Non-Standard and Precarious Employment: A New Dawn?

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I Introduction

In recent times, the emergence of certain forms of employment and their allegedly precarious nature, have been the subject of much discussion. On 23 May 1996, the Federal Minister for Industrial Relations, the Honourable Mr Peter Reith, introduced the much heralded *Workplace Relations and Other Legislation Amendment Bill 1996 (Cth)* into Federal Parliament. The Bill fuelled the debate on non-standard employment.

Casual employment is put into the category of non-standard employment. But a closer examination shows that it may not be as precarious as it has been claimed. Moreover, recent cases have confirmed that, for certain types of casual employees, there is protection in that they may have access to a remedy under termination laws. *The Workplace Relations Act 1996 (Cth)* seems to usher in a new dawn for non-standard employment, particularly, part-time and casual employment.

II The Emergence of Non-Standard and Precarious Employment in the Australian Labour Market

It is now generally agreed that the last two decades or so have witnessed

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a dramatic transformation of the Australian labour market.[1] One of the main developments has been the emergence and growth of genera of employment which do not conform to the paradigm with which we have become accustomed. It should be pointed out that this development is not peculiar to Australia but appears to have occurred across the OECD economies.[2] This development has caught the attention not only of the OECD but also the International Labour Organisation.[3]

'Standard employment' is described as possessing the following characteristics:

1. full-time - likely to be capable of generating an income level capable of supporting some minimum standard of living;
2. waged employment - likely to be located within a regularity context guaranteeing rights, income and working conditions;
3. on-going - employment is secure and continuous; and
4. located at an establishment owned by the employer - conditions of employment are regulated.[4]

In other words, the employment paradigm is one of full-time, permanent work performed at the employer's premises and remunerated by way of a wage or salary. Put simply, there has to be both visibility and security of the employment. From the legal perspective, this translates into a worker who is recognised by the law as an employee on a single employment contract.

It is this paradigm which is giving way to 'a quite bewildering range of new forms of work-relationships.'[5] Whilst there is general recognition of the new phenomena, there is no agreement on the nomenclature for describing them. They have been described variously as, 'non-standard', 'precarious', 'atypical', 'unprotected', 'non-regular', 'forgotten', 'marginal', 'peripheral', 'secondary', 'vulnerable' or 'flexible'.[6]

Work relationships which are said to fall into this broad category include: casual employment, part-time employment, self-employment,

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1 Eg, A Vandenheuvel and M Wooden, "Self-Employed Contractors in Australia: How Many and Who are They?" (1995) 37 *Journal of Industrial Law* 263; J Burgess, "Non-Standard and Precarious Employment: A Review of Australian Workforce Data" (1994) 6 *Labour Economics and Productivity* 118.

2 Kuhl has identified 20 forms of these in the European Community: J Kuhl, "New Deals and New Forms of Employment" (1990) 15 *Labour and Society* 237. See generally: OECD, *Flexibility in the Labour Market - The Current Debate* (1986); OECD, *Employment Outlook* (July 1991); G and J Rodgers (eds), *Precarious Jobs in Labour Market Regulation* (1989) and H Collins, "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) 10 *Oxford Journal of Legal Studies* 353.

3 J Burgess, n 1 above, esp at 122.

4 J Burgess, n 1 above at 121.

5 B Creighton, "The Forgotten Workers: Employment Security of Casual Employees and Independent Contractors" in R McCallum, G McCarry and P Ronfeldt, *Employment Security* Sydney: Federation Press, 1994, 51.

6 The references in this article show examples of those using these terms.

contracting and subcontracting, outwork and agency employment.[7] There appears to be no single explanation for this development.

At the broad level, it would seem that a combination of factors is the cause. In the forefront is technological change. But economic, social and demographic factors also seem to be playing parts. At a more specific level, it can be put down to this: the employer desires flexibility in its work arrangements with concomitant cost-saving and efficiency gains; the worker wants work which suits his or her own individual situation. (Though, it is readily conceded that some workers have no real choice). It has been noted, however, that: "In some circles the virtues of labour flexibility have acquired an almost cultish following and it is not surprising in such a milieu to find advocates of labour flexibility, along with their policy-making followers, lionising its elixir qualities".[8]

The situation is well encapsulated in the following observation by the International Institute of Labour Studies:

> "... there is a growth in unprotected forms of employment and these undermine or substitute for conventional, regular jobs, reducing job security and labour incomes. Such forms of labour include various types of part-time, fixed-term, irregular and temporary work; the use of non-unionised intermediaries such as employment agencies; the creation of separate small enterprises with inferior working conditions; or subcontracting to home workers, to individuals or to small enterprises which effectively consist of disguised wage labourers... Some of these phenomena may represent a positive evolution towards more flexible work patterns, preferred on both supply and demand sides; but they may also imply the undermining of rights and welfare of labour, and have essentially regressive effects."[9]

To compound the difficulty, there is no reliable data on these new forms of employment in Australia. The Labour Force Survey of the Australian Bureau of Statistics is not designed to provide such data. The Bureau has recently been called upon to modify its survey so as to be able to provide comprehensive information on the incidence and extent of the new forms of employment so that policy makers will be better informed on how to deal with them.[10]

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[7] See eg, A Brooks, "Marginal Workers and the Law" in M Bray and V Taylor, *The Other Side of Flexibility, Unions and the Marginal Workers in Australia* (Reprint 1995) 44; R Markey, "Marginal Workers in the Big Picture: Unionization of Visual Artists", (1996) 38 *Journal of Industrial Law* 22.

[8] M Bray and V Taylor, "Introduction: Flexibility, Marginal Workers and Unions" in M Bray and V Taylor (eds) *The Other Side of Flexibility, Unions and the Marginal Workers in Australia* (Reprint 1995) 1. The two sides of flexibility are discussed in chs 1 and 9.

[9] Cited in P Dawkins and K Norris, "Casual Employment in Australia" (1990) 16 *Australian Bulletin of Labour* 156.

[10] John Burgess, n 1 above; A Vandenheuvel and M Wooden, n 1 above.

III The Response of the Law

Some leading experts have lamented the incapacity of the law, both common law and legislation, to deal with the new phenomena. One expert has argued that the continued division by the law of work arrangements into contracts of service on the one hand, and all others on the other, "becomes more absurd year by year."[11] Another did not mince his words when he pronounced the 'failure' of Labour Law several years ago.[12] The case against the law has been neatly put as follows:

> "Neither the common law nor statute have been able to come to terms with the rapidly changing nature of employment in Australia. The contract of employment - conceptually confused and unwieldy instrument at the best of times - has proved singularly unable to come to grips with the categorisation of new forms of employment relationship, let alone to accommodate their content and practical operation. The legislatures have fared little better - usually electing to ignore the issue thereby passing the buck to the demonstrably ineffectual devices of the common law, and occasionally adopting inadequate solutions through the use of 'deeming' provisions or other ad hoc measures."[13]

It is not only the law (and the Australian Bureau of Statistics) which has been caught unprepared by the new development. It has been asserted that policy makers, lawyers (separate from the law itself), administrators and industrial relations practitioners have similarly been unable to come to grips with the new forms of employment, resulting in a 'collective failure of vision.'[14]

IV Casual Employment in Australia

As stated earlier, there is no reliable data on the incidence and extent of non-standard employment in Australia. As far as casual employment is concerned, whatever information there may be is distorted by the working definition used by the Australian Bureau of Statistics. It defines casual workers as those "not entitled to either annual leave or sick leave in their main job."[15] This is clearly unsatisfactory for the purposes of legal analysis,

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[11] A Brooks, "Approaches to the Regulation of Atypical Working Arrangements or Labour Law and Science Fiction" in R McCallum, G McCarry and P Ronfeldt, *Employment Security*, Sydney: Federation Press, 1994, 79, 89.

[12] A Stewart, "'Atypical' Employment and the Failure of Labour Law" (1992) 18 *Australian Bulletin of Labour* 217, esp. 223.

[13] B Creighton, "The Forgotten Workers: Employment Security of Casual Employees and Independent Contractors" in R McCallum, G McCarry and P Ronfeldt, *Employment Security*, Sydney: Federation Press, 1994, 51, 77.

[14] Id, 52.

[15] ABS, *Employment Benefits, Australia*, Cat No 6334.0 (1989a), 27.

as the definition may fit a range of work relationships that the law would not consider as having even a remote resemblance to casual employment.

That leaves one with only a recent attempt to provide 'some guesstimates'. According to Dawkins and Norris, in the period 1982-1989, casual employment in Australia grew by a huge 89 per cent.[16] The study found a number of features of casual employment in Australia. First, for industries where there tends to be a marked fluctuation in demand, there is a likelihood of a relatively high demand for casual workers. Examples of such industries are: retail trade, recreational, and personal services. Second, employers tend to avoid using casuals where the training costs are high. Third, more women than men tend to be willing to work as casuals (part-time most of the time). Fourth, industries with high numbers of casuals tend to have weaker unionisation. Overall, the study concluded that casual employment now represents about 20 per cent of total employment in Australia and that the wholesale and retail industry has the highest number of casual workers.[17]

V Recent Case Law Developments

At the outset, issue ought to be taken with the approach whereby casual employment and part-time employment are lumped together with the other new forms of employment into one broad category and described as 'unprotected', 'precarious' or some other similar terminology which conjures up images of an employment Armageddon.

It is my contention that it is a flawed analysis to put casual employment (and more especially so, part-time employment) into the same category as the other new types. It is stretching legal analysis to breaking point to suggest that the former two types are as precarious, if indeed precarious is an appropriate description, as the latter.

Leaving aside any clandestine work[18] (this is not an issue in this context), the law has always recognised casual and part-time employment and protected them to the extent that protection can be given. Unless one subscribes to some post-modern view that all forms of work *must be given*

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[16] P Dawkins and K Norris, "Casual Employment in Australia" (1990) 16 *Australian Bulletin of Labour* 157, 163.

[17] *Id*, 167 and 170. See also J Burgess, "Marginal Workers and the Australian Labour Market" in M Bray and V Taylor, *The Other Side of Flexibility, Unions and the Marginal Workers in Australia* (Reprint 1995) ch 2, esp 28-29.

[18] Cordova has classified this layer of work into four groups: "undeclared work, which is carried on beyond the reach of labour, fiscal and administrative law; *family work*, which takes advantage of family ties to elude the requirements of social protection; *work performed by foreigners without valid work permits*... and work in *micro-enterprises* which, capitalising on the shortage of labour inspectors, seldom comply with industrial regulation": E Cordova, "From Full-time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?" (1986) 125 *International Labour Review* 641.

the same level of protection, the fallacy of lumping together different types of work, albeit with similar characteristics, and applying the same legal analysis to them, becomes palpable.

By definition, casual and part-time employment cannot be given the same level of protection as the full-time, permanent one. By the same reasoning, casual employment cannot enjoy the same level of protection as part-time. As the literature abundantly shows, there are workers who prefer to work casual and/or part-time for various reasons. It would be strange indeed if such workers expected that they would be given benefits on the same terms, and protection to the same level, as their full-time, permanent colleagues.

Unless it is one's purpose to challenge the very edifice on which the whole of labour law is built, it becomes illogical to paint all forms of non-standard work with one broad brush. This is what Brooks appears to do with her call for the law to be 'rapidly proactive' and for lawyers to look to science fiction for inspiration. She put her case forcefully thus:

> "'Job protection' is not the issue, because job protection was always merely a means to an end. It is that end on which we should focus. Our task is not 'job protection'. It is 'rights protection'. We need to find a way to ensure and protect rights, other than by attaching them to jobs. This requires more than a charter of workers' rights. It requires a charter of civil rights - and they should not be the limited set of rights labour lawyers have been immediately concerned with: paid leave from work, compensation in the event of injury at work, rights to promotion and training in the job. They should be the rights which are the end to which those limited rights were a means: rights to education and health care, to adequate housing, to the opportunity to lead a rewarding life, to a feeling of dignity and self-worth - rights which essentially derive not from the status of employee nor even of worker, but which essentially derive - and should be recognised as so deriving - from the status of the person, whether that person is an employee or worker or not."[19]

This line of reasoning hits the nail on the head. We may take a more fundamental approach to the issue altogether or apply the law as we have it now (of course, with improvements). Until lawyers, or more accurately, legislators, embrace the science fiction approach, we cannot gloss over the inescapable reality that the law as it currently stands *does not* treat casual and part-time employment as non-standard.

The scene is now set for a consideration of the legal issues pertinent to casual employment. The understanding of the term, 'casual' in general parlance has never been in doubt. The common law has no definition of the term. In *Doyle v Sydney Steel Company Limited*,[20] the High Court of Australia had to grapple with who was a 'casual worker' for the purposes of New South Wales workers compensation legislation. McTiernan J

[19] A Brooks, n 11 above at 90.
[20] (1936) 56 CLR 545, at 565.

observed: Now the term 'casual worker' is not capable of exact definition. Hamilton L J said in *Knight v Bucknill* [21]: "I think that 'casual' is here used not as a term of precision, but as a colloquial term." Each case is to be determined on its own facts, consideration being given not only to "the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period of time over which the employment extends, indeed all the facts and circumstances of the case" (*Stoker v Wortham*[22] per Swinfen Eady MR). The question being one of fact, the commission's finding should not be set aside if there was evidence to support it.[23]

The methodology of the courts has been to use recognised tests to first categorise the worker as either an employee or otherwise. Where the worker is found to be an employee, the secondary question is whether the employee works under a single contract or a series of contracts. If the employee works under a series of contracts, then he or she is a casual employee.[24] Fundamental to this approach is that there has to be in existence a contract of service in the first place. There lies the gravamen of the matter: there has to be a contract of employment!

The argument being put here is that it is this keystone of casual employment which either removes it from the genera of non-standard employment, or at any rate (together with part-time employment) makes it conspicuous. Once the law recognises a worker as an employee, the same principles which apply generally to the 'standard' employee, also apply to the casual (and part-time) employee *mutatis mutandis*. As it is also well known, in Australia, casual (and part-time) employment is regulated by awards and industrial agreements in a number of industries.[25] In such cases, the differences between these and the standard employment are narrowed even further.

The crux of the issue for casuals is the regularity or otherwise of their employment. Under what circumstances may it be said that the relationship which was operating under a series of contracts has changed into a single, continuous contract? In other words, has the casual employee over time been transmogrified into a 'standard' employee? If it were held that

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[21] (1913) 6 BWCC 164, 165

[22] (1919) 1 KB 499, 503-504.

[23] *Id*, 565. See also per Starke J at 551.

[24] See eg Nii Wallace-Bruce, *Outline of Employment Law* Sydney: Butterworths, 1994, chs 3-4; B Creighton & A Stewart, *Labour Law, An Introduction* 2nd ed, Sydney: Federation Press, 1994, ch 7; R C McCallum and M J Pittard, *Australian Labour Law, Cases and Materials*, 3rd ed, Sydney: Butterworths, 1995, 69-71.

[25] For recent cases, see eg, *Simiana v Woolworths Ltd* (1993) 50 IR 382; *Keane v Heide Pty Ltd (t/a Farmhouse Smallgoods* (1992) 43 IR 266; *Lane and Ors v Arrowcrest Group Pty Ltd (t/a as ROH Alloy Wheels)* (1990) 43 IR 210; *Siddons v National Union of Workers, New South Wales Branch* (1994) 57 IR 81. See generally, Karl-Jurgen Bieback, "The Protection of Atypical Work in Australian and West German Labour Law" (1992) 5 *Australian Journal of Labour Law* 17. Adrian Brooks critically evaluates the various protections available to non-standard employment generally in "Marginal Workers and the Law" in M Bray and V Taylor, *The Other Side of Flexibility, Unions and the Marginal Workers in Australia*, Reprint 1995, ch 3.

such a legal transformation had indeed occurred, it would provide the casual employee with additional protection, such as the right to seek a remedy for unfair dismissal.

The approach of the courts has been to closely examine the factors which present themselves in each case. In *Licensed Clubs Association of Victoria v Higgins*,[26] a casual employee of the Athenaeum Club in Melbourne who had been found to be unfairly dismissed, was successful in her claim for re-employment. A Full Session of the then Industrial Relations Commission of Victoria put forward the following factors for determining the casual nature or otherwise of the employment:

- The number of hours worked per week.
- Whether the employee worked according to a roster system that was published in advance and whether the employment pattern was regular.
- Whether there was reasonable mutual expectation of continuity of employment.
- Whether notice was required by an employer prior to the employee being absent or on leave.
- Whether the worker reasonably expected that work would be available.
- Whether the worker had a consistent starting time and set finishing time.[27]

These factors necessarily have to be treated as a guide as in practice, some of the factors listed here may not be present in another context. The key point is that whether a worker is considered to be a casual or to have a continuing contract is a matter of fact to be determined by the courts.

This leads us to a consideration of the recent cases. In *Ryde-Eastwood Leagues Club Limited v Taylor*,[28] the worker was employed in a full-time capacity for three years. To enable him attend an educational institution, the worker changed his employment to that of a casual employee under the award. The employee, described as 'versatile', worked as a barman, change-attendant, poker machine supervisor and in other capacities, as and when required. Two and half months after making the change to a casual employee, the management declined to 're-engage' him for alleged dishonesty. The Industrial Relations Commission of New South Wales found the allegation unsubstantiated and the dismissal unfair.

The threshold question was whether the dismissed employee had a continuing relationship with the Club at the time the decision was taken not to 're-engage' him as to give the Commission jurisdiction to deal with

[26] (1988) 4 VIR 43.
[27] Id, 54. See also *Metals and Engineering Workers Union - Western Australia v Centurion Industries Ltd* (1996) 66 IR 312 at 316.
[28] (1994) 56 IR 385

the matter. Otherwise, the Commission would not have jurisdiction as there would not have been a 'dismissal' within the meaning of the New South Wales legislation. The evidence established that the Club used casual employees regularly and that it operated in a way which "relies on lasting performance - each party having reasonable, and calculated, expectations of the other."[29] The Commission found that:

> "Whilst each shift stands alone, per calculation of entitlements according to the Award, the means of engagement must be viewed... within the umbrella of a broader, continuous, employment relationship which effectively provides an essential framework for each period contracted to be worked. That relationship, being a foundation for each engagement, surely does not come to an end in accordance with its own terms at the end of each shift."[30]

The Full Commission had no difficulty in confirming the decision at first instance that there was an ongoing relationship. However, reinstatement being impracticable, the appropriate remedy was compensation which was determined to be $5,200. More importantly for our purposes, the Full Commission advanced this general proposition:

> "It is apparent that two classes of employee colloquially described as 'casual' can readily be identified in the organisation of industrial relationships. The first class refers to those employees who are truly casual in the sense that there is no continuing relationship between the employer and the employee. The second class is where there is a continuing relationship which amounts to an ongoing or continuing contract of employment; it is this second class of contract which, for the reasons set out earlier by us, is of such a nature as to attract the Commission's jurisdiction under Pt 8 of Ch 3 of the Act."[31]

This approach was applied by the Industrial Court of New South Wales in *New South Wales Department of School Education v Andrews*.[32] There, it was held that there was jurisdiction to deal with a 'dismissal' where the respondent had been a casual relief teacher regularly for about nine years until the withdrawal of his 'casual teaching approval' by the appellant, following the complaint of a student. The Court found that a continuous relationship had developed.[33]

In the other category falls *Pacific Waste Management Pty Limited v Saley*.[34]

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[29] *Id*, 401.
[30] *Id*, 401.
[31] *Id*, 401-402. Note that the relevant provisions are now contained in Pt 6 of Ch 2 of the *Industrial Relations Act 1996 (NSW)*. In particular, it should be noted that s83(2) provides for the making of regulations to exclude certain types of employees, including, 'employees engaged on a casual basis for a short period'. This is considered in the last section of this article.
[32] (1995) 60 IR 126.
[33] See also, *Killington v News Ltd* (1993) 51 IR 307 and *Richens v Tresilian & Dun* (1993) 50 IR 155.
[34] (1993) 51 IR 339.

The respondent had worked as a relief driver with the appellant for some 18 months on what was described as 'job and finish' basis. It was up to the employee whether he accepted work or not, and in fact, on some occasions he had declined to work. On 15 January 1993 when the respondent completed his work for that day, he advised the company that he was unavailable for work for the balance of the week as he was proceeding on leave. On his return, he contacted the company for work but was advised that due to complaints about his performance, the company 'could not use his services anymore.' The Industrial Relations Commission of New South Wales at first instance found that a 'dismissal' had occurred within the meaning of the legislation and reinstated the respondent. The Full Commission upheld the appeal, holding that at the time of the decline of offer of work, there was no relationship of employer and employee in existence.

A number of conclusions may now be drawn from these cases:

- there is no 'talismanic significance in the designation casual employee'.[35] The fact that an employee is labelled 'casual' does not preclude an industrial tribunal or court from closely examining that employment relationship and determining its true nature;[36]
- the circumstances of each case will determine whether the employee is a 'true casual' and so works under a separate contract each time, or whether the relationship has been transformed into a continuing relationship; and
- where it is held that a continuing relationship has developed, the employee would be entitled to the same protection as the full-time, permanent employee. In particular, a refusal to re-engage such an employee would be characterised as a 'dismissal' or 'termination', and if it is unfair, the employee would primarily be entitled to a remedy of reinstatement or re-employment. Where this was not practicable, the employee would be entitled to a remedy of compensation.

VI A New Dawn?

The Howard Government has made it clear that it wants to encourage and promote casual and part-time employment. Two of the principal objects of the *Workplace Relations Act* 1966 (Cth) demonstrate the Government's intention. Section 3(c) seeks to enable 'employers and employees

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[35] Per counsel for the appellant in *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385, 387-388.

[36] In *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1990) 34 IR 138, the Federal Court held that the coach driver who had been labelled an 'independent contractor', in fact, worked under a series of contracts of service.

to choose the most appropriate form of agreement for their particular circumstances'. Paragraph (i) seeks to assist 'employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.'

A number of provisions have been enacted to provide the mechanisms for attaining these objects. From 1 January 1997, the jurisdiction of the Australian Industrial Relations Commission to make awards has been limited by s89A to 20 allowable award matters. The only situations in which the Commission may include other matters in an award are where it considers a matter incidental to an allowable award matter and it is necessary for the effective operation of the award, or where the matter is an exceptional matter. This is one of the radical departures made by the present Federal Government with over 90 years' tradition of award regulation. By so scaling back awards, the Howard Government has put it beyond all doubt its preference for the other forms of federal regulation, namely, certified agreements and Australian workplace agreements.[37]

One of the allowable award matters listed in s.89A(2) (r) is the "type of employment, such as full-time employment, casual employment, regular part-time employment and shift work". However, subsection (4) states that the Commission's jurisdiction does not include the power to limit the number or proportion of employees that an employer may employ in a particular type of employment. Nor does it include the power to set maximum or minimum hours of work for regular part-time employees. But the latter does not prevent the Commission from including in an award provisions on minimum number of consecutive hours that may be required of a part-time employee or for facilitating a regular pattern in the hours worked by a regular part-time employee. This is pursuant to subsection (5).[38]

The Senate Economics References Committee which conducted hearings into the *Workplace Relations and Other Legislation Amendment Bill* 1996 (Cth) noted that the then proposed s89A(4) was 'one of the most contentious issues' in the Bill.[39] It found that the proposed section had its supporters but it had also opposition. According to the Government, the proposed section would benefit employees who, for family and other reasons, might not be in a position to work a set minimum number of hours. For this group, the alternative would be to remain casual or be unemployed altogether. In fact, the Government was of the view that the provision would usher in a 'boom' for such employees.[40] Employer groups also supported the provision, which they considered 'constructive and

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[37] Generally see, Marilyn Pittard, "Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements" (1997) 10 AJLL 62.

[38] See also, s143 (1C) (b).

[39] Report by the Senate Economics References Committee, *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (22 August 1996) para 5.5.

[40] *Id*, para 5.6.

necessary for increasing labour market flexibility.'[41]

On the other side of the debate were a number of people who provided the Committee with submissions, arguing that the regularity of hours was far more important for ensuring access to the workforce for the employees concerned than removing the award limitations.[42] At the end of the day, the majority of the Committee concluded that there was no reason to remove the Commission's power to establish minimum and maximum hours for the employees concerned. The majority saw the Commission's power as providing some safeguard in the regularity of hours. It therefore recommended that the proposed s89A(4) should not be implemented.[43]

But the Government was not persuaded and the provision survived the negotiations between the Government and the Australian Democrats which was necessary to ensure passage of the legislation in the Senate. Section 89A (4) -(5) of the *Workplace Relations Act* 1996 (Cth) and the other provisions discussed have been law since 1 January 1997. The federal provisions have been given a boost by being adopted by Queensland in its *Workplace Relations Act* 1997 (Qld).[44]

It would seem, therefore, that there is a new dawn for non-standard employment in Australia. The application of the provisions referred to here can only lead to a further growth in casual and part-time employment in particular. But one area that is likely to prove troublesome is the interpretation of who is a casual employee engaged for a short period. A number of Australian jurisdictions, including the federal, exclude such employees from the termination provisions.[45] However, whether they are indeed excluded will depend on the facts of each case. As concluded in Part V of this article, the courts now distinguish between 'true casuals' and those who develop an ongoing employment relationship with their employers. The latter may be considered 'dismissed' when they are not offered re-engagement.

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41 *Id*, 5.8.

42 *Id*, para 5.14.

43 *Id*, para 5.23.

44 Section 3(c) and (g). See also, ss129 (3)-(4) and 134 (3) (b). *Cf* Part 5 of chapter 2 of the *Industrial Relations Act* 1996 (NSW).

45 Section 170CC(1) (c) of the *Workplace Relations Act* 1996 (Cth). See also; s83(2) (c) of the *Industrial Relations Act* 1996 (NSW); Regulation 10(c) of the *Industrial and Employee Relations (General) Regulations* 1994 (SA); s216 (2)-(3) of the *Workplace Relations Act* 1997 (Qld).