The Legal Production of Precarious Work

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INTRODUCTION

As the various chapters in this volume document, all industrialised countries have experienced a rise in 'non-standard', 'contingent', or 'precarious' forms of employment over the last two decades. However, the precise kinds of precarious work differ between countries—an indication that the local regulatory regimes have played a role in mediating and channelling the effects of global economic restructuring. This chapter examines the role of Australian labour regulation in producing particular kinds of precarious work, and it also looks at the timing of these changes. The chapter argues that Australian labour law[1] has been a large part of the problem in relation to precarious work for at least the last 15 years, and there are few signs that it has much to contribute by way of solutions. However, labour law has interacted with several other factors in the production of precarious work in Australia, including entrenched gender divisions of labour in both the public and private spheres. Among other things, these factors have given precarious work its particular gender dimensions.

THE INCIDENCE AND DISTRIBUTION OF PRECARIOUS WORK

The major forms of precarious work in the Australian labour market are casual employment, certain part-time jobs, home work/outwork, dependent contracting, and agency work. There is a considerable degree of overlap between these categories. For example, part-time work may also be undertaken on a

* I would like to thank Anna Harrop for her invaluable research assistance on this chapter.
[1] I am using the term 'labour law' here to refer broadly to both the individual (employment) and collective (industrial) aspects of labour regulation.

casual basis, outworkers may also be dependent contractors, and agency workers may also be casual employees or dependent contractors. Casual employment is the most prominent of these categories. Home workers and dependent contractors each make up around 3 per cent of the Australian workforce (Burgess and Campbell, 1998: 14; Watson *et al*, 2003: 64; O'Donnell, 2004: 25), but casual workers constituted 28 per cent of Australian employees in 2003.[2]

The incidence of precarious work has been rising in Australia, while that of standard employment has declined. For example, between 1988 and 2003, the proportion of employees engaged on a full-time permanent basis fell from 75 per cent to 61 per cent.[3] While the Australian labour force grew by two-and-a-half million between 1985 and 2001 (Watson *et al*, 2003: 53), employment growth has been in forms of precarious employment, at the expense of full-time permanent employment (Brosnan and Walsh, 1998: 12). Casual jobs accounted for two thirds of the increase in total employment in the period 1990–2001 (Watson *et al*, 2003: 48).[4] As a result,

> in spite of high 'headline' employment rates, many sections of the community now have limited access to jobs paying a substantial wage (Borland *et al*, 2001: 4).

There have been clear gendered patterns in the growth of precarious employment.

> Men's employment growth since 1987 has been concentrated in casual jobs, whether part-time or full-time. Women's employment growth has been concentrated in part-time jobs, whether casual or permanent (Junor, 1998: 78).

The rate of jobs growth for women has also considerably exceeded that for men, particularly in low-skilled occupations such as sales and personal services. '[W]omen accounted for three quarters of all the new jobs in the low-skilled occupations' since the late 1980s (Watson *et al*, 2003: 59). In a study based on 1995 data from Australia and New Zealand, Brosnan and Walsh found that women in both countries had less employment security than men, and the least secure employment in Australia was in the industries of cultural and personal services, trade and food (1998: 32, 35)—industries in which women predominate.

[2] ABS, 2004b. This statistical series defines 'casual' workers as those without entitlements to paid holiday and sick leave. As O'Donnell notes, it tends to overestimate the number of casual workers because it includes owner-managers of incorporated enterprises (who constitute around 2% of employees), and uses employees as its denominator rather than all employed persons. However, it is the only series to provide significant trend data on casual employment, and more recent surveys using different definitions of casual employment have introduced their own problems of under-estimation (O'Donnell, 2004: 4–7).

[3] ABS, 1988a; ABS, 2004b.

[4] At the other end of the scale, there was also a substantial increase in professional jobs (Watson *et al*, 2003: 55–57), resulting in increased income inequality and a so-called 'hollowing out' of the middle of the employment ladder.

Casual Employment

Casual workers have traditionally had no entitlements to annual leave, sick leave, parental leave, redundancy pay, protection against unfair dismissal, or other benefits available to permanent employees. They have only limited access to superannuation accumulation, and virtually no access to training or career paths. Few casual employees belong to a union (Campbell, 1996: 586), and casualisation has in fact been one of the contributing factors to the decline in union membership in Australia (Creighton and Stewart, 2000: 215).

The various disadvantages of casual employment are supposedly offset by a casual 'loading', that is, a higher hourly rate of pay than that available to permanent employees. But the casual loading does not adequately compensate for the multiple benefits foregone and extensive 'disamenities' of casual work (Smith and Ewer, 1999: 35–41). Moreover, this assumes that the casual loading is actually paid, something that cannot necessarily be relied upon (Campbell, 1996: 581).

Although the traditional justification for casual employment was to enable employers to fill short-term, temporary job vacancies, there is in fact wide variation in the duration of casual employment. At one end of the spectrum are 'long term casuals', who are used in the same way as permanent employees, but are 'deprived of the standard rights, benefits and entitlements associated with permanency' (Campbell, 2000: 72). At the other end of the spectrum are those casual workers who 'cycle in and out of work without finding a long-term secure job,' in the phenomenon known as 'labour market churning' (Watson *et al*, 2003: 41). A recent study has demonstrated a close alignment between the demographic characteristics of self-identified casual employees and the unemployed, suggesting that these two groups have much in common, and are often the same people (Parliamentary Library (Australia), 2004: 1–4).

The number of casual employees in the Australian workforce doubled between 1988 and 2003, from 1.1 million to 2.2 million.[5] The major period of growth in casual employment was in fact between 1988 and 1996, when casual employees as a proportion of all employees rose from 18.9 per cent to 26.1 per cent. Since 1996, the proportion of casual employees has risen only marginally to 27.6 per cent.[6] This timing is significant, since it shows that the burgeoning of casual employment occurred *before* the introduction of new, deregulatory labour legislation at federal level in 1996.[7] Casual work is still more likely to be found in part-time than in full-time

[5] See above n 2.
[6] *Ibid.*
[7] Workplace Relations Act 1996 (Cth).

employment, but the major growth has been in full-time employment. In 1988, full-time casuals constituted only 5.8 per cent of full-time employees, but by 1996 the proportion had almost doubled to 10.8 per cent, rising again to 13.8 per cent in 2003. By contrast, part-time casuals made up 68.3 per cent of all part-time employees in 1988, falling to 60.4 per cent of part-time employees in 2003.[8]

The occupational groups in which casual employment has grown are those at the lower end of the occupational scale. Almost all new permanent full-time jobs in the 1990s were created in managerial, professional, and associate professional occupations. Trades and advanced sales and service occupations saw an overall decline in employment. All other occupations experienced an increase in casual employment (Borland *et al*, 2001: 12–13). Borland *et al* argue that such a striking pattern across a range of occupations cannot be explained by supply-side factors (eg by employee choice) alone (2001: 17).

It has been widely observed that over the last 15 years 'the net of casual employment [has spread] and [drawn] in a wider range of social groups' (Campbell, 2000: 87). In particular, casual employment has gone from being a female ghetto area to one increasingly shared by men. In 1988, 11.7 per cent of male employees were employed on a casual basis. By 1996, that figure had almost doubled to 21.2 per cent, rising again to 24.0 per cent by 2003. By contrast, female casual employees as a proportion of all female employees remained fairly stable at around 30 per cent.[9] The main employer of both male and female casual workers is the retail industry, accounting for 25 per cent of all casual employees. Beyond that, however, female casual employees are clustered in the accommodation, cafe and restaurant, and health and community services industries, while male casuals tend to be found in property and business services, construction, and manufacturing.[10] The 'apparent shrinking of the gender differential in participation in casual employment' (Campbell, 2000: 87) is, therefore, a phenomenon observable only at the aggregate level. The gender segregation of the labour market continues to place women and men in different kinds of casual jobs and, in particular, to place women far more often in part-time casual jobs. This has significant economic consequences.

Part-Time Work

As noted above, part-time work is primarily the domain of women. Thus any discussion of women and precarious work must take account of part-time work as a form of precarious employment, and particularly its failure to

[8] See above n 2.
[9] *Ibid*. Female casual employees made up 28.8% of all female employees in 1988 and 31.9% in 2003.
[10] *Ibid*.

deliver the feminist goal of economic independence for women. Belinda Probert has noted the fact that women's participation in full-time employment in Australia has barely changed since the 1930s. In 1933, 25.2 per cent of Australian women were in full-time employment, and that figure had only risen to 27.1 per cent in 1994. By contrast, only 8.4 per cent of women were employed part time in 1966, rising to 20.1 per cent by 1994 (Probert, 1997: 186). Rather than improving their economic status over the course of the twentieth century, therefore, women have increasingly moved into part-time employment, in a context in which by 2000, average earnings in part-time jobs were only 37.5 per cent of average earnings from a full-time job (Borland *et al*, 2001: 10). Probert argues that part-time work for women does not challenge the domestic division of labour:

> We might conclude that the massive expansion in part-time work for women has been the vehicle through which major forces for change (both economic and cultural) have been contained. Women have been incorporated into the labour force, but have manifestly failed to seriously challenge the culture of work that rests on a traditional sexual division of labour at home.
>
> (Probert, 1997: 187)

In the 1980s in Australia, full-time jobs grew by 19 per cent while part-time jobs grew by 77.5 per cent accounting for 43 per cent of all new positions created. In the 1990s, full-time jobs grew by only 5.5 per cent while part-time jobs grew by 60.8 per cent. These figures contrast with those from the United States, where full-time employment grew much more rapidly than part-time employment during the 1980s and 1990s, for both women and men (Borland *et al*, 2001, 10).

Like casual work, part-time work also exists on a spectrum of precariousness. In the Australian context, part-time casual work carries with it many of the disadvantages of casual employment outlined above, combined with very low earnings. In 2000, average weekly earnings in part-time casual jobs were only around 30 per cent of average weekly earnings in full-time permanent jobs (Borland *et al*, 2001: 4). In relation to permanent part-time work, Anne Junor draws a valuable distinction between such work that is 'employee-initiated'—often a temporary Equal Employment Opportunity (EEO) measure designed to enable professional women to balance career and family responsibilities—and 'employer-initiated' permanent part-time work, which offers security of tenure, but less than a living wage and no career prospects. This kind of part-time work, Junor argues, 'may present the façade of standard employment, without the substance' (1998: 91).

Home Working, Dependent Contracting, and Agency Work

Home-based work or outwork is a familiar concept with a long history. Outworkers are usually paid at piece rates rather than receiving a regular wage, and have little or no control over the amount of work they receive. In slow periods, their income may drop dramatically, while in periods of high demand, they may be compelled to recruit family members and friends to finish the work provided within the required time. The piece rates paid are unlikely to reflect the full value of the work performed.[11] In addition, home workers bear all their own overhead costs, are required to regulate their own health and safety, and have no access to training or skills development. They are unlikely to belong to a union, and such legal protections as may exist 'on the books' are notoriously difficult to enforce. If their work arrangement is structured in terms of dependent contracting rather than direct employment, they are exposed to a range of additional costs, including for equipment and insurance. Home working is a traditionally gendered phenomenon, like part-time work, employing particularly women with childcare responsibilities. In a case study of outworkers in south-east Queensland, Brosnan and Thornthwaite observed that 'people with disabilities, those from ethnic minorities, and non-native language speakers are also often used as homeworkers' (1998: 98).

Dependent contractors are those who are theoretically self-employed, or working on their 'own account', but who are in fact dependent upon the provision of work by a single organisation or entity. The attachment of a range of employment protections to the status of 'employee' but not to other kinds of workers has enabled the exploitation of the common law distinction between 'employees' (those employed under a 'contract of service') and independent contractors (those employed under a 'contract for services'), to create a category of workers who are deprived of basic employment conditions such as payment at award rates, workers' compensation coverage, employer superannuation contributions, and protection against unfair dismissal. Where contractors own their own tools of trade, and can tender for business or perform work for a range of buyers at rates which they set to reflect their expenses, this is a perfectly legitimate arrangement. But where a contractor is in a position to sell services to only one buyer, who dictates the terms of engagement, the result is a distinctly precarious form of employment. As noted above, dependent contractors may also be home workers; however, those who are not home workers tend to be found in male-dominated areas of the labour market, particularly labourers in the construction industry, IT professionals in property and business services, and drivers in the transport and storage industries (Watson *et al*, 2003: 71–72).

Agency work involves engagement by a labour hire agency rather than directly by the ultimate consumer of labour. Agency work resembles casual employment in many ways, including a spectrum of practices ranging from

[11] New South Wales Industrial Relations Commission, 1998: 536–611.

instability, insecurity, and irregularity of work at one end, to quite stable arrangements whereby an agency supplies a pool of workers to a particular enterprise on a regular and long-term basis at the other. Agency workers may be permanent or casual employees of the agency, or may be engaged as dependent contractors, with the benefits and protections available to them varying according to the relevant status. Like casual work, too, the gender distribution of agency work has undergone a change from being predominantly female (for example, clerical and nursing) to more mixed gender (spreading to male-dominated industries such as construction and mining) (Watson *et al*, 2003: 73–74). Agency work also connects directly to the global economy, as large corporations increasingly attempt to source cheaper labour from offshore labour hire agencies (Watson *et al*, 2003: 74)—an area that remains beyond the scope of domestic labour regulation.

LEGAL REGULATION ENCOURAGING PRECARIOUS WORK ARRANGEMENTS

One of the arguments of this chapter, as noted above, is that the particular kind(s) of precarious work found within a national labour market owe much to the features of national labour regulation. I take a broad view of national labour regulation, to include not only laws regulating employment per se, but also industry, trade and competition policy, taxation regimes, rules relating to pensions and benefits, and welfare provisions. For example, it is clear that the much-vaunted reduction in unemployment in Australia over the past eight years is directly related to the increasingly disciplinary and punitive nature of social security legislation in Australia, which has, on the one hand, produced discouraged job seekers, who cease looking for work and thus disappear from the unemployment statistics, and, on the other hand, driven people into precarious, low-value, temporary jobs as a condition of the receipt of unemployment benefits (Burgess and Campbell, 1998: 17). In addition to local regulatory regimes, the particular kinds of precarious work created are also a product of gendered assumptions made by employers, historical gender segregation in the labour market, and ongoing gender divisions of labour in the family.

As discussed in the previous section, much of the striking change in the labour market in relation to precarious employment occurred between the advent of economic restructuring and the determined pursuit by employers of a flexibility agenda, dating from the late 1980s (Junor, 1998: 77), and the introduction of the Workplace Relations Act 1996. There was a Labor government in power at federal level in Australia from 1983, which by the later 1980s had thoroughly embraced a restructuring agenda, involving corporatisation and privatisation of state-owned enterprises, deregulation of the financial system, the dismantling of trade barriers and tariff protection for manufacturing industries, and increased exposure of Australian companies and products to (global) competition. This in turn produced demands for reduced labour costs and increased flexibility of labour utilisation (Owens, 1993: 405; Burgess and Campbell, 1998: 16), as well as the significant decline of some areas of employment (particularly manufacturing) and the rise of others (particularly services).[12]

The Workplace Relations Act 1996 can be seen to have confirmed and cemented the shifts that occurred in the previous decade. While it introduced a range of new measures that were conducive to the increased precariousness of employment (see Owens, chapter 15 in this volume), most of the legal structures facilitating growth in insecure part-time jobs, casual employment, dependent contracting, and agency work were already in place. These included award restructuring to break down rigidities in the classification, organisation and skilling of labour; a shift from centralised wage-fixing to enterprise-level bargaining; and long-established distinctions between permanent and casual employment, and between employees and independent contractors, that were able to be exploited.

Casual Employment

As O'Donnell has observed, 'the category of casual employment in Australia is largely the creation of the award system' (2004: 13). Awards at once invoked and restricted the employment of casual workers as an exception to the norm. They often contained proportional limits or quotas on the employment of casuals, placed restrictions on how casual employees could be used (Campbell, 1996: 579), or specified time limits on their engagement (such as a maximum of three months) (Weller *et al*, 1999: 4). In the 1980s and early 1990s, however, the value of casual workers increased, while award restrictions on their use were gradually stripped away.

While pursuing an economic restructuring agenda, federal and state Labor governments also introduced new protections and benefits for permanent employees in the 1980s, such as parental leave entitlements, redundancy payments, unfair dismissal regimes, and mandatory employer superannuation contributions. These new entitlements made permanent employment more costly. By contrast, casual employment did not attract the same range of entitlements, and also enabled a lower level of investment in recruitment and training.

[12] Allan explains why personal service work tends to produce more precarious jobs: production and consumption occur simultaneously in personal services, resulting in 'strong cost pressure on employers to ensure that labour-use patterns directly correspond to consumer-demand patterns' (1998: 3).

For example, 'short term' casual employees are excluded from the coverage of much unfair dismissal legislation.[13] A group of textile, clothing and footwear employers interviewed in 1995 'attributed their preferences for casual labour to the inflexibilities of labour market regulations, particularly unfair dismissal laws' (Weller *et al*, 1999: 28):

> Employers were not certain whether or not relying on casual employment produced a cost saving ... Overall managers did not emphasise cost advantage as a primary motive for casual recruitment. ... The consensus seemed to be that the direct cost difference between casual and permanent employees is insignificant, but that the indirect costs – the costs of staff turnover and recruitment, absenteeism, redundancy and carrying ineffective or disruptive workers—are important.
>
> (Weller *et al*, 1999: 28)

Across the manufacturing sector, according to Weller *et al*: 'The rise of casual work represents a substantial shift in approaches to recruitment stemming partly from employers' unwillingness to commit to permanent employment until they are certain that a potential recruit meets their expectations, and partly from unstable business conditions' (1999: 30–31).

Weller *et al* contend that the growth of casual employment is constrained by labour market conditions, labour market regulations, and union activity (1999: 31). However, in Australia in the 1980s and 1990s, labour market conditions and labour market regulation did not act as constraints on, but rather as accelerators of, the growth of casual employment. And as a result, the possibilities for union activity became constrained. Creighton and Stewart (2000: 215) have observed more generally that:

> In theory, the [casual] loading is meant to discourage employers from hiring casuals. However, even if the loading does constitute adequate compensation for the full value of the non-wage benefits foregone, most employers seem happy to pay the additional amount in return for what they perceive as the flexibility of being able to hire and fire at will. For some workers too, the loading may seem an attractive substitute for benefits they are unlikely to access, or whose true value they do not appreciate. For many though, the question of choice is simply irrelevant when the only alternative to accepting casual work is unemployment.

As well as casual employment becoming more attractive to employers in the 1980s and 1990s, limitations on casual employment were eased or traded off in award restructuring and enterprise bargaining processes. The process

[13] See, eg, Workplace Relations Act 1996 (Cth), s 170; Industrial Relations Act 1996 (NSW), s 83; Industrial Relations (General) Regulations (NSW), cl 6; Industrial Relations Act 1999 (Qld), s 72; Fair Work Act 1994 (SA), s 105A. Each of these provisions defines (differently) what constitutes 'short-term' casual employment for the purposes of exclusion.

was completed by the Workplace Relations Act 1996, which specifically deprives the Australian Industrial Relations Commission (AIRC), in making or varying industrial awards, of the power to 'limit the number or proportion of employees that an employer may employ in a particular type of employment.'[14] Campbell also argues that a significant effect of labour market deregulation has been to widen the gaps in award coverage, so that there is a wider sphere of unregulated contracting, providing greater opportunities to designate employment as 'casual' (1996: 584).

The desire to avoid liability for unfair dismissal does not appear to be the primary motivation for 'long-term casual' employment, since casuals employed for more than 12 months are covered by the federal and most state unfair dismissal legislation.[15] But it still presents other cost advantages, for example in relation to recruitment, (non-) training, redundancy, and (non-) unionisation. In two case studies of private hospitals, Cameron Allan identified another advantage of long-term casual employment, to achieve flexibility of labour supply and thus to reduce labour costs, while at the same time ensuring quality control, familiarity with structures and systems, and continuity of personnel (1998: 61, 70). The hospitals in the case studies targeted their recruitment of regular casuals towards:

> middle-aged, married local women, a group that the hospital identified as the most stable labour market segment ... less likely to quit and more prepared to tolerate working shortened shifts, to attend work at short notice, and go without work for reasonable periods.
>
> (Allan, 1998: 71)

This strategy exploited women's domestic arrangements, in that they were likely to be primary carers of children and to prefer working locally, and unlikely to be primary breadwinners. This is consistent with statistics for New South Wales showing that for 25.2 per cent of women, but only 1.4 per cent of men, undertaking casual, part-time, or temporary employment was dictated by family reasons[16] (see also Owens, 1993: 425).

Part-Time Work

Legal restrictions in awards on part-time work were more extensive than those relating to casual work (Probert, 1995: 7). These restrictions were a legacy of the union movement's concern to protect the wages of male

[14] Workplace Relations Act 1996 (Cth), s 89A(4).

[15] *Ibid*, s 170CBA; Industrial Relations (General) Regulations (NSW), cl 1.6 (six months); Industrial Relations Act 1999 (Qld), s 72(8); Fair Work Act 1994 (SA), s 105A (nine months).

[16] ABS, *Part-time, Casual and Temporary Employment, New South Wales* (Cat No 6247.1) (Canberra: ABS, 1998), cited in Smith and Ewer, 1999: 22.

breadwinners. Where part-time work was created, it thus tended to be casual rather than permanent.

In 1988, the Business Council of Australia argued that award restrictions on part-time work encouraged casualisation, and hence that award revisions to allow for more flexible working time could lead to increased permanent part-time employment (Campbell, 1996: 583). In introducing the Workplace Relations Act 1996, the federal Liberal–National Coalition Government made the same argument—that preventing the Commission from including in awards either limitations on the number or proportion of employees that an employer may employ in a particular type of employment, or specifications of maximum or minimum hours of work for regular part-time employees, would enable employers to offer more permanent part-time work. Neither of these predictions has eventuated, and casualisation has continued apace (Campbell, 1996: 583). Where the regulatory regime allows for both permanent and casual part-time employment, the casual option appears to be preferred, for the kinds of reasons outlined in the previous section.

Home Working, Dependent Contracting, and Agency Work

The common law distinction between 'employees' and 'independent contractors' has been compounded in Australia by the fact that virtually all employment benefits and protections provided in industrial awards or industrial legislation have attached only to the status of 'employee.' Thus 'contracting out' work to supposedly independent (but in reality dependent) contractors can be even more advantageous to employers than engaging casual employees. Employers can avoid any form of paid leave *and* the casual loading, any requirement to pay award or minimum wages or penalty rates for unsociable hours, any liability for unfair dismissal, redundancy payments, or superannuation contributions, the need to administer PAYE tax deductions and the obligation to pay payroll tax. In addition, employers can externalise the costs of production onto contractors (particularly if they are home workers), externalise responsibility for supervision and quality control (often by means of penalties for sub-standard work), and externalise occupational health and safety risks, thereby avoiding the costs of providing a safe workplace, as well as the need to pay workers' compensation premiums (Brosnan and Thornthwaite, 1998: 100). It is then hardly surprising that employers in highly competitive industries with low profit margins make use of dependent contractors and, as discussed earlier, this is even easier where the domestic division of labour presents limited choices to the workers themselves. For example, clothing outworkers in Australia were classified as independent contractors until the late 1980s, and consequently worked for low pay under appalling conditions. Family daycare workers engaged by local councils (women providing child care to a small number of children in their own homes) have also been found to be independent contractors rather than employees, and thus not entitled to award pay and conditions.[17]

Brosnan and Thornthwaite's illuminating case study (1998) gives an insight into contemporary home work and dependent contracting. The home workers they interviewed had previously been employed directly by the same company and paid at piece rates, but in 1991 the company moved to a contracting system, thereby avoiding training levies, superannuation contributions, workers' compensation premiums, and payroll tax. It invited its current home workers to tender for the work, but only accepted tenders at the existing piece rate of 5.5 cents per unit. Home workers were required to re-tender for business each year, but only at the rate determined by the company. Pay rates for home workers remained fixed for four years, and those who attempted to increase their rates simply did not have their contracts renewed. Home workers could be underemployed for part of the year, overworked in busy periods, and easily dismissed by the company providing no further work. The company attempted to justify the low rates of pay by arguing that the workers could minimise income tax by claiming their costs as business expenses, but this assumed that their earnings were above the tax-free threshold—something that did not necessarily occur (Brosnan and Thornthwaite, 1998: 103–6). Here, a legal regime providing overwhelming cost and flexibility advantages of contracting out to home workers, combined with a ready supply of labour with little choice but to accept work on that basis, produced an inevitable shift to precarious employment.

Obtaining workers through a labour hire agency provides all the advantages for the employer of contracting out, together with the administrative simplicity of contracting only once with an agency, as opposed to multiple times with individual contractors. In structuring the relationship with their workers, agencies have made the same kinds of choices as those of direct employers outlined above, preferring to engage workers on either a casual or dependent-contracting basis rather than as permanent employees. While considerations such as the casual loading and tax advantages—combined with an absence of real choices—may induce workers to enter into casual or dependent-contracting arrangements, a further factor in agency arrangements is the complexity and ambiguity of the legal relationships involved in agency work. These may lead workers to misunderstand and overestimate their employment status (see, for example, Gryst, 2000), the implications of which may only become clear when they find themselves dismissed.

COUNTERVAILING MEASURES—(LIMITED) PROTECTION FOR PRECARIOUS WORKERS

It must be acknowledged that labour law has not uniformly and consistently worked in the direction of increasing precarious work. Some state governments have enacted legislation and some industrial tribunals have made decisions designed to extend protection for precarious workers; some courts have interpreted legal provisions and common law principles to the benefit of workers; and some unions have sought to shift the legal status of workers to less precarious forms, and to increase the costs of precarious employment for employers. Nevertheless, these efforts have been piecemeal, and in some instances unsuccessful or counterproductive. At best, they have mitigated the status of precarious workers, within an overall policy and legal setting which continues to respond to employer demands for flexibility by facilitating the spread of precarious employment.

Improved Conditions for Casual Workers

Increased Casual Loading

In *Re Metal, Engineering and Associated Industrial Award 1998 – Part I*,[18] the Australian Metal Workers Union sought a variation of the metal industry award to increase the loading to be paid to casual employees. In its decision, the Full Bench of the AIRC took the view that the casual loading should compensate for the lack of standard award benefits, primarily paid leave, long service leave, lack of notice of termination, and the effects of employment by the hour.[19] However, it considered that disadvantages relating to underclassification, lack of access to training, and limited access to superannuation were more appropriately dealt with otherwise than via the casual loading,[20] although it did not specify how or where this was to occur. Looking at the value of the benefits forgone, the Full Bench took the view that the existing 20 per cent loading covered only the absence of paid leave, while permanent employees had gained access to additional forms of personal leave since the last adjustment to the casual loading, and the other factors listed above remained uncompensated.[21] It determined, therefore, that the casual loading should be increased to 25 per cent.

[18] (2002), 110 IR 247 (AIRC) (*Re Metal Award*). See also *QCU v Crown & Ors*, [2001] QIR Comm 43 (QIRC) in which the Queensland Industrial Relations Commission made a general ruling increasing the minimum casual loading in all Queensland State awards to 23%.
[19] See *Re Metal Award* above n 18 at 306, 318.
[20] *Ibid* at 318.
[21] *Ibid* at 319.

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In the course of the decision, the Full Bench expressed the view that casual employment 'should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment'.[22] Actual deterrence of casual employment would be inconsistent with the rationale for its existence,[23] that is, employers' need for labour flexibility. The decision, however, maintained the status of casual employment as at least indirectly a cheaper form of labour, by not addressing the issues of classification, training, and superannuation, or that of ease of termination (at least for the first 12 months). Since employers appear to have been more attracted to these indirect benefits, while being undeterred by the casual loading, it is at least questionable whether a 5 per cent increase in the loading would have any effect on the growth of casual employment (while rendering casual employees marginally better paid but no more secure in their jobs). As noted earlier, it is also questionable whether the full casual loading is actually paid in all cases.

Protection Against Unfair Dismissal—For Some

As discussed previously, most industrial legislation provides access to unfair dismissal provisions for casual employees other than short-term casuals, and some industrial tribunals have taken a narrow view of short-term casual employment, so as to maximise the extent of protection against unfair dismissal for casual employees.[24] Such coverage may be of very little value for at least some casual employees, however. For example, in *Jeanine MacKenzie and RMF Group Pty Ltd*,[25] the applicant was engaged as a casual employee, but was covered by the unfair dismissal provisions in the Queensland Industrial Relations Act since she had been employed on a regular and systematic basis for more than one year. However, under the award, casual employees could be legally terminated on one hour's notice. Given this provision, the Commissioner found that the applicant's termination was not harsh, unjust, or unreasonable.

Parental Leave (and Other Entitlements)—For Some

The New South Wales Industrial Relations Act extends entitlement to parental leave to 'regular casual' employees but not to other casual employees.[26] The

[22] *Ibid* at 307.
[23] *Ibid* at 316.
[24] See, eg, *SDA v Dymocks* (2001), 103 IR 390 (NSWIRC).
[25] [2001] QIR Comm 39 (QIRC).
[26] Industrial Relations Act 1996, s 53(1). Section 53(2) defines a 'regular casual' employee as one who 'works for an employer on a regular and systematic basis and who has a reasonable expectation of on-going employment on that basis'. Section 57 of the Act stipulates that parental leave is available only to employees (of whatever kind) who have more than 12 months' continuous service with their employer.

Queensland Industrial Relations Act has also recently been amended to extend family leave, carer's leave, and bereavement leave to 'long-term casual' employees.[27] By contrast, the federal, South Australian, and Western Australian legislation specifically excludes casual employees from access to parental leave,[28] although casual employees covered by federal awards do enjoy the benefit of the 2001 parental leave test case,[29] in which the AIRC extended the award standard parental leave clause for permanent employees to those casual employees 'employed on a regular and systematic basis ... during a period of at least twelve months' who have 'a reasonable expectation of ongoing employment'. A union campaign to extend redundancy protection and severance pay to long-term casuals was rejected in Queensland[30] and at federal level,[31] on the basis that these matters are already covered by the casual loading.

As Owens points out, however:

> In every instance ... these protections operate, through the use of qualifications of continuity and length of service, by assimilating casual workers to the traditional image of the worker with ongoing employment. Incorporated into the legal regime then is the view that it is acceptable to exclude some casual workers from the rights and entitlements which are the marker of the dignity of the worker as a human being.
>
> (2002: 222)

She goes on to argue that the legal divide between short-term and long-term workers is as potentially dangerous as that between permanent and casual employment (Owens, 2002: 230), or, one might add, as the legal divide between employees and independent contractors: '[s]uch a divide creates an opportunity to structure inequality into the workplace by providing business with incentives to organise patterns of employment in ways that avoid the duty to accord workers' rights and entitlements' (Owens, 2002: 230). In this context, it is encouraging to note that the Australian Council of Trade Unions' (the ACTU's) current *Family Provisions Test Case* seeks to extend entitlements to all casual employees,[32] and this campaign has recently resulted in an agreement to allow all casual employees under federal awards access to short periods of unpaid leave to care for family members in situations of

[27] Industrial Relations Act 1999, ss 16, 39(2), 40. Section 15A defines a 'long term casual employee' as one who is 'engaged by a particular employer on a regular and systematic basis, for several periods of employment during a period of at least one year'.

[28] Workplace Relations Act 1996 (Cth), sch 14; Fair Work Act 1994 (SA), sch 5; Minimum Conditions of Employment Act 1993 (WA), s 33.

[29] *Re Vehicle Industry Award* (2001), 107 IR 71.

[30] *Queensland Council of Unions v Queensland Chamber of Commerce and Industry Ltd & Ors*, [2003] QIR Comm 383 (QIRC).

[31] *National Union of Workers & Ors v Australian Industry Group & Ors*, (26 March 2004) No PR032004 (AIRC).

[32] *Family Provisions Test Case 2004*, ACTU Outline of Contentions, 30 April 2004.

illness or emergency.[33] But the balance of the claim remains undecided at the time of writing.

Moreover, as with casual loadings and protection against unfair dismissal, the legal situation with regard to parental and family leave for casuals still leaves a problem of enforcement—another potential gap between the law in the books and the law in action. In the case of *Tapuvae v Vetob Pty Ltd t/a Browse About*,[34] the New South Wales Industrial Relations Commission found that a regular casual employee had not been advised of her maternity leave entitlements as required by the legislation, and had been refused work when she wished to return after having her third child. In the circumstances, this refusal constituted a harsh, unjust and unreasonable termination of employment, and the employee was awarded compensation. One wonders, however, how often this factual scenario is repeated without the employee having any knowledge of, or ability to assert, her legal rights.

Permanent Part-Time, rather than Casual Part-Time

Permanent part-time (PPT) work has been perceived by feminist and union advocates as providing higher quality jobs than casual part-time work, since permanent part-timers have pro rata access to the full range of legislative and award benefits denied to casual employees.[35] Based on their studies of PPT employment, however, both Probert and Junor have been highly critical of PPT work as a panacea for women with family responsibilities.

First, the kinds of jobs in which the majority of PPT work is available have, in practice, turned out to be low status and low paid. In terms of Junor's distinction between the 'individual EEO' model and the 'employer initiative' model of PPT work, most PPT jobs conform to the 'employer initiative' model—they are 'not fractions of full-time jobs but different jobs altogether' (Junor, 1998: 91). These jobs enable more efficient time utilisation by service industry employers 'by making possible more sophisticated forms of rostering than can be achieved through casualisation.' They also allow employers to avoid overtime payments, since PPT workers can be asked to work up to full-time hours at ordinary-time rates (Junor, 1998: 86). Importantly, such jobs tend to be 'base grade jobs given to mature-aged women re-entering the workforce' (Junor, 1998: 77). They are 'explicitly

[33] ACTU Media Release, 'Two million casual workers win new right to time off for families' (5 July 2004).
[34] (2002), EOC 93-241 (NSWIRC).
[35] Conversion from casual part-time to permanent part-time work is an aspect of the broader strategy of conversion from casual to permanent employment (see Owens, chapter 15 in this volume).

female, graded at entry level and located outside the career track, although maturity and experience [are] recruitment criteria' (Junor, 1998: 80). Similarly, Probert notes that PPT work in the retail industry is identified with married women with children, who are thought to have a different attitude to work, which is used to justify the lack of career structure and low pay (1995: 31–32).

Second, the benefits attaching to PPT work may turn out to be illusory, and the switch from casual to PPT may actually involve losses for the workers involved. According to Junor, 'when employers initiate a switch to permanency in formerly casualised industries, particularly where hours are very flexible, they may be pursuing the removal of casual loadings in exchange for a rather tenuous form of job security' (Junor, 1998: 83). For example, in one agreement between the shop assistants' union and a large supermarket chain, casual workers were converted to part time, with the loss of casual loadings, together with an extended spread of hours attracting the ordinary time rate of pay, hence reducing the incidence of overtime payments. 'According to one account, a 19 year old casual worker ... [would] lose about half of his wage packet' (Probert, 1995: 40). In another agreement concerning hotel maids and cleaners, the company (Sheraton) believed it would save money by shifting from casual to PPT employment arrangements, because it would not have to pay the casual loading, it could achieve flexibility by means of rostering, and it gained a more highly trained and multi-skilled workforce than it would have done with casual employees. Time flexibility was accompanied by 'functional flexibility'—total flexibility of jobs and duties, and the total elimination of 'normal' hours and penalty rates (Probert, 1995: 20–21).

This kind of flexible rostering can in fact be extremely family unfriendly, thus negating the supposedly major benefit of part-time employment (Junor, 1998: 84). According to Belinda Probert (1995, 41), the new agreements in many cases greatly increase the range of hours within which a part-timer may be expected to work. Such a range of hours is particularly problematic for women with family responsibilities.' In the Sheraton case, for example, the flexibility requirements disadvantaged women with children, who had to deal with the inflexibilities of childcare arrangements, school hours, and school holidays, and the company ended up with the majority of its workforce aged under 25 (Probert, 1995: 22–23). In light of such outcomes, Probert criticises the assumptions behind the strategy of casual to PPT conversion:

> [I]t has generally been assumed that making women's work more like men's work will benefit women, so that reducing casual employment, giving part-timers access to pro-rata benefits and increasing full-time standard employment opportunities are seen as progress. Since, however, women are not like men in their freedom to exploit employment opportunities, these changes may have the unintended consequences of reducing women's access to certain kinds of employment, or at

least of excluding older married women in favour of improving the employment conditions of younger single women.

(Probert, 1995: 34)

Third, where the potential benefits of PPT for workers are real, employers are less likely to be interested in providing it. Junor refers to an industrial campaign on behalf of Technical and Further Education teachers, which attempted to convert their status from casual to PPT. However, this would have resulted in considerably increased salary and other costs for TAFE employers (and hence ultimately for the government), and they refused to agree to the change (Junor, 1998: 83).

Fourth, under some circumstances, PPT may drive out permanent full-time as well as, or instead of, casual part-time employment. In 1991, the former Victorian Industrial Relations Commission sought to discourage casualisation and increase permanent employment in the retail sector, and it amended the relevant state award to allow more part-time employment, to increase the span of normal working hours, and to reduce penalty rates. Retail employers responded by increasing the number of part-timers at the expense of full-timers, rather than at the expense of casuals (Probert, 1995: 27–28). This should have been a predictable outcome, according to Probert, since the casual and part-time workforces in the retail industry have been long recognised to be 'derived from different and non-substitutable social groups' (Probert, 1995: 31). In the Sheraton case, where substitution between casuals and permanent part-timers did occur, management adopted a practice of replacing full-time jobs with two part-time jobs, since part-timers offered much greater flexibility than full-timers (Probert, 1995: 21).

Thus, PPT appears to represent a 'win–win' solution for both workers and employers in only a small proportion of cases that conform to Junor's 'individual EEO' model. Otherwise, casual-to-PPT conversion at best substitutes one form of precarious employment for another, and at worst renders jobs inaccessible to their previous incumbents.

Deemed Employees

The remaining set of measures discussed in this section attempts to mitigate the more deleterious effects of dependent contracting and agency work arrangements. One strategy in this context is to redefine as employees groups of workers who would be defined at common law as independent contractors. For example, in the 1987 *Clothing Textile and Footwear Award 1982* decision,[36] the AIRC reclassified clothing outworkers as employees, which brought them under the protection of the award and the other entitlements attached to being an employee (Hunter, 1992; Owens, 1995: 47–48). The current Clothing Trades Award 1999 contains explicit and extensive protections for outworkers, including employer registration, agreed hours of work, and awards rates of pay, and entitlement to paid annual leave (Pittard and Naughton, 2003: 76). The difficulty of enforcing this legal position, however, is widely acknowledged.

Two state Labor governments have included in their industrial relations legislation provisions that deem certain workers to be employees, or enable applications to be brought for groups of workers to be deemed employees, and hence to gain access to legislative and award conditions and benefits attaching to the status of employee.[37] The list of deemed employees under the New South Wales legislation includes milk vendors, bread vendors, cleaners, carpenters, joiners and bricklayers, painters, plumbers, drainers and plasterers, blinds fitters, outworkers in the clothing trades, timber cutters and suppliers, ready-mixed concrete drivers, and Road Transport Authority lorry drivers. It is interesting to note that only two of the specified occupations involve typically women's work—cleaners and clothing outworkers. Home working dependent contractors in other industries are not covered.

The Queensland Industrial Relations Act allows the Full Bench of the Queensland Industrial Relations Commission to make an order declaring a class of persons to be employees.[38] There has only been one reported order made to date, concerning security guards who were engaged as independent contractors on terms falling far short of the entitlements they would have enjoyed even as casual employees under the company's certified agreement.[39] The fact that there have not been more cases under the Queensland legislation may be a reflection of the circumstances under which it can be invoked. Applications may be brought only by a trade union, a state peak council, or the Minister. Many groups of dependent contractors, particularly home workers, are unlikely to come to the attention of any of these entities.

Similarly, in New South Wales, extension of the groups covered by schedule 1 of the Act requires the government to pass regulations, something it is unlikely to do without at least significant union pressure. In other words, traditional mechanisms of enforcement and protection for full-time permanent employees, via unions, are assumed to be effective for unorganised workers in circumstances of deunionisation and enterprise-level bargaining

[37] Industrial Relations Act 1996 (NSW), s 5(3), sch 1; Industrial Relations Act 1999 (Qld), ss 5(1)(d), 275.

[38] In *Transport Workers' Union of Australia (Qld Branch) v Australian Document Exchange Pty Ltd*, [2000] QIR Comm 18 (QIRC), a Full Bench held that a 'class of persons' for the purposes of the section could be a class identified by reference to their employer/contractor.

[39] *ALHMWU v Bark Australia*, [2001] QIR Comm 22 (QIRC).

structures that make it difficult for unions to represent their traditional constituents, let alone extend their reach to new ones. In practice, it is likely that unions will act if proposed or actual dependent contracting arrangements threaten the position of current full-time permanent union members. Where this is not the case, deemed employee provisions are unlikely to have any effect.

Classification Cases

While deemed employee provisions represent an attempt (if ineffective) to tackle dependent contracting at a systemic level, there has also been a considerable amount of litigation over the question of whether, in the circumstances of a particular case, workers should be classified at common law as employees or as independent contractors. (There have also been some classification cases concerning the question of whether employees are casual or permanent[40]—interestingly involving women workers, whereas independent contractor cases have tended to involve male workers.)

The employee versus independent contractor cases often involve convoluted reasoning as the court attempts to reach its preferred result, and the outcomes of these cases are highly unpredictable. For example, the same bicycle couriers have been held by one court to be independent contractors and by another court to be employees;[41] agency workers in some cases have been classified as employees, while in others, agency workers with similar contracts have been classified as independent contractors.[42] The way in which the issue is framed, and the court's policy choices in relation to that framing, appear to have a large bearing on the decision. This legal indeterminacy renders the litigation strategy risky and unreliable, as it is impossible to predict which way the court will jump in any given case.

Unfair Contract Provisions

The federal, New South Wales and Queensland industrial relations legislation contains provisions allowing (in)dependent contractors to challenge contracts whose terms are unfair.[43] Again, these provisions are little used,

[40] See, eg, *Australian Municipal, Administrative, Clerical and Services Union v Ansett* (1998), 83 IR 38; *Julia Ross Personnel and Rebecca Wain*, [2001] QIC 8 (QIC).

[41] *Vabu Pty Ltd v Commissioner of Taxation* (1996), 81 IR 150 (NSWCA); *Hollis v Vabu Pty Ltd* (2001), 207 CLR 21.

[42] See, eg, *Forstaff Pty Ltd v Chief Commissioner of State Revenue*, [2004] NSWSC 573 (employees); *Building Workers Industrial Union of Australia v Odco Pty Ltd*, (1991), 29 FCR 104 and *Odco Pty Ltd v Accident Compensation Commission*, [1990] VR 178 (VSC) (independent contractors).

[43] Workplace Relations Act 1996 (Cth), s 127B; Industrial Relations Act 1996 (NSW), ss 105–106; Industrial Relations Act 1999 (Qld), s 276.

and such cases as have been brought have tended to be confined to male-dominated occupations such as truck driving, taxi driving, and insurance agency work.[44] Indeed, the federal jurisdiction incorporates a public/private distinction, excluding work for the private and domestic purposes of the principal.[45] Another deterrent is the fact that, under the federal legislation, applications must be brought in the Federal Court, although the New South Wales legislation allows for applications to the Industrial Relations Commission.

It appears that unfair contract cases are often brought after termination of the contract, perhaps indicating that contractors are unaware of their rights when performing work under the contract but tend to seek legal advice if it is terminated, or perhaps indicating an awareness that attempting to bring a case while a contract is on foot would soon result in termination. Nevertheless, it seems that, in some cases, contractors attempt to use the unfair contract jurisdiction as a de facto unfair dismissal remedy. This can involve some straining of the legislative provisions, which are intended to deal with the terms of the contract, not the manner in which it was terminated, and further illustrates the inequitable consequences of the legal distinction between employees and independent contractors (Brooks, 1994).

Thus, it can be seen that the various attempts via legislation or litigation to reverse the trend to precarious employment or to mitigate its effects have had limited success at best. At worst, as in the case of some casual-to-PPT conversions, they have been distinctly counterproductive.

CONCLUSION

This chapter has identified several factors interacting to produce the particular kinds of precarious employment now evident in the Australian labour market, including the notable increase in casual employment from the late 1980s to mid-1990s. Those factors are: the nature of the economy and economic policy—including job creation policies that give no emphasis to the quality of the jobs created; the state of the labour market; labour law and regulation (conceived broadly); and gendered practices both in paid employment and in the home. Attempting to change legal norms while the other factors remain constant can only have a limited effect. Even if legislation

[44] See, eg, *Buchmueller v Allied Express Transport Pty Ltd* (1999), 88 IR 465 (FCA); *Jordan v Aerial Taxi Cabs Co-operative Society Ltd* (2001), 108 IR 263 (FCA); *Harding v EIG Ansvar Ltd* (2000), 95 IR 349 (FCA). The recent NSW case of *Masri v Nanny Santoso*, [2004] NSWIR Comm 108, however, did involve the recovery of a large sum of unpaid wages to an Indonesian housemaid.

[45] Workplace Relations Act 1996 (Cth), s 127A(1)(a)(ii).

were enacted that extended a minimum set of conditions and benefits to all workers, regardless of their status as permanent, casual, long-term, short-term, employees or contractors, pressures to minimise labour costs and maximise flexibility would still result in loopholes in the safety net being found and exploited, for example, by converting full-time jobs to part-time jobs, by extending the use of home workers, or by increased recourse to agency arrangements, including offshore agencies. Moreover, such a legislative outcome is highly unlikely from any Australian government in the foreseeable future.

Of the four factors identified, the one most likely to change in the medium term in Australia is the state of the labour market. Gender segregation in the labour market and the gender division of labour in the family have proved remarkably stable and resilient in the face of more than three decades of social change around the status of women. However, the demands of flexibility in the labour market appear to have had an adverse impact on the important matter of labour reproduction. Thus, the country faces significant demographic change, as the post-war 'baby boomer' generation starts to retire and the size of the working-age population shrinks. This chapter has discussed the fine line between precarious employment and unemployment for many Australian workers, and the limited choices available to low-skilled service workers, particularly women with family responsibilities. By contrast, conditions of relative labour scarcity would provide increased choices and bargaining power for workers, and may do more to reduce precarious employment than legal tinkering around the edges.