

Casual EMPLOYMENT Big issues/limited solutions!

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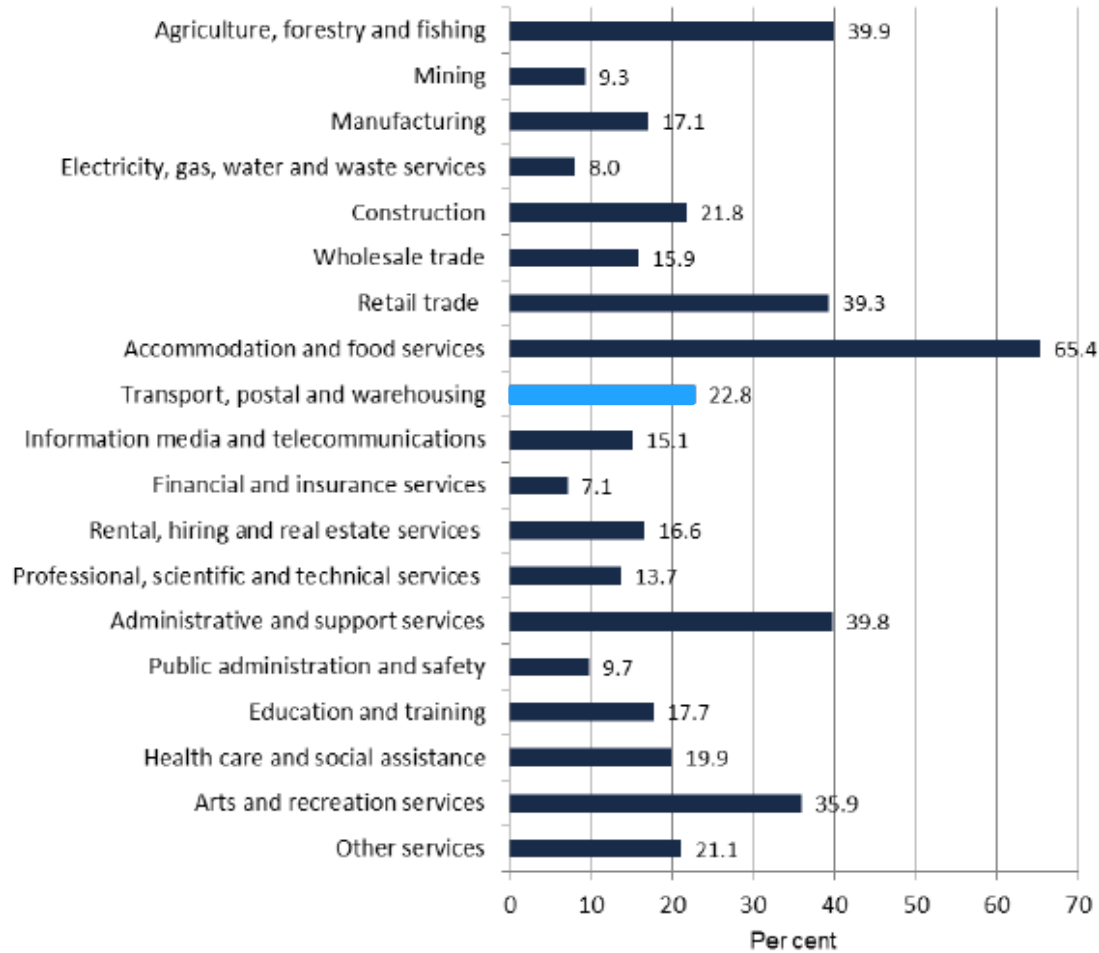
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Prevalence of casual employment

- Around one in four Australian employees work as casuals
- Casualisation among bus drivers ranges between **62.5-90%**.

Casual employment by Industry



Source: [2017] FWCFB 3541 at [359]

Regulation of casual employment

- ❖ Loading of (usually) 25% compensates for lack of entitlements to annual leave, paid personal leave, notice of termination, redundancy pay
- ❖ Casuals also get other benefits
 - > unpaid personal leave (including now family and domestic violence leave)
 - > parental leave, long service leave (if they work long enough)
 - > superannuation (if they earn enough each month)
 - > overtime pay
 - > access to unfair dismissal laws

Casual conversion

- Award-covered casuals employed for at least 12 months may request conversion to permanent position, employer can refuse only on reasonable grounds
- Where a casual takes up permanent employment, does their time as a casual count in calculating service-related entitlements?
 - > For redundancy pay purposes there are conflicting authorities
 - > but clearly no for annual leave, given s 86 of the Fair Work Act 2009 – as long as they are a casual

Can casuals bring unfair dismissal claims?

YES!

Who exactly *is* a casual?

- In strictest or 'true' sense, casual employment is informal, uncertain and irregular
- Awards and enterprise agreements typically define a casual as anyone 'engaged and paid' as such
- But Fair Work Act 2009 has no general definition
- So it's possible someone might be a casual for award or EA purposes, but not for other parts of the Act

Skene v Workpac



Skene v Workpac: The fallout

- Workpac decided against a High Court appeal ... but have now engineered another test case (*Rossato*), ostensibly about set-offs (see below), but could potentially challenge *Skene*
- There have been follow-up claims in the mining industry
- Not yet aware of claims in the Bus Industry?
- Can employers 'set off' or recover previous payments?
 - > arguably no – unless it's possible to pre-pay accrued leave and redundancy entitlements
- For how far back can liability stretch?
 - > At least 6 years, but note potential ambiguity of 6-year limit in FW Act s 545(5)

Skene v Workpac: The fallout (continued)

- Calls for a legislative ‘fix’
 - > this might enshrine the common sense position – if designated and paid as a casual – employee is a casual for all purposes
- No sign Coalition will do this – Morrison Govt has opted instead for a largely meaningless (and disallowable) ‘declaratory’ regulation
 - > Fair Work Amendment (Casual Loading Offset) Regulations 2018
- Labor has promised an ‘objective’ definition of casual
 - > though no details yet on how this would affect existing arrangements, or how to address transitional issues

Skene v Workpac: The fallout (continued)

- Australian Business Industrial and NSW Business Chamber have flagged an application to FWC to vary certain awards to create a new category of ‘perma-flexi’ employment
 - > would allow permanent employees to be rostered as if they were casuals, with entitlement to 10% loading and full NES benefits (including annual leave)
 - > but opposed by AiG and ACTU
 - > is partial solution going forward

Taking stock

- Any solution has to deal with four realities
 - > *Skene* is probably correct, at least on the NES issue (although can't rule out the High Court taking a different view)
 - > but the decision has left an unworkable situation
 - > many employers are attached (understandably with school bus drivers and charter work) to the benefits of engaging employees as casuals
 - > many low-paid casuals are attached (quite rationally) to their loading

Some solutions

- Retaining and extending the freedom of employers to designate workers as casuals, even for ongoing jobs
- Switching to a narrower definition of casual employment, without a credible plan as to how to transition from the current situation – and in particular without slashing the wages of many low-paid employees
- Relying on casual conversion rights to fix the problem

What about the past?

- Whatever legislative fix is introduced for the future, question of liability under current regime remains
- Possible fixes
 - > retrospective alteration of status of workers engaged and paid as casuals
 - but query constitutionality of this – remember The Castle
 - and would it apply even to workers like Skene who have successfully made claims???
 - > meaningful move to allow offsetting of loadings
 - but what about liability for penalties, or for incidental breaches (eg record-keeping)?
 - > ignore the problem and hope that only large employers with sufficient assets are targeted?

Questions?



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