work arrangements, such as labour hire, is also often used as a means of avoiding a union presence or union-negotiated collective agreement.³⁹ These types of arrangements also intensify competitive pressure between workers and places downward pressure on the wages and conditions of workers engaged in more secure work arrangements within the same workplace.

In a number of sectors such as education and health care, the **structure and delivery of government funding, as well the lack of adequate funding**, has promoted and facilitated the rise in insecure work, both in terms of the increased number of workers in casual and other non-standard forms of work and deterioration of working conditions and increased insecurity for those engaged in more 'permanent' jobs. In some areas, this has involved the privatization and contracting out of core public sector functions, resulting in a deterioration of job security, wages and working conditions.⁴⁰ In other sectors such as education, devolution of budget management, reforms to the length and nature of funding cycles and/or an increased reliance on outside funding sources has fuelled the growth in insecure types of work.⁴¹

In other industries, such as TCF and road transport, growth in insecure work has been fostered by the emergence of increasingly complex and elaborate outsourcing arrangements and **contracting chains**. These supply chain systems, and the deliberate strategies employed by those holding large concentrations of market share at the top of the chain and various parties throughout the chains to maximize profit and minimize liabilities (including those arising under labour laws), has resulted in much of the risks and costs associated with employment being borne by workers at the lowest end of the supply chain, who can least afford to bear them. In many cases this has involved the extensive use of sham and dependent contracting arrangements.⁴²

While employers may prefer insecure work arrangements for the cost savings it brings, **gaps in the regulatory framework** that have enabled it to proliferate.⁴³ The Australian industrial relations system has failed to adequately recognise and extend adequate protections to workers engaged in insecure work or to adequately or comprehensively address new forms of work organisation (such as supply chain outsourcing). It has also failed to ensure that specific work arrangements, such as casual work, are only used for their intended purpose and not subject to abuse.

It is often argued that the growth in casual and other types of nonstandard work has been driven by **employee preferences**. These types of work, it is argued, meet the desire of many workers for flexibility and for more choice and control in their working arrangements. There is no doubt that these types of arrangements do enable highly skilled workers who wield a significant degree of bargaining power to shape their working lives to best meet their needs. But this remains a small and privileged minority of the workforce. Many workers in these types of work would prefer permanent jobs. In the case of casuals, for example, ABS data indicates that over 50 percent of all casual workers would prefer ongoing employment.⁴⁴ Research also shows that, despite the common claim that labour hire work is attractive to workers who value the flexibility and independence, labour hire workers are less likely than ongoing workers to be satisfied with their job security, pay, or job overall.⁴⁵ A further reason why many casual workers may prefer not to take up ongoing work is that low pay renders it very difficult for them to afford to lose the hourly loading that accompanies casual employment. Another commonly identified demand-side factor driving the increase in non-standard forms of work is the increased participation of students and women in the labour market. However while there is evidence of a preference for flexible working arrangements and for part-time work among these groups of workers, there is no evidence to suggest a preference for casual or poorer quality, less secure work.⁴⁶

Securing better jobs

Given the scope and breadth of the challenge that insecure work presents and the different forms it takes in different industries and occupations, there is not one policy solution that is capable of addressing the problem. This section identifies a range of options which may have a significant impact in addressing the rise of insecure work.

There are two broad possible approaches to addressing the rising levels of job and income insecurity. The first is directed at improving the rights and conditions of work for all workers. The second is to seek to prevent the growth in insecure work by ensuring that non-standard forms of employment are used for their legitimate purpose and to a reasonable extent, and not as a cheap substitute to ongoing employment. The following discussion includes both approaches.

It is envisaged that the industrial response to job and income insecurity will include a range of measures, including bargaining, changes to awards and legislative reform. Different solutions may be accorded different priority in different industries and sectors. The following discussion is followed by an appendix which organizes the following industrial options into workplace, industry-wide and general solutions.

3.1 Existing ACTU priorities

There are a number of existing ACTU priorities, which have the potential to significantly address the proliferation of insecure work. These include:

(i) Work and family

Many workers are in insecure work because they cannot access ongoing full or part-time employment that is sufficiently flexible to enable them to meet their caring responsibilities. The following measures will assist workers access working arrangements that are flexible but also of a decent quality:

- Extend the right to request flexible working arrangements to all those who need it
- Make denials of 'requests' subject to challenge in Fair Work Australia

- Provide a right for workers to return to work part-time after parental leave, unless the employer can demonstrate that this would be unreasonable.

(ii) Contractors

The ACTU is committed to ensuring a decent safety net, bargaining rights and protections against unfair treatment apply to all workers regardless of the type of labour contract under which they are engaged. This includes:

- Ensuring contractors have rights to bargain collectively and to be represented by their union in bargaining, including through amendments to the *Australian Competition and Consumer Act 2010* (formerly the *Trade Practices Act 1974*);
- Ensuring contractors have access to low cost and effective remedies against unfair contracts, including through amendments to the Independent Contractors Act 2006;
- Ensuring there are effective mechanisms in place to prevent and prosecute sham contracting arrangements (including amending the sham contracting provisions within the FW Act)
- Seeking amendments to the SG and workers' compensation legislation to extend these entitlements to excluded contractors
- Pursuing taxation reforms to ensure that, where work is being performed by a worker in a manner analogous to that of an employee, that person should be treated as an employee for taxation purposes
- Ensuring the implementation of a Safe Rates system in the road transport industry.

(iii) Improvements to the bargaining system

Removing restrictions on the level of bargaining and on the content of agreements would significantly facilitate efforts to address insecure work. The ACTU is committed to:

- Greater access to multi-employer bargaining
- Default application of agreements to categories of workers even if indirectly engaged (e.g. labour hire and contracting chains)
- Removing unnecessary restrictions on the content of agreements
- Securing mandatory arbitration within agreements, awards and the NES.

(iv) Procurement and the expenditure of public funds

Measures to ensure that government expenditure (procurement and grants) takes account of the employment effects. At present, significant parts of the government's economic footprint is value neutral as to its effects on the labour market, or at worst provides perverse incentives to employers to use an insecure workforce. In some industries and local labour markets, the government component is sufficient to drive good outcomes or, alternatively, to distort the norm towards insecure work arrangements.

3.2 Other options for addressing insecure work - general

(i) Improving wages, rights and conditions

Most industrial rights in Australia are limited to employees. There are some rights, however, that apply to all workers. This includes, for example, the general protections provisions in the FW Act. Consideration could be given to **strengthening and increasing the minimum floor of rights to all workers**. In the UK, for example, a distinction is drawn between employees, workers and the self-employed. Some minimum standards (e.g. minimum wages, working time, and rights to be accompanied to disciplinary and grievance hearings) extend beyond 'employees' to encompass other individual workers who perform work or services for another party.⁴⁷ A similar approach could be considered in Australia, with standards such as a minimum wage, paid leave and rights to access dispute resolution processes extended to all workers. A consideration in support of focusing on securing better wages for workers in insecure work is the finding from the ACTU Working Australia Census that wages are the key issue for workers in terms of improving conditions at work. In addition, there is evidence to suggest that low wages are an immediate barrier to some workers in casual employment wishing to convert to ongoing employment, despite its benefits.

The advantages of this approach include that it provides a stronger safety net of minimum rights for all workers, regardless of how they are employed. The disadvantages of this approach include that it requires significant amendment to the Fair Work Act and that it would not of itself be capable of addressing some of the major causes of insecure work experienced by many workers.

An alternative approach may be to **establish principles of equal treatment to different types of employment**. This is one of the main approaches towards the regulation of non-standard forms of work adopted in the UK, to implement various European Union directives. Under this

approach, employers are obliged to treat part-time and fixed term contract employees no less favourably than a comparable permanent employee, unless there is 'objective justification' for doing so.⁴⁸ The same approach has been taken more recently in the UK with respect to labour hire. From October 2011, after 12 weeks in a given job a labour hire worker has an entitlement to equal treatment (with respect to duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay) that would apply to the worker concerned if they had been recruited directly by that undertaking to occupy the same job. In Australia, this approach could be applied to fixed-term employees, labour hire employees and to casual workers after a set period of time (e.g. 12 weeks). This could be done through bargaining, awards and/or legislation.

While this has been the main approach to improving protections for non-standard workers in UK labour law, it has significant weaknesses. This includes the nature of the comparisons they permit and the use that can be made of the 'justification defence' available to employers who treat part-time, fixed-term or labour hire workers differently from their ongoing employees.⁴⁹ In particular, the directives have proven of limited use in addressing disadvantages faced by casual workers, as courts have found that they do not have 'the same type of employment contract or relationship' as full time workers and so are not entitled to equal treatment.⁵⁰

An alternative and less ambitious approach could be to **extend rights of regular casual workers to paid leave**. This could include paid annual, personal and/or long service leave. In New Zealand and the UK, for example, statutory leave entitlements extend paid leave entitlements to all employees, including regular casuals.⁵¹

This could be done, for example, through:

- Providing for casual employees to accumulate paid annual leave on a pro-rata basis;
- Providing that casual employees who have been employed on a regular and systematic basis for a minimum period of time (e.g. 6 months) have the same rights to paid leave as ongoing employees; and/or
- Introduce and/or expand statutory portable entitlement schemes.

If this option were to be considered, policy issues such as when entitlements accrue, whether entitlements should be portable across jobs and, if so, who should be responsible for

managing these entitlements (e.g. the employer or an industry fund), would all need to be considered. This approach is likely to gain significant support among casual workers. The disadvantage is that it is relatively narrowly focused and may serve to further increase the appeal of contracting to employers as a means of avoiding costs associated with direct employment.

Through award modernisation, the casual loading in awards has been standardised at 25%.⁵² Agreements and/or awards could build on this safety net by providing for **a higher casual loading**. While this could benefit casual workers in the short term and provide an additional disincentive to employers to casualise their workforce to reduce costs, it could also backfire in increasing the incentive for workers to engage in casual employment and make it harder for workers to afford permanent work as the impact of losing the casual loading would be more substantial.

Awards, legislation or agreements could **extend rights to notice and redundancy pay to fixed-term employees and/or regular casuals**.

(ii) Limiting non-standard employment to where it is necessary, fair and appropriate

Conversion

A key mechanism to limit insecure work lies in enabling **non-standard workers to convert to ongoing employment**. This could be done through individual rights to conversion, through secure employment orders, or through automatic conversion on a gradual or immediate basis.

Individual right to conversion involves providing workers who have been employed with a particular employer for a significant period of time with the individual right to request conversion to permanent full-time or part-time employment. These clauses are generally subject to the right of employers to refuse such requests where they have reasonable grounds for doing so. Conversion clauses were put into a number of state and federal awards in the early 2000s but are now only found in a few modern awards.

While conversion rights are most commonly associated with casual employees, they can also be included in agreements for fixed-term employees and possibly for labour hire workers who have been engaged for a significant period of regular employment with a host employer.

While individual casual conversion clauses have existed for some time now, the evidence suggests they have not been used widely. Identified limitations of these clauses include a reluctance of some casual workers to shift to ongoing work because of the prospect of a drop in take home pay due to loss of the casual loading; a reliance on the individual worker who may be reluctant to risk their employment by challenging their employer; and the limitations of such clauses in industries where casual workers do not work regular hours. They are also rarely used in non-unionised workplaces. There is also the risk, for any conversion clauses that are triggered from a period of regular and consistent work that employers may engage in churning to avoid their obligations under these clauses.

Consideration could be given to ways of strengthening casual conversion clauses so as to overcome some of these limitations: e.g. rather than relying on an individual employee knowing of their right to request conversion and exercising this right, the clause could impose a requirement on the employer that, on a specified date each year, they offer employees that meet specific criteria the opportunity to convert to ongoing employment. Conversion clauses can be secured through bargaining, awards and/or legislation.

To address some of the limitations of individual casual conversion and to provide a tool for organising in workplaces that have systemically abused non-standard forms of employment to cut workers' conditions, a new mechanism for consideration could be **secure employment orders**. This is an innovative mechanism, which builds on concept of the take-home pay order, where conditions for a group of workers can be protected in a single order from Fair Work Australia. The mechanism would provide for unions to apply FWA for an order which requires an employer to offer permanent employment to specific groups of workers. This mechanism could be included in awards through a test case, legislation or agreements, and could be used to secure ongoing employment for casual, fixed-term and labour hire workers.

It is envisaged that the clause would work as follows:

- Unions would go into a workplace and assess the level of interest among insecure workers for more secure employment, and recruit members accordingly.
- The union would identify the specific group or class of employees that would be subject to the secure employment order application. The group would be selected so as to cover those workers who wish to convert to ongoing employment and red-circling/ excluding those who wish to remain on current arrangements. The

application could be wide (e.g. all casual workers) or narrow (e.g. only casual workers in a particular occupation or classification employed by the employer).

- The union would lodge the application with FWA and serve a copy on the employer.
- FWA would be required to grant the order, unless the employer can show that it has a genuine need to keep the employees on existing arrangements. In considering an employer's claim that an application be rejected, FWA would be required to have regard to a number of factors.
- FWA would have broad discretion in terms of the process adopted to determine an order (e.g. written submissions from parties, private conferences, hearings etc.)
- FWA would have broad discretion as to the types of orders it could make to remedy the situation. A secure employment order could, for example:
 - (i) require all casual workers who have been employed on a regular and systematic basis for a particular employer over a period of 12 months be offered ongoing employment;
 - (ii) authorise a process whereby employees who have been employed by a particular employer for a certain period of time have the right to elect to convert to ongoing employment (this may be useful where some casual workers wish to remain casual);
 - (iii) specify the terms of ongoing employment for the workers (e.g. an order that the casual loading be phased down over time so as to avoid a sharp drop in take home pay for the workers); and
 - (iv) require report-backs, audits and other monitoring procedures.

A secure employment order could bind the employer not only in respect of the engagement of the employees who are subject to the application, but also in respect of employees engaged at a later date who fall within the same class.

Another approach could be to gradually increase the rights and entitlements available to casual workers until they are equal to those of permanent employees (*gradual conversion*). This could be done through insertion of a clause through an award test case and/or through bargaining. The speed of conversion and the nature of the increments could be altered as deemed appropriate.

A final conversion option is ***automatic conversion after a set period of time***. This involves providing maximum periods of engagement, beyond which time the worker automatically transitions to ongoing employment. This can be used for casuals and fixed term employees. It could also be used for labour hire workers. This is already done in some agreements and awards, and could conceivably be done through legislation. While this mechanism avoids the limitations of having to rely on vulnerable individual employees making requests to convert to ongoing status, it may be resented by some casual employees who wish to retain the flexibility and loading associated with casual work. Anecdotal evidence also suggests many employers seek to avoid automatic conversion by dismissing the casual employee prior to the expiry of the relevant period.

Improving definitions of certain types of work

The proliferation in forms of insecure work in Australia has been facilitated by an absence of adequate definitions of these types of employment.

One option is to include a **statutory presumption in favour of an employment relationship in the Fair Work Act**. Most rights at work rely on the existence of an employment relationship. The Fair Work Act relies on the common law definition of an employee, but this can be problematic as the common law test is not clear-cut and is easily open to manipulation by an employer seeking to evade their obligations. Consideration could be given to introducing a statutory presumption into the Fair Work Act (and other statutes as appropriate), whereby a person who contracts to work for another would be presumed to be an employee, unless it can be shown otherwise. A statutory presumption in favour of an employment relationship is an approach that has been adopted in other jurisdictions. This would effectively extend the legal definition of an employee to capture some 'dependent contractors' and may assist in combating sham contracting through providing greater clarity.

Another option is to **amend the definitions of types of employment**. The expansive definition of a 'casual' in awards, for example, whereby a casual is someone 'engaged and paid as such' has been identified as one of the main regulatory gaps that have enabled the proliferation of this type of work. The definitions of types of employment could be amended so as to ensure that they more appropriately correspond to their original and intended purpose and to limit the potential for abuse. This could be done in conjunction with specifying the circumstances under which certain types of employment can be used and/or

maximum periods of engagement. These types of provisions were found in many awards but have effectively been stripped away over the preceding decade or so.

For example:

- amend the definition of a casual employee so that it is confined to short-term, irregular employment and/or sets out the circumstances under which casual employment can be used;
- amend the definition of fixed-term employment so that it sets out the specific circumstances under which fixed term employment can be used (e.g. Higher Education Industry – Academic Staff – Award 2010);
- include maximum periods of engagement for regular casuals; maximum periods of engagement or number of renewals for fixed-term employees; or maximum lengths of engagement for labour hire workers, after which time the worker automatically transitions to ongoing employment. Maximum periods of engagement could be accompanied by a mechanism through which employers could apply to FWA to have a specific employee's period of engagement as a casual/ fixed-term employee extended if this could be justified according to set criteria.

Definitions of types of employment in awards could be amended through the running of test cases in Fair Work Australia. In the past, applications for these types of restrictions on specific types of employment have had only very limited success. In the case of the federal Metals award, for example, while the Full Bench of the AIRC accepted that 'a compelling case has been established for some measure to be introduced in the Award to discourage the trend towards the use of permanent casuals', it rejected the AMWU's claim for a more restrictive definition of casual employment.

Any mechanism that automatically shifts casual employees to permanent roles could be resented by some casual employees who wish to retain the flexibility and loadings associated with casual work. It is also questionable whether FWA would include provisions specifying the maximum duration of employment given that they removed a number of such provisions during award modernisation.

An alternative approach would be to **directly restrict the number or proportion of employees in a particular type of employment through awards**. While these types of clauses were not

permitted in awards under the *Workplace Relations Act 1996*, there is no such restrictions in the *Fair Work Act*. It is questionable, however, to what extent FWA would be receptive to such proposals.

There are a range of ways in which to **restrict circumstances in which employees are engaged in non-standard forms of employment through bargaining**. These include:

- Improving definitions of employment so as to ensure that they correspond to their original and intended purpose and to limit the potential for abuse: e.g. tighten up the definition of a casual employee or provide circumstances under which fixed-term employment can be used;
- Providing that the employer consult with the union with respect to the engagement of workers on casual or fixed-term employment;
- Providing that casual and fixed-term employment only be used or offered with prior agreement of the union(s) covered by the agreement;⁵³
- Providing that the employer review, on a regular basis, the use of casual and/or fixed-term employment.
- Impose quotas or limits on the proportion of casuals or fixed-term employees.

With respect to **bargaining restrictions on the use of contractors and labour hire**, there continues to be conflicting authority on the extent to which matters concerning contractors and labour hire workers are considered 'permitted' to be included in collective agreements.⁵⁴

Based on existing authority, the following clauses are permitted:

- Clauses requiring the employer to consult before engaging contractors and/or labour hire workers;⁵⁵
- Clauses requiring that the employer review, on a regular basis, the use of contract and labour hire with the relevant union(s);
- Clauses requiring the employer to afford contractors and labour hire workers wages and conditions that are no less favourable than those afforded to employees under the agreement.⁵⁶

It is less clear whether the following clauses are permitted in agreements:

- Clauses requiring the employer to pay the contractors more than employees (or pay some other penalty for using them);⁵⁷
- Clauses requiring that the employer only use contractors and/or labour hire workers where it cannot find employees to perform the work.⁵⁸

It is also possible to include clauses on sham contracting in collective agreements. The advantages of doing this is that it would then be possible to exercise right of entry to monitor compliance and to subject any suspected use of sham contracting arrangements to the dispute resolution procedure in the agreement.

Additionally, to protect workers on sites with less bargaining power, consideration could be given to amending the rules governing the application of enterprise agreements. The current approach – in which agreement coverage is determined according to the legal identity of the individual employer – is increasingly ineffective in light of the structure of the Australian economy and of the labour market. It is predicated upon the presumption that individual employers enjoy economic autonomy and engage a relatively stable and secure workforce. Increasingly, however, the capacity of entities at the enterprise level to genuinely engage in bargaining is limited because the locus of economic power and control lies elsewhere. Examples include employers who are ‘price takers’ in highly competitive industries or employers in the public and government-funded sectors. These realities highlight the need for a greater capacity for multi-employer bargaining and agreements. In order to address the shifting of employment costs and liabilities through supply chains, legislative amendment could also mandate that enterprise agreements to apply to all subcontractors down the supply chain contracting with a business.

It may also be appropriate to modify the rules governing the application of enterprise agreements so as to extend protections afforded through collective bargaining to all workers on a particular process or project. This could be done through a **legislative amendment to the rules governing the application of enterprise agreements**, so that agreement coverage is determined according to categories of employees or workers rather than the legal identity of the employer.

(iii) Improve minimum standards on working hours

A key means of improving working time security is to enable greater access to decent quality part-time work. This is discussed above on page 11 (Work and family).

There are two basic approaches with respect to regulating working time so as to ensure that working hours are reasonable, predictable and within the control of the employee. These can be pursued alternatively or simultaneously.

The first is to introduce substantive minimum standards (where they do not already exist) with respect to:

- A guaranteed minimum set number of hours or income for part-time workers
- Improved minimum periods of notice of being required to work and/or changes to rosters for part-time and casual employees
- Fair and adequate minimum engagement periods for casual and part-time workers; and
- A right to a working time agreement at the commencement of employment
- Maximum daily and weekly hours of work & maximum overtime limits.

The advantage of this approach is that it provides strong and effective minimum standards. The disadvantage lies in the difficulties in formulating minimum standards that are capable of responding to the diverse working patterns in different industries and occupations. This, however, is not such an issue if minimum working time arrangements are secured through awards.

The second option is to ensure processes are in place that enable workers to exercise greater control over their working time arrangements. This could involve, for example, requiring employers to consult with employees prior to drawing up rosters and to reasonably accommodate employee preferences. Employers can also be required not to alter rosters without the consent of the employees affected (except in exceptional circumstances).

(iv) Better enforcement of existing rights

Workers in insecure work are less likely to be aware of or to enforce their rights at work. Greater attention could be focused on promoting compliance by employers with and bringing enforcement proceedings in the courts to clarify and secure existing rights for insecure

workers. This option has the benefit of directly assisting workers enforce their rights and serving to clarify for employers that workers in non-standard forms of employment (e.g. casuals) are not devoid of protections.

This could involve:

- running cases in the courts to enforce the rights of regular casuals to unfair dismissal; unpaid parental leave etc.
- running cases in the courts to enforce the rights of systematic and regular casual employees to certain employment standards, on the basis that, despite being engaged and paid as casuals, they are in reality ongoing employees under general law and for the purposes of the Fair Work Act⁵⁹
- bringing sham contracting prosecutions under sections 357-359 of the FW Act.

(v) Labour hire

Unlike many other OECD countries such as the UK, Australia does not have any form of regulation of labour hire agencies. ACTU Congress policy calls for the development of **an industry code of practice** for labour hire, in association with unions and adopted by labour hire operators, peak employer groups and governments. A licensing scheme for labour hire operators could also be considered at the federal and/or state level, to ensure that all operators meet basic minimum standards.

Joint employment is a feature of various international jurisdictions (including in the US and Canada) and occurs where more than one employer shares or co-determines matters relating to essential terms and conditions of employment. There is also precedent for the principles underlying joint employment in Australian OHS laws, where liability may arise despite the absence of an employment relationship. Joint employment is a potential solution where employers use the narrower Australian definition of the employment relationship to shed or shield themselves from responsibility for workers (for example in labour hire and contracting out situations). Legislation and policy could recognise that both the labour hire operator and the client have a role in respect of employment responsibilities.

.

Appendix: Summary of options for addressing job and income insecurity

	Workplace (through bargaining)	Industry-wide (through awards and/or legislation)	General (through legislation and/or government policy)
Work and family	<ul style="list-style-type: none"> Extend right to request flexible working arrangements to all those who need it Subject denials of 'requests' subject to challenge in FWA Provide a right for workers to return to work part-time after parental leave 		<ul style="list-style-type: none"> Extend right to request flexible working arrangements to all those who need it Subject denials of 'requests' subject to challenge in FWA Provide a right for workers to return to work part-time after parental leave
Contractors		<ul style="list-style-type: none"> Secure implementation of Safe Rates system in the road transport industry 	<ul style="list-style-type: none"> Amend FW Act to make sham contracting a strict liability offence Ensure contractors have rights to bargain collectively and to be represented in bargaining, including through amending the <i>Australian Competition and Consumer Act 2010</i> Ensure contractors have access to low cost and effective remedies against unfair contracts, including through amending the <i>Independent Contractors Act 2006</i> Ensure effective mechanisms in place to prevent and prosecute sham contracting (including reform of sham contracting provisions in FW Act) Amend SG and workers' compensation legislation to extend these entitlements to excluded contractors Pursue tax reforms to ensure that, where work is being performed by a worker in a manner analogous to that of an employee, that person

			is treated as an employee for tax purposes
Bargaining system			<ul style="list-style-type: none"> • Greater access to multi-employer bargaining • Default application of agreements to categories of workers even if indirectly engaged (e.g. labour hire and contracting chains) • Remove unnecessary restrictions on the content of agreements • Secure mandatory arbitration within agreements, awards and the NES
Government economic footprint/ procurement			<ul style="list-style-type: none"> • Attach secure employment criteria to government procurement of goods and services • Attach secure employment criteria to public funding of agencies and NGOs • Attach secure employment criteria to 'subsidized' industries (e.g. health insurance, aged care, child care) • Ratify and implement ILO Convention 94 (requiring tenderers for public contracts to demonstrate they pay market rates)
Increase floor of rights for all workers			<ul style="list-style-type: none"> • Amend FW Act to extend rights to minimum wages, working time, paid leave and/or rights to access dispute resolution to all workers
Introduce principles of equal treatment to different types of employment	<ul style="list-style-type: none"> • Introduce obligation on employer to accord all workers equal treatment with respect to pay and conditions of work unless they can provide an 'objective justification' for doing so. 		<ul style="list-style-type: none"> • Introduce obligation on employer to accord all workers equal treatment with respect to pay and conditions of work unless they can provide an 'objective justification' for doing so.
Extend rights to casuals and fixed-term employees	<ul style="list-style-type: none"> • Paid leave for casual employees • Higher casual loading • Rights to notice and redundancy pay to fixed-term employees and/or regular casuals 	<ul style="list-style-type: none"> • Paid leave for casual employees • higher casual loading • rights to notice and redundancy pay to fixed-term employees and/or 	<ul style="list-style-type: none"> • Extend NES on paid leave to cover casual employees • Extend rights to notice and redundancy pay in NES to fixed-term employees and/or regular casuals

		<p>regular casuals</p> <ul style="list-style-type: none"> • Introduce portable long service leave schemes for groups of non-permanent workers 	
Conversion rights	<ul style="list-style-type: none"> • Different types of conversion clauses for casuals, fixed-term employees and/or labour hire workers, including: <ul style="list-style-type: none"> (i) Individual right to request conversion (ii) obligation on employer to, on a specified date each year, offer employees that meet specific criteria the opportunity to convert to ongoing employment; or (iii) gradual conversion (iv) automatic conversion after a set period of time 	<ul style="list-style-type: none"> • Individual right to request conversion • Obligation on employer to, on a specified date each year, offer employees that meet specific criteria the opportunity to convert to ongoing employment • Gradual conversion process in awards and/or legislation • Introduce secure employment orders • Automatic conversion after a certain period of engagement. 	<ul style="list-style-type: none"> • Introduce individual right to request conversion in NES or awards • Introduce obligation on employer to, on a specified date each year, offer employees that meet specific criteria the opportunity to convert to ongoing employment in NES or awards • Introduce gradual conversion process in awards and/or legislation • Introduce secure employment orders through awards or FW Act • Introduce automatic conversion in legislation and/or awards after a certain period of engagement.
Improve definitions of types of work	<ul style="list-style-type: none"> • Amend definition of a casual employee so that it is confined to genuinely short term and irregular work and/or set out circumstances under which casual employment can be used • Include maximum periods of engagement for casuals and/or fixed-term employees and/or labour hire workers, after which time they transition to ongoing employment. 	<ul style="list-style-type: none"> • Improve definitions of types of employment 	<ul style="list-style-type: none"> • Introduce a statutory presumption in favour of an employment relationship into the FW Act and other statutes as appropriate
Directly restrict number or proportion of employees in a particular type of employment	<ul style="list-style-type: none"> • Provide that employer must consult with union with respect to the engagement of casual, fixed-term, labour hire workers and contractors • Provide that casual and fixed-term 	<ul style="list-style-type: none"> • Introduce clauses in awards which restrict the proportion of an employer's workforce that can be engaged a type of employment 	

	<p>employment can only be used or offered with prior consent of the union(s) covered by the agreement</p> <ul style="list-style-type: none"> • Provide that the employer review, on a regular basis, the use of casual, fixed-term employment, labour hire and/or contractors • Impose quotas or limits on the proportion of casuals of fixed-term employees • Require employer to afford contractors and labour hire workers wages and conditions that are no less favourable than those afforded to employees under the agreement • Include sham contracting clause 		
Working time security	<ul style="list-style-type: none"> • Guaranteed minimum set number of hours or income for part-time workers • Improved minimum periods of notice for being required to work and/or changes to rosters for part-time and casual employees • Fair and adequate minimum engagement periods for casuals and part-time employees • A right to a working time agreement at the commencement of employment 	<p>Include within awards (where they do not already exist or improve):</p> <ul style="list-style-type: none"> • Guaranteed minimum set number of hours or income for part-time workers • Improved minimum periods of notice for being required to work and/or changes to rosters for part-time and casual employees • Fair and adequate minimum engagement periods for casuals and part-time employees • A right to a working time agreement at the commencement of employment 	
Enforcement	<ul style="list-style-type: none"> • Enforce rights of regular casuals • Enforce rights of systematic and 		

	<p>regular casual employees on basis that they are, under common law and for the purposes of the FW Act, ongoing employees</p> <ul style="list-style-type: none"> • Prosecute sham contracting 		
Other			<ul style="list-style-type: none"> • Introduce labour hire industry code of practice • Introduce joint employment doctrine • Change default application of agreements to cover categories of employees (rather than by reference to the legal identity of the employer) • Change default application of agreements to cover all subcontractors down the supply chain.

References

-
- ¹ M Rafferty and S Yu, *Shifting Risk: Work and Working Life in Australia*, A Report for the Australian Council of Trade Unions, Workplace Research Centre, University of Sydney, September 2010.
- ² See, e.g., I Campbell, G Whitehouse and J Baxter, 'Australia: Casual Employment, Part-Time Employment and the Resilience of the Male Breadwinner Model' in L Vosko, M Macdonald and I Campbell (eds) *Gender and the Contours of Precarious Employment*, 2009, 60-75; B Pocock, R Prosser and K Bridge, "'Only a Casual": How Casual Work Affects Employees, Households and Communities in Australia', Labour Studies, University of Adelaide, August 2004; B Pocock, J Buchanan and I Campbell, 'Securing Quality Employment: Policy Options for Casual and Part-Time Workers in Australia', Chifley Research Centre, April 2004; I Watson, 'Contented Casuals in Inferior Jobs? Reassessing Casual Employment in Australia', ACIRRT Working Paper 94, University of Sydney, undated.
- ³ ABS, *Forms of Employment, November 2010*, Cat 6359.0, with no entitlement to paid leave as proxy for casual status.
- ⁴ J Burgess, I Campbell and R May 'Pathways from Casual Employment to Economic Security: the Australian Experience', *Social Indicators Research* (2008), 88, 161, 165, supplemented by ABS, *Forms of Employment, November 2010*, Cat. 6349.0.
- ⁵ ABS, *Forms of Employment, November 2010*, Cat 6359.0.
- ⁶ J Burgess, I Campbell and R May 'Pathways from Casual Employment to Economic Security: the Australian Experience', *Social Indicators Research* (2008), 88, 161
- ⁷ ABS, *Employee Earnings, Benefits and Trade Union Membership*, Cat 6310.0, 2010.
- ⁸ ABS, *Forms of Employment, November 2010*, Cat 6359.0.
- ⁹ ABS, *Employment Arrangements, Retirement and Superannuation*, Cat 6361.0, 2007.
- ¹⁰ ABS, *Measures of Australia's Progress 2010: Casual Employees*, 2010.
- ¹¹ ABS, *Forms of Employment, November 2010*, Cat 6359.0.
- ¹² ABS, *Forms of Employment, November 2010*, Cat 6359.0.
- ¹³ ABS, *Forms of Employment, November 2010*, Cat 6359.0.
- ¹⁴ *Race to the Bottom: Sham Contracting in Australia's Construction Industry*, A Report by CFMEU Construction & General, March 2011, 2.
- ¹⁵ Parliament of Victoria, *Inquiry into Labour Hire Employment in Victoria*, Economic Development Committee, Final Report, June 2005.
- ¹⁶ ABS data only covers employees and not dependent contractors organized through labour hire arrangements. Underestimation can also result because people misunderstand and report their employment status.
- ¹⁷ HILDA (Household, Income and Labour Dynamics in Australia), 2002. *HILDA Survey Annual Report 2002*. Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, produced in R Hall, 'Temporary Agency Work and HRM in Australia: Cooperation, Specialization and Satisfaction for the Good of All?' *Personnel Review*, 35(2), 158, 2006; and Productivity Commission, 'The Growth of Labour Hire Employment in Australia', Laplagne, P, Glover, M and Fry, T, February 2005.
- ¹⁸ Productivity Commission, 'The Growth of Labour Hire Employment in Australia', Laplagne, P, Glover, M and Fry, T, February 2005.
- ¹⁹ I Watson, J Buchanan, I Campbell and C Briggs, *Fragmented Futures: New Challenges in Working Life*, Sydney, 2003; and Parliament of Victoria, *Inquiry into Labour Hire Employment in Victoria*, Economic Development Committee, Final Report, June 2005.
- ²⁰ I Watson, J Buchanan, I Campbell and C Briggs, *Fragmented Futures: New Challenges in Working Life*, Sydney, 2003; and R Hall, 'Temporary Agency Work and HRM in Australia: Cooperation, Specialization and Satisfaction for the Good of All?' *Personnel Review*, 35(2), 158, 2006.
- ²¹ ABS, *Labour Force, Australia, Detailed, Quarterly*, Cat. 6291.0.55.01, July 2011
- ²² ABS *Working Time Arrangements, November 2009*, Cat. 6342.0.
- ²³ ABS, *Employment Arrangements, Retirement and Superannuation, Australia*, Cat. 6361.0, 2007.

-
- ²⁴ ABS, *Employment Arrangements, Retirement and Superannuation, Australia*, Cat. 6361.0, 2007.
- ²⁵ B van Wanrooy, J Buchanan and I Campbell, 'When do we Stop? Achieving Maximum Weekly Hours in Australia, A submission to the Federal Government's National Employment Standards Exposure Draft, Workplace Research Centre, Sydney.
- ²⁶ ABS, *Labour Force, Australia, Detailed, Quarterly*, Cat. 6291.0.55.01, July 2011.
- ²⁷ Australia at Work 2009, 39.
- ²⁸ ABS, *Australian Social Trends, 2006: Trends in Hours Worked*, Cat 4102.0.
- ²⁹ ABS, *Australian Social Trends, June 2011: Overemployment*, based on 2007 figures.
- ³⁰ ABS *Working Time Arrangements, November 2009*, Cat. 6342.0.
- ³¹ ABS unpublished data; Van Wanrooy et al, Australia at Work: In a Changing World, Workplace Research Centre, University of Sydney, November 2009.
- ³² Quinlan, P (2003) 'The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge', <http://www.actu.asn.au/public/ohs/quinlan.html>; J Buchanan 'Paradoxes of Significance: Australian Casualisation and Labour Productivity', ACIRRT Working Paper 93, Sydney, 2004.
- ³³ M McCann, 'Health, Freedom and Work in Rural Victoria', Interim Research report, Social Justice Initiative, University of Melbourne, July 2010; G Aronsson, et al, 'Work Environment and Health in Different Types of Temporary Jobs', 11(2) *European Journal of Work and Organizational Psychology*, 2002, 151; L Artaxcox t al, 'Social Inequalities in the Impact of Flexible Employment on Different Domains of Psychosocial Health' 59 *Journal of Epidemiology and Community Health*, 2005, 761; M Clarke et al, 'This Just Isn't Sustainable: Precarious Employment, Stress and Workers' Health' 30 *International Journal of Law and Psychiatry* 2007, 311; and J Ferrie, 'Health Consequences of Job Insecurity' in J Ferrie et al (eds) *Labour Market Changes and Job Insecurity: A Challenge for Social Welfare and Health Promotion*, 1999.
- ³⁴ J Buchanan 'Paradoxes of Significance: Australian Casualisation and Labour Productivity', ACIRRT Working Paper 93, Sydney, 2004; M Quinlan, 'The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge', <http://www.actu.asn.au/public/ohs/quinlan.html>;
- ³⁵ Dr Michael McCann, 'Health, Freedom and Work in Rural Victoria', Interim Research Report, Social Justice Initiative, University of Melbourne, July 2010.
- ³⁶ *Race to the Bottom: Sham Contracting in Australia's Construction Industry*, A Report by CFMEU Construction & General, March 2011.
- ³⁷ G Gonos, 'The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms' 31 (1) *Law and Society Review* 1997, 81, 106.
- ³⁸ I Campbell, 'Casual work and casualisation: How does Australia compare?' 15(2) *Labour and Industry* 2004, 85; I Campbell; B Pocock, J Buchanan and I Campbell, *Security Quality Employment: Policy Options for Casual and Part-Time Workers in Australia*, Chifley Research Centre, April 2004.
- ³⁹ R Hall, 'Labour Hire in Australia: Motivation, Dynamics and Prospects', ACIRRT Working Paper No 76, April 2002, 10.
- ⁴⁰ See, eg, C McDonald and S Charlesworth, S. (2011) 'Outsourcing and the Australian Non-Profit Sector' in I. Cunningham and P. James (eds) *Voluntary Organisations and Public Sector Delivery: the Employment Outcomes of Government Outsourcing and their Implications*, Routledge, 2011.
- ⁴¹ See, eg, A Junor, 'Casual University Work: Choice, Risk, Inequity and the Case for Regulation' 14(2) *Economic and Labour Relations* 2004, 276 and L Gottschalk and S McEachern, 'The Frustrated Career: Casual Employment in Higher Education' 52(1) *Australian Universities Review* 2010.
- ⁴² M Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' and S Marshall, 'An Exploration of Control in the Context of Vertical Disintegration' in C Arup et al, *Labour Law and Labour Market Regulation*, Federation Press, 2006.
- ⁴³ B Pocock, J Buchanan and I Campbell, 'Securing Quality Employment: Policy Options for Casual and Part-Time Workers in Australia', Chifley Research Centre, April 2004.
- ⁴⁴ ABS, *Employment Arrangements, Retirement and Superannuation, Australia*, Cat. 6361.0, 2007.
- ⁴⁵ R Hall, 'Temporary Agency Work and HRM in Australia: Cooperation, Specialization and Satisfaction for the Good of All?' *Personnel Review*, 35(2), 158, 2006.
- ⁴⁶ B Pocock *The Work/Life Collision*, Federation Press, 2003.
- ⁴⁷ The worker is defined to include both individuals working under a contract of employment and those subject to '... any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a

client or customer of any profession or business carried on by the individual': *Employment Rights Act 1996*, s 230(3). See also *Employment Relations Act 2004*.

⁴⁸ Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002; Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

⁴⁹ See, e.g., D McCann, *Regulating Flexible Work* (2008) 135-6.

⁵⁰ *Ibid* 140.

⁵¹ In the UK, statutory leave entitlements for jobs without a regular work pattern are based on your average contracted hours. This includes for shift workers, term-time only workers, casual workers and zero-hours contract workers.

⁵² The default casual loading, forming part of the national minimum wage order applying award/agreement free employees, will also eventually be 25% (to be phased in, reaching 25% by July 2014).

⁵³ Section 355 of the Fair Work Act provides that a union must not coerce an employer not to employ or engage a 'particular person'. It is arguable that this type of clause would violate this provision but we think the better view is that it would not be inconsistent with section 355 as the clause provides a blanket restriction rather than focusing on an individual employee.

⁵⁴ Section 172 of the FW Act.

⁵⁵ See, e.g. *Asurco Contracting Pty Ltd v CFMEU* [2010] FWA 6180.

⁵⁶ See also Explanatory Memorandum to the *Fair Work Bill*.

⁵⁷ *Australian Workers' Union v Alcoa World Alumina Australia* [2010] FWA 884

⁵⁸ See *Australian Post Corporation v CEPU* [2009] FWA 599 at [57]; and *MUA v Freemantle Port Authority* [2009] FWA 1173.

⁵⁹ See, e.g., the recent case of *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 (30 November 2010). See also *Williams v JMZ Roof Restorations Pty Ltd* [2010] FWA 6181, where a worker successfully brought a claim for unfair dismissal in FWA, despite his employer arguing he was a contractor.



The future of work in Australia: dealing with insecurity and risk

An ACTU options paper on measures to promote job and income security



Australian Unions



Working for a
better life.

ACTU

level 6 365 Queen Street
Melbourne Victoria 3000
Tel: 1300 362 223 (local call cost)
Tel: 03 9664 7333
Fax: 03 9600 0050
Email: help@actu.org.au
Web www.actu.org.au

For more information or to join the campaign,
visit www.securejobs.org.au

D74 - 2011
Working Australia Paper 13/2011