

AWU Submission

Independent Inquiry into Insecure Work in Australia

January 2012



1. An overview of your union and the industries it operates in (including membership, number of workers in the industries, main types of jobs).

The AWU represents over 135,000 working men and women in an extremely broad range of industries and in a broad range of roles. Some of the industries and occupations we represent are included in Annexure A.

2. The prevalence of insecure work in your industries.

It is not simple to ascribe a name or define the concept and incidence of “insecure work”, precarious work, indecent work, non-standard work, non-typical work or the respective antonyms. For the purposes of uniformity, this submission relies on the ACTU definition of “insecure work”, as set out in the ACTU *The future of work in Australia: dealing with insecurity and risk*,¹ without endorsing or critiquing that definition.

The AWU has conducted substantial internal research. Based on available data, it is clear that non-standard work is on the rise across many of the industries the AWU represents, and insecure workers are often not reflected in our growing membership. Though, as a necessary consequence of “insecure work” we receive a high number of complaints, disputes and “rights based” claims in particular industry sectors where we are not experiencing any sustainable growth.

Within the industries the AWU represents, there are some particularly vulnerable groups exposed to “insecure work”. Insecure workers for the AWU include those engaged as independent contractors and casual, labour-hire or fixed-term employees, as well as fly-in-fly-out (FIFO) and drive-in-drive-out (DIDO) employees. Within the AWU coverage, some of the industries and workplace callings of significant concern include:

1. Agricultural workers;
 - a. Horticultural workers;
2. Fishery workers;
3. Civil construction workers;
 - a. Traffic controllers working within the civil construction industry;
4. FIFO and DIDO workers in the resources sector;
5. Retail workers; and
6. Health and Aged care workers.

Additionally, the growth in outsourcing and use of labour hire is evident in many of the other AWU industries that have traditionally had high representation of standard contracts of direct employment. Though, it is the exponential swell in the casual workforce that is the most remarkable feature of

¹ ACTU, *The future of work in Australia: dealing with insecurity and risk: An ACTU options paper on measures to promote job and income security*, (2011), at 3.

“insecure work” across industries the AWU represents, occurring both with and without the use of interposed entities.

Many of those employees within our coverage who are subject to insecure work are not members of the AWU, for varying reasons, and often because of the insecurity in their employment itself. It should be noted that the vast majority of the AWU’s membership is made up of directly engaged permanent employees, who are relatively “secure” workers.

This submission does not seek to address all of the areas where insecure work is a significant concern for the AWU; however, it intends to highlight some areas most in need of a response.

Agriculture and Fisheries: Particularly Horticulture

Casual employees are heavily concentrated in agriculture, forestry and fishing industries.² Within that sector the subgroup most detrimentally affected, in the AWU’s experience, is the seasonal workforce. Most significantly within that subgroup it is the horticultural workers, those picking and packing seasonal produce, that are most vulnerable. A significant proportion of those employees are paid as piece-rate workers with little or no say in how the piece-rate is set. Agricultural workers are often put into share houses, commonly with six people per room and thirty per house. There are many transient workers, but there is also a high proportion of long-term casual employees engaged in packing and grading work. It is not uncommon for the AWU to connect with fruit pickers who have been working in the industry for 20 years.

The length of the working season will depend on the produce. Although seasonal variation is a very strong influence on insecurity for workers in this sector, there are some crops that are consistently grown and picked. For instance, lettuce farming in many regional areas is a yearlong crop. Despite such certainty in the crop, there is little or no security for employees engaged in such work. In respect of flexibilities, the *Horticultural Industry Award 2010* does not adequately discriminate between the seasonal and non-seasonal jobs within the horticultural sector and so all employers are entitled to significant flexibilities.

Income insecurity is a key problem for horticulture workers and workers within the agricultural industry more generally. Non-compliance with industrial law is rife within the broader agricultural industry. Employers are often guilty of failing to pay the correct amount of wages, incorrectly classifying employees, requiring employees to perform duties without payment, and generally contravening industrial laws. One AWU Organiser surveyed achieved settling or processing of \$500,000 worth of underpayment claims in the last year in the horticulture sector alone. Underpayment claims are often a key driver for organising at the enterprise level in traffic control and horticulture. Typically, a new member raises concerns with their wages, allowing an opportunity to identify a broader scheme of non-compliance through times and wages checking.

Other bodies have highlighted similar issues related to insecure work in the horticulture industry. While finding significant underpayment of wages within the sector, a 2007 report in Queensland found that

² ABS, *Forms of Employment, November 2010*, Cat 6359.0.

non-payment of superannuation to seasonal workers was prevalent across the industry.³ Employers studied exhibited a general misunderstanding when it came to the application of superannuation provisions, and a number of incidents of “sham” contracting were highlighted.⁴ Such concerns are generally reflective of the national experience in the sector for the AWU.

Farming and associated processing of farmed fish is generally not as precarious in respect of security for the worker. Generally, fish processing plants supplied from farms experience more continuous supply, and as such, employ a significant proportion of people on a permanent basis. There is therefore less of a problem with ‘casualisation’ of that sector of the workforce.

Abalone, prawns and crustacean processing work are often similar in workforce composition to seasonal horticultural or agricultural work, where the produce is not farmed, by virtue of the seasonal nature of supply. There is a high use of casual employees as a result, and these workers experience the many forms of insecurity in their employment.

Traffic Control

All of the ‘various manifestations’⁵ of insecurity in work are prevalent in traffic control. There is employment insecurity and insecurity in the working environment, as the environment is unregulated and often tainted by safety problems. Employees experience income insecurity, working-time insecurity and skills-reproduction insecurity. Often the employers refuse to negotiate with the employee representatives, and triangular work relationships are highly prevalent.

Triangular work relations, as typified in labour hire arrangements, pose yet an additional set of difficulties for security, particularly when the principle construction contractor is not engaging directly with the labour hire firm.

According to AWU South Australian research, approximately 95% of traffic control and line marking employees are engaged as casual employees. Based on Newcastle, Central Coast and Northern New South Wales Coast AWU research, 98% of employees in traffic control and line marking employees are engaged as casuals.

Outsourcing of traffic control enables construction companies to undercut the Enterprise Agreements entered into with the AWU.

In some instances, it is clear that there is regular and systematic traffic control work on one particular project. However, the insecurity allows clear exploitation of the employees. There are many employees who consistently work in traffic control, with some AWU members having worked as a controller for 10-to-15 years; some have consistently done so as casuals.

³ Queensland Workplace Rights Ombudsman, “Fruit and Vegetable Harvesting Industry Report – 2007”, accessed 30-01-2012 from: <http://www.workplacerrights.qld.gov.au/resources/reports/fruitveg2007/superannuation/index.htm>.

⁴ Queensland Workplace Rights Ombudsman, “Fruit and Vegetable Harvesting Industry Report – 2007”, accessed 30-01-2012 from: <http://www.workplacerrights.qld.gov.au/resources/reports/fruitveg2007/subcontracting/index.htm>.

⁵ See generally for a discussion of the various forms of “insecurity”: J Burgess and I Campbell, ‘The Nature and Dimensions of Precarious Employment in Australia’ (1998) 8 *Labour and Industry* 5 at 11–16 and G Standing, ‘Globalisation, Labour Flexibility and Insecurity: The Era of Market Regulation’ (1997) 3 *European Jnl of Industrial Relations* 7.

For example, a long-term traffic controller (“LTTC”) may have a long-term relationship with company X, while employed by company Y or Z. That LTTC may maintain a strong relationship with the client company; company X, though contractually the LTTC is an employee for Y. Later, that relationship with Y ends and the LTTC is engaged as an employee of company Z, but the main and true relationship is maintained by the LTTC with company X. In some situations, one employee may have worked for the same client, but was technically engaged by four contractors in the space of 18 months.

Retail (Northern Queensland)

In Northern Queensland, the clear majority of workers in the retail industry are engaged as casual employees. Northern Queensland has a higher than average real unemployment rate and a significant tourism industry, which possibly compels a broader and more diverse demographic to work in the retail sector.

High casualisation coupled with high unemployment often results in discontinued employment where an employee challenges or is unhappy with rostered hours or days. Employers are able to replace workers relatively easily, as compared with other parts of the nation.

There are many employers in the retail sector in Northern Queensland who fail to understand their employment law obligations, which compounds the insecurity for employees in the sector. A recent report resulting from an audit addressed these issues specifically. Several businesses surveyed in the report confessed to not being fully aware of their monetary obligations to employees, and there were a significant contraventions pinpointed by the study.⁶ The recent floods in Queensland, which confined the geographic scope of the study, limited the report, but the results still indicate a significant misunderstanding on behalf of employers across the state in the retail trade. The report is generally reflective of the experience for the AWU in representing the retail workers.

Fly-In-Fly-Out (FIFO) and Drive-In-Drive-Out (DIDO) Workers in the Resources Sector

FIFO is typically found in the resources sector, which operates in remote areas of Australia that are underdeveloped and have small populations with low residential skills sets. FIFO work is particularly prevalent in Western Australia, and specifically in the Pilbara region, with estimates of between 50-70% of the total resource sector workforce in that region classified as FIFO.⁷

FIFO/DIDO has the added effect of creating insecurity for those not engaged in the sector directly. Communities that have a sudden influx of workers due to a resource project are suddenly subject to highly inflated costs of living, as well as congestion in social services and infrastructure. Resource companies have been guilty of under-investing in communities and in associated infrastructure and social capital. Furthermore, the import of labour skills means that resource companies have no incentive to invest in training local community members; meaning local workers are frozen out of the benefits that flow from the exploitation of the resources in their area. Local community members are in turn left with unsustainably high costs of living, congested infrastructure and a reduction in quality of

⁶ Fair Work Ombudsman, “National Retail Industry Campaign 2010-11: Final Report”, November 2011, accessed 30-01-2012 from: <http://www.fairwork.gov.au/campaignresults/National/Retail-Industry-Campaign-Final-Report.pdf>.

⁷ House Standing Committee on Regional Australia, “Submission to the Inquiry into the use of ‘fly –in, fly-out’ (FIFO) workforce practices in regional Australia”, *Centre for Social Responsibility in Mining*, 7th October 2011.

life and security as they are exposed to insecure work. Resource companies often use recruitment methods that favour FIFO workers, making it more difficult for local residents to access local jobs.⁸ As such, it is essential that FIFO engagements and the consequences of FIFO work be considered in any definition, discussion, and response to insecure work.

Given the transient nature of their employment, FIFO workers are subject to uniquely insecure conditions. The extensive hours of FIFO place large stresses on workers who are forced to work for extended rolling periods in areas that are poorly equipped in terms of social infrastructure and amenities. The deleterious effect and insecurity of FIFO/DIDO is often hidden through the high-profile discussion of “inflated income” such workers receive. The benefits of FIFO/DIDO are few, and generally flow to employers who are able to deploy off-the-shelf skills instantaneously in order to boost production. “Inflated wages” for workers are often lost in inflation in local communities, with the regime having significant impacts on the broader economy by cannibalising skills, drawing down on public infrastructure and deferring investment in social amenities.

Aged Care (Queensland):

In Queensland, the AWU represents members in the aged care sector predominately working as cleaners, caterers, therapists and employees in laundry services.

There has been a recent shift across the sector from casual to part time engagements. In most instances of which the AWU is aware, the shift was designed to avoid transitioning the casual loading rates.

The majority of the workers the AWU represents in the aged care sector are employed as part time employees. The hours of work often vary weekly, however most aged care workers will work 40-60 hours per fortnight and they are predominately award dependent employees. Under enterprise agreements, there is marginal improvement of two or three dollars per hour above award rates achieved through bargaining.

The sector relies heavily on government funding, calculated on the type of care that is required.

A significant number of workers are undertaking unpaid overtime to care for patients. It is common for workers to commence duties an hour early to assist with preparation. This can be partly attributed to the difficulty in both attracting and retaining staff in aged care, which has led to skill and staff shortages in the sector.⁹ In the AWU experience, throughout 2011 many of those people working in the industry desired transition to more secure work and were actively seeking new opportunities outside of the industry.

⁸ J. Watts, 'Best of both worlds? Fly in – fly out Research Project Final Report', *Pilbara Regional Council*, 2004, accessed 19-01-2012 from:

http://www.prc.wa.gov.au/main/index.php?option=com_docman&task=doc_view&gid=15&tmpl=component&format=raw&Itemid=

⁹ Productivity Commission, “Ensuring workforce capacity and efficiency” in *Vocational Educational and Training Workforce*, April 2011: 171.

3. Reasons for its growth.

What has been termed the “standard employment relationship”, permanent, or full-time work pursuant to an employment contract, is currently subject to substantial challenge. Market and social pressures have contributed to this phenomenon as costs of living increases, dual-income households become more prevalent, and businesses seek to lower their costs base to become more competitive in a globalised trade environment.

Employers have substantial power to utilise non-standard arrangements in the current regulatory environment. Some commentators argue that the legislative program of the “coalition government from 1996 onwards contributed to the shifting balance of power and interests away from workers and their institutions and towards employers throughout the 1996–2007 period, and beyond.”¹⁰

One of the major reasons for the continued growth of insecurity for workers that the AWU represents is based on the lack of education employers have in particular industries and sectors of industries with a high incidence of small and medium sized business. For instance, commonly in the agricultural and retail sectors, employers do not understand the potential benefits that security in work can have for the employer as well as the employees. Incidence of non-compliance with industrial laws is correspondingly high in those sectors.

Insecurity of work in some discrete areas within the manufacturing sector, which have historically been areas of “standard employment relationships”, has significantly increased. Manufacturing firms, particularly commodity manufacturers such as steel and base metals, are increasingly competing against low cost foreign competitors who have significantly reduced labour costs in real and relative terms, as well as far lower compliance and regulation costs.

Globalisation has of course had an effect on facilitating and opening up the Australian economy, and the integration of regional and global markets. It has been argued that: “*With globalisation the old industrial models of work and law are rapidly disintegrating.*”¹¹ Some international trade unions have succeeded in building a number of campaigns against insecure work at the international level. The International Metalworkers Federation [“IMF”] campaign ‘*Precarious Work Affects Us All*’ is an example of such campaigning.¹² The IMF writes:

“Globalisation is not just about how things are made, bought and sold. It’s also about people. Transnational companies want cheap and flexible workers. So they have shifted from secure to insecure employment – making all jobs more “precarious”.”

Manufacturing business often source labour offshore in order to reduce cost bases, particularly in labour intensive industries more heavily influenced by wage-price competitiveness. Consequently, there is an increase in precarious work within Australia as continued viability of production itself

¹⁰ R. Mitchell, D. Taft, A. Forsyth, P. Gahan and C. Sutherland, “Assessing the Impact of Employment Legislation” (2010) 23 *Australian Journal of Labour Law*.

¹¹ J Conaghan, R Fischel and K Klare (Eds), *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities*, OUP, Oxford, (2002) in Rosemary Owens, Decent Work for the Contingent Workforce in the New Economy (2002) 15 *Australian Journal of Labour Law*.

¹² International Metalworkers’ Federation:., *Precarious Work Affects Us All* <http://www.imfmetal.org/index.cfm?c=19404> (accessed 24 January 2011)

becomes precarious, and fear of redundancy payments looms. Interposed entities add some buffering, as does creating a casual workforce or a specified period or outer limit contractual workforce.

Growth of Insecure Work in Horticulture

During the Award Modernisation process, the AIRC drafted an exposure draft award for the Horticulture industry, after consultation with the AWU and other interested parties. Unfortunately, the Ministerial Request for Award Modernisation was specifically amended in relation to the horticulture sector, requesting, more or less, the removal of protections provided in the exposure draft award. This specific change caused disadvantage to workers in that sector nationally, as the safety net is now flawed at the industry level and far too flexible for employers who may or may not be exposed to the seasonal pressures. Under the current regime, despite any seasonal variation in the production, it is extremely advantageous for employers to engage casuals. This removal of clear penalty rates for casuals outside a span of hours in the modern safety net has been a key reason for the growth of insecurity in recent years.

A minimum standard that is flexible allows for many compliant outcomes,¹³ like the 38 hours plus reasonable additional requirement. In practice, if hours can be averaged and there are no overtime penalty rates related to spans of hours for casuals in a modern award, there is no force in application of the legislated standards.¹⁴ The minima set in the Act, the National Employment Standards, are extremely basic and for agricultural workers the industry safety net has ossified as a result of “award modernisation”.

4. What your union has done to counter the spread of insecure work; particularly, what industrial strategies have you pursued, and how successful have these been. What has worked, and what has not?

Employers who accumulate capital almost always have greater bargaining power than workers.¹⁵ The employees with the least bargaining power are the most difficult to unify and as such suffer from a reduced ability to counter the negative consequences of non-standard work. Generally, the *Fair Work Act* 2009 has re-calibrated bargaining rights and has created some industrial fairness where employees are organised, empowered and informed. Targeted bargaining strategies have been the main driver in countering the spread of insecure work for the AWU. Successful union organising strategies have been the main concern for the AWU in solving insecure work through integrating protections within the enterprise agreement.

As a symptom of the internal inequality, growth in density within targeted industries has been a major focus for the union. Within the current industrial system, establishing bargaining power within enterprises has been the simple key to achieving gains and ensuring the growth of insecure work is curbed. It is clear from viewing the most affected and vulnerable workers within the AWU coverage,

¹³ J Murray, ‘Labour Standards, Safety Nets and Minimum Conditions’, in J Riley and P Sheldon (eds) *Remaking Australian Industrial Relations*, CCH, 2008, p 132.

¹⁴ See the Horticulture Award 2010 and the Consolidated Award Modernisation Request.

¹⁵ Ron McCallum, ‘Australian Labour Law and the Rudd Vision: Some Observations’, in J Riley and P Sheldon (eds) *Remaking Australian Industrial Relations*, CCH, (2008) pp 128-138, p 21.

that both seasonal variation and the “insecurity” itself in particular industry sectors are the major impediment in utilising enterprise bargaining to curb insecure work.

Campaigning and educating the workers subject to insecure work generally:

Significant AWU resources are expended on compliance and education campaigns centred on specific industry sectors in high-risk areas and industries. The AWU has been actively communicating with both employers as well as employees. The AWU is embracing new media, alongside conventional communication methods, in campaigning as a proactive strategy we use to achieve awareness and compliance with national workplace laws. For instance, we are currently conducting a national survey of members of the AWU, promoted heavily through social media and the AWU magazine, to give all members the opportunity to provide feedback and information on their job and their industry. The survey will capture current figures on insecure work within our membership as well as other detail.

In 2009, the AWU developed the National Education Strategy to direct the training of members around the country. Over the last three years, our union has successfully applied for and received funding from the Australian Government to provide training to our delegates and members in the regions. The core focus of our training is to provide an understanding of the *Fair Work Act* 2009 and workplace rights. The training assists those members to go back into their workplace and provide advice and support to their fellow workmates. Such training empowers employees to understand and engage with insecure work. It has led to an increase in member activism and more efficient bargaining for new and renewed collective agreements, with particular focus placed on security of employment and consultation clauses.

Traffic Control and Horticulture

For workers engaged in traffic control and horticulture work, the AWU generally organises around breaches of industrial rights and laws. As set out above, underpayments are common and provide a fragmented basis on which to organise and campaign. The success of the campaign in traffic control is often short lived. Once an organising strategy is implemented, traffic control companies frequently liquidate their assets and the controlling individuals set up another business.

There are often extremely tight profit margins within the traffic control business. Therefore, some employers are appreciative of support in training that AWU officials may provide – and there are rare instances where the AWU may be invited by employers to improve safety awareness and understanding in the industry.

Over the years, we have attempted to include clauses protecting traffic controllers. Providing access under agreements to permanent part time employment, which allows for a minimum of 24 hours a week. Though in many cases, although such clauses exist under the relevant industrial agreements, employees do not enjoy any certainty of hours because of employer attitudes in application of the agreement.

5. Employer attitudes and responses to insecure work, and campaigning against it.

There are a variety of employer attitudes to insecure work.

Some employers have taken a proactive and responsible approach to concerns over insecure work, considering the mutual benefits those employers may derive from a strong and secure workforce. For instance, those employers who have secure employees and an up-skilled and content workforce enjoy the benefit of skills reproduction and improved productivity. However, many employers uncompromisingly oppose restrictions on their flexibilities and prerogatives, irrespective of the purpose or outcomes, basing their employment and management model on an archaic view of the labour transaction.

In response to increased union density within their business, some employers have responded by simply using interposed entities as a means to circumvent the balance a collective workforce provides in employee bargaining. Labour hire companies are beneficiaries of insecurity, as are for instance, many traffic control companies. Many traffic control employees are hesitant to join the union because they fear persecution from an employer who may become aware they have joined the union. Their precarious casual role controls both the internal and external influences for the employer.

Employer attitudes to job security clauses and restrictions imposed through enterprise bargaining are mixed in degree and substance. In the AWU's experience in parts of the manufacturing sector, employers use interposed entities to circumvent enterprise bargaining, to save on costs associated with paying conditions achieved by unified and/or represented workers.

The Australian Industry Group (AiGroup) and other employer bodies have taken a strong approach in their attempt to erode and oppose the use of particular forms of job security clauses. Those campaigns have taken various forms – from frequent public statements against security clauses to legal action taken against the introduction of those clauses into workplace agreements.¹⁶

Some employers will not allow any restriction within an enterprise agreement seeking to deal with insecure work, and without industrial strength at the enterprise, there is little a union can do directly.

Many employers are comfortable with security clauses, as they perceive the value their body of employees adds and the benefits the employer derives from:

- a. The security of employment;
- b. The continuity of the relationship; and
- c. The training and up-skilling.

¹⁶ Phillip Coorey, "Unions want more power to negotiate agreements", *The Australian*, December 2, 2011. [Australian Post Corporation v CEPU \[2009\] FWA 599 at \[57\]](#); and [MUA v Freemantle Port Authority \[2009\] FWA 1173](#); [Asurco Contracting Pty Ltd v CFMEU \[2010\] FWA 6180](#); [The Australian Industry Group v ADJ Contracting Pty Ltd](#); [ADJ Contracting Pty Ltd \[2011\] FWA 2380](#); [Kagan Logistics v NUW \[2011\] FWA 1724](#); [Kagan Logistics v NUW \[2011\] FWA 1724](#); [NUW v. CMC Coil Steels P/L \[2010\] FWA 410 \[9\]](#);

Even where the AWU has achieved clauses imposing “no less favourable” conditions for workers indirectly engaged – clauses pertaining to the security of those directly engaged – the interposed entity softens the employee voice, divides the employees, and is often a key driver for the employer to avoid future campaigning at the workplace.

6. Options for solutions to insecure work – industrial and legislative

Fair Work Act Objectives:

The regulation of insecure work in Australia is and has been a major challenge for policy makers – as well as tribunals and employee organisations – for decades. In respect of legislative solutions, there are associated questions concerned with the effectiveness of the inbuilt regulatory control devices.

The extension of the legislative guarantee of certain basic rights to all workers is one of the commendable aspects to the *Fair Work Act 2009* in addressing some of the concerns of insecure workers. The AWU would warmly welcome any further extension of those basic rights.

However, centralist changes at the industry level are also required, as in many areas the industry-specific safety net has been found wanting since, and as a result of, award modernisation. The safety net should protect workers who neither possess market power nor benefit from collective bargaining.¹⁷ A safety net entrenches the public interest in the regulatory regime; ensuring workers have a base level quality of life superior to that in an unregulated market. The safety net should properly address the issues within the labour market such as insecure work. Enterprise bargaining will not solve those problems alone, as bargaining cannot set the social and industrial priorities.

While employers navigate the current regulation and push their current avenues for flexibility, there remains a real and anticipated risk that a legislated safety net will ossify if successive governments lack the agenda, or the control of both Houses of Parliament, to ensure regular revision and progression of legislated standards.¹⁸

The improvement of the safety net at the industry level is available through Fair Work Australia, which is guided by broad objectives defined in the law. Countering the effects of insecure work in a flexible market and a scheme of enterprise bargaining is a continual task to oppose the manipulation of workplace practices of employers to avoid rights and entitlements, to avoid a stale minimalistic award system which is obviously failing to rectify the problems of insecure work with responsive regulation.

Labour law is generally animated by various objectives, rational attempts to articulate standards, and as it is apparent that insecure work is increasing, regulation should include as an objective: *controlling the growth and consequences of insecure work*.

¹⁷ Keith Hancock, “The Future of Industrial Relations in Australia”, in J Riley and P Sheldon (eds) *Remaking Australian Industrial Relations*, CCH, 2008 pp 128-138, p 6.

¹⁸ J Riley, “Legal Developments in the Transition Period”, in J Riley and P Sheldon (eds) *Remaking Australian Industrial Relations*, CCH, 2008 pp 128-138, p 61.

By adding the security of employment throughout the objects of the *Fair Work Act 2009*, a thrust for resolving the problems of insecure employment could develop and this may facilitate the Tribunal's concern for all workers – whether they have bargaining power or not.

A general definition of the concepts surrounding insecure work in the *Fair Work Act 2009* is something that could both recognise the negative consequences of insecure work and also enliven change through advanced institutional capability for resolving the problems that the phenomenon causes. It is not the AWU's view that the term 'insecure work' or the definition ascribed is necessarily appropriate, but our recommendation is that there is some definitional recognition of the phenomenon of insecure work in the *Fair Work Act 2009*, which is related to the objects throughout the Act including the objects at Section 3. The submission now turns to some of the divisional and particular objects.

Modern Awards

For Award dependant employees, who are also most commonly the employees exposed to the negative consequences of insecure work, some recognition of the policy objective to protect those workers from the negative consequences of non-standard work is a necessary inclusion in Fair Work Australia's modern award objectives. The objectives, set out in Section 134 of the *Fair Work Act 2009*, apply when FWA exercise the modern award powers.

The AWU recommends the modern award objective include as a distinct paragraph of sub-section 134 of the Act some recognition and linkage to a definition of the problem that we are seeking to solve. For instance, a paragraph of sub-section 134 may take a form such as:

(x) *The reduction of "insecure work" and the protection of workers who are not engaged as permanent employees.*

Recognition of insecure work as a reference in the modern award objectives would permit or even compel the Tribunal to properly consider the potential for security at the industry and occupational level upon application by an employee representative body or on FWA's own application. This would allow for progressive changes to the award system relevant to award variation applications and FWA's reviews. It would also balance the specific inclusion of paragraph (d), which provides that the Tribunal must consider the need to promote flexible modern work practices and the efficient and productive performance of work.

This recommendation could align and compliment any improvement in the definitions of types of employment in Australia, as proposed by the options addressed by the ACTU,¹⁹ and also result in appropriate and remedying definitions of types of employment in awards.

Insecure work as a reference in the modern award objectives might compel the Tribunal to consider the potential for security at the industry and occupational level and promote progressive variations that "sufficiently relate to employees' job security".

¹⁹ The future of work in Australia: dealing with insecurity and risk: An ACTU options paper on measures to promote job and income security, in 23.

Low Paid Bargaining

Sub-section 243(3) could also be amended so FWA has to consider whether granting the authorisation will promote secure employment and reduce, or counter, the negative consequences of insecure work.

Reference to promoting secure employment could also be inserted as an object in section 241.

Agreements and the Better Off Overall Test

Within the processes of enterprise bargaining, representative organisations such as the AWU are able to focus upon the protection-fairness/flexibility equation, and the tension between those objectives. Where non-standard work is contrary to the interests of workers, union involvement at the enterprise level is extremely important.

There are obvious limitations in the application of the 'better off overall' test to protect employees from a reduction in their terms and conditions of employment relevant to the security of their employment. There is no impediment to the stripping away of many basic award rights that are designed to deal with insecurity, and it is possible for employees to be misled about being 'better off' by cashing out entitlements.

The AWU has had some negative experiences with the application of the 'better off overall' test by some members of FWA. For instance, FWA members have valued an increase of one percent extra casual loading as 'better off' than a right to casual conversion in agreements for labour hire staff. Whether or not such a conversion clause may or may not have otherwise been utilised by the employees, the casual employees may feel pressured to 'cash out' such basic entitlements. The employer's ability to ask the employees to vote 'yes' for the agreement empowers the employer to potentially be coercive and reduce employee security. If such a strategy is used in tandem with voting processes allowing the employee to be easily identified, the employer can compel cashing out. Some employers no longer require casuals who voted against the agreement. The insecurity in employment allows the employer to urge votes in favour of an agreement, or compel those employees through fear. Such examples reveal the weakness in the processes of making agreements.

The AWU suggests consideration of further regulating the method of attaining votes for an agreement. The legislation could provide for consideration of the insecurity that an agreement may promote insecure work in implementing the better-off-overall equation. Similar to the suggestion made above in relation to modern awards, FWA could have as an object: *the reduction of insecure work*, where such reduction is possible.

The application of the better off overall test in non-union agreements is the responsibility of FWA. In the AWU's experience, it is an intricate process to monitor all non-union agreements that are subject to the approval processes. Some improved automatic notification mechanisms would be welcomed, as is possible for award variations, whereby a union representative could request notification for agreements in particular industries and areas. This is an administrative change that would be welcomed.

Fixed Term Employment and Unfair Dismissal

In respect of rolling fixed-term/task employment, the means by which the conditions of such work are protected is of immense importance. Present presumptions in industrial law favour employers, allowing use of rolling fixed-term or outer-limit contracts to avoid obligations.

For instance, fixed-term employment contracts are and may be used by employers to circumvent laws ensuring fairness in employment and security, such as the unfair dismissal laws in the *Fair Work Act* 2009. There is some limited recognition of the employer's potential to use such non-standard employment relationships to circumvent the otherwise applicable measures to prevent unfair dismissal. However, the presumption favours the employer – enabling misuse.

The AWU recommends the reversal of the statutory presumption, so that there is an onus on the employer to prove that the unfair dismissal laws do not apply where the engagement meets some particular conditions. These conditions might include:

- a. The original fixed term or maximum term was extended; and
- b. The employee's annual earnings for working a 38-hour week are below some designated threshold.

Construction Regulation

The AWU opposes the separate and additional regulation in the construction industry, and proposes bringing the industrial laws in that industry back into line with those applying to the rest of the community. Such disparate regulation poses problems for organising in the construction industry.

Secure Employment Orders

The AWU believes there is substantial merit in considering the creation of a power for FWA to make secure employment orders as set out in the ACTU's options paper.²⁰

Labour Hire: Industry Code of Practice and Unfair Dismissal Protections

Much debate on the issue of labour hire employees has centred on definitional ambiguities. The International Labour Organisation (ILO) has addressed these ambiguities by urging its member-states to adopt national employment definitions that account for the tripartite relationship. This was the ground upon which the ILO issued Recommendation 198, which called for member-states to '*ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protections they are due.*'²¹ Similarly, the European Union issued Directive 2008/104/EC in 2008 which required member-states to introduce laws that ensure '*the basic working and employment conditions of temporary workers [are]...at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.*'²²

²⁰ ACTU *The future of work in Australia: dealing with insecurity and risk* (2011), at 21.

²¹ International Labour Organisation, Recommendation 198, Adopted 15th June 2006.

²² 'Directive 2008/104/EC', *Official Journal of the European Union*, Adopted 19 November 2008.

In Australia, it has been noted that there is a significant lack of legislation that deals directly with the tripartite employment relationship arising out of labour hire arrangements.²³ Any move to recognise labour hire workers under the *Fair Work Act 2009* is in line with ILO R198, in increasing the protection of workers in tripartite employment relationships.

The AWU supports consideration of any changes that recognise responsibilities the client of labour hire agencies should have in respect to employment responsibilities. The AWU supports an investigation into creating an industry code of practice for the labour hire industry as set out in the ACTU options paper. We believe that by developing a code of practice, the application of industrial legislation to the labour hire relationship would become more consistent across the industry. This could potentially be taken a step further, through legislative recognition.

The AWU also supports a move to address inconsistencies in unfair dismissal protection for labour hire employees. It has been noted that there is a particularly high rate of failure in unfair dismissal cases because of the difficulty in defining the “employment relationship”. A potential remedy to this problem would involve setting legal parameters around which a labour hire employee can be recognised as “dismissed”. Currently the *Fair Work Act 2009* does not recognise the unique nature of a labour hire employment contract and is inadequate in protecting them from unfair dismissal.

Alternatively, the AWU proposes for consideration that contractual arrangements between an agency and their clients could include compulsory fair dismissal procedures that would cover all labour hire workers performing services for the client company for the qualifying period. Such a change may remedy the situation where a client seeks to deny an employment relationship in unfair dismissal cases after a protracted relationship with the employee.²⁴ In terms of the incidence of labour hire, this requirement would make interposed entities less appealing to employers seeking to avoid the regulations associated with unfair dismissal protections.

International Campaigning

Australian unions should be active in contributing to campaigns at the international level to succeed in building a consensus on a large number of standards and tactics that can be taken against transnational companies. Furthermore, the promotion of secure working conditions internationally will increase the incidence of security in those countries, and potentially as well in the Australia labour market. International campaigns may restrict the ease with which transnational companies shift to lower cost labour markets. The AWU notes some of the conduct of global unions in response to insecure work, including:

1. The International Metalworkers Federation’s (IMF) Precarious Work Effects Us All Campaign, which has mobilised affiliate unions around the world to take action against precarious work;

²³ Trina Malone, ‘Vulnerability in the Fair Work-Place: Why Unfair Dismissal Laws Fail to Adequately Protect Labour-Hire Employees in Australia’, *Centre for Employment and Labour Relations Law*, May 2011: 5.

²⁴ Richard Hall, ‘Labour Hire in Australia: Motivation, Dynamics and Prospects’, *Workplace Research Centre*, Working Paper 76, April 2002: 5.

2. The International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) Contract & Agency Labour Campaign, which specifically targets the over-use of contract and agency labour work by multinational corporations; and
3. The International Trade Union Confederation (ITUC) World Day of Decent Work, held annually on 7 October, and brings together affiliate unions in solidarity over the issue of decent work, encouraging those unions to hold actions in their respective countries.

The AWU supports the actions these global unions have been taking and encourages Australian unions to take part in the global movement against insecure work. Consequences of globalisation require a united global response.

Financial Disincentives: Increasing Casual Loading and Exploring a Transitional Assistance Fund

The AWU encourages the consideration of increasing casual loading. A broad and national assessment of the compensation levels under current casual loading rates is required in order to provide an up-to-date perspective into the effect these rates are having on insecure work patterns in the Australian economy.

Based on the AWU's experience, casual loading does not offset income insecurity, working-time insecurity or skills-reproduction insecurity. Moreover, the AWU has found that the current loading rate does not adequately reflect the conditions sacrificed in financial terms.

The benefits of casual work tend to flow more to the employer than the employee. Employers benefit from reduced liabilities in hiring employees under insecure working conditions. It is extremely uncommon that the casual loading will be used by insecure workers in the same fashion as accrued benefits and conditions – which act as a forced saving that can be drawn down on as a safety net if employment ceases.

Rather than simply increasing the casual loading, the AWU also proposes a second financial disincentive that could address the degradation of employee entitlements under casual work. There is merit in considering an alternative structure for the increased benefit for casuals and a reciprocal financial disincentive for the employer to engage casual employees, where permanent employment may otherwise be appropriate. The AWU proposes that further investigation is conducted into the possibility of creating a fund, through the quarantining of any increase on casual income, that would be payable as a levy by an employer on casual and fixed-term employment. The fund might operate in a similar fashion as a levy on the total amount of wages earned, if evidence proves that the casual rate is too low. This policy could be applied through establishing individual accounts or collective accounts.

An individual account would be directly linked to an employee, in a similar fashion to superannuation. The funds would accrue over the lifetime of employment as a “precarious worker” and would rollover as workers change employers or are re-engaged. The dollar figure in the account could be activated once an individual is seeking work for a particular period. Unfortunately, there is a high probability that many individuals would not be employed for periods long enough to accumulate a significant quantum of funds.

Alternatively, a collective fund might be leveraged to offer transitional assistance to insecure workers, providing more security for casual workers who are terminated due to a greater depth of funding. Using collective funds, there is a greater scope for government programs and there is potential for creation a low-wage pension to be payable or supplement unemployment benefits.

There are potential problems with the implementation of such a policy. For instance, it is unlikely that this system could be used equitably to assist people in particularly acute personal situations. Further, a situation could arise where workers cross-subsidise less secure workers, as is typical of social welfare programs generally. There is also potential for waste and misuse of funds under such an arrangement.

Government Procurement and Major Resource Projects

One of the major problems for traffic control employees is the use of interposed entities by the construction company in government civil construction and roads projects.

Contract tenders are generally assessed on a lowest-cost basis. The cost reductions are generally made possible through a focus on 'upfront' costs that ignore long-term maintenance costs, as well as quality. Furthermore, these upfront cost reductions are often facilitated through the hiring of insecure workers and a squeezing of wages and conditions through the processes of outsourcing.

This model results in the de facto government sanctioning of the use of taxpayer money in the exploitation of Australian workers, as financial markets often reward companies that reduce their core workforce.

Additionally, recent operation of government procurement as well as the governance of major Australian resource projects has lead to an increased prevalence of outsourcing and contract work. Contracts are awarded for the express purposes of factoring out risk from the government, and the resource sector proponent. This exposes sub-contractors to insecure conditions that are being funded by the government, or from the exploitation of Australian owned public resources.

The Australian Government has made recent steps to improve domestic content in major government and resource projects.

Australian Industry Participation Plans (AIPPs) have been strengthened under the Enhanced By-Laws Product Scheme – as well as being mandatory as part of any project that includes a \$20 million federal grant. It is expected that this will apply to \$6 billion worth of government-funded projects. In addition to these improvements, employment on government and major resource projects should also be secure in nature. Government money should not be spent on creating insecure employment conditions.

The planned investment pipeline in resources is estimated to be \$200 billion, with a further \$400 billion projected. It is clear that this represents a huge opportunity for Australia. However, government policy should ensure that this investment boom does not lead to a situation where more Australians find themselves suffering from the stresses of insecure work (such as FIFO/DIDO) as proponents engage in cost-competitive strategies or are frozen out from participating in the benefits through a lack of investment in training and in infrastructure.

The AWU believes that AIPPs, as part of government tenders or major projects, should include secure worker provisions. Proponents and tender bidders should be required to show that the cost competitiveness of their tender or project has not been artificially boosted through the cannibalisation of working conditions and or wages.

Portability

The AWU supports the exploration of a model that would allow for the increased portability of conditions for insecure workers. This model could be structured in a way that allows employers to maintain flexibility of employment needs.

Conclusions

The comments set out in this submission have been canvassed from a variety of AWU stakeholders and members who have provided insight into “insecure work” in AWU industries and for relevant employees.

It is clear that insecure work, in its various manifestations, is having a significant impact on the working lives AWU members and those employees within our coverage. The incidence of “insecure work” is growing for a mixture of reasons in various industries. There are a range of employer attitudes and responses to insecure work. Somewhat as a consequence of this variety of employer attitudes, the AWU has primarily focussed on organised and targeted campaigning and bargaining to deal with “insecure work”, within the context of the current and past regulatory framework.

The regulation of insecure work in Australia is, and has been, a major challenge for policy makers, as well as tribunals and employee organisations, for decades. Industrial and legislative solutions should be concerned with the effectiveness of the inbuilt regulatory control devices. Minor changes to the objects and definitions within current legislation could have adaptive and sustainable consequences, empowering and/or compelling tribunals and courts to deal directly with the negative consequences of “non-standard” work.

This submission supports a process whereby a number of potential options are considered and investigated further. It is hoped that this submission will contribute to understanding the growing phenomenon of “insecure work” and assist in understanding some options for industrial and legislative solutions that are both sustainable and suitable.

ANNEXURE A: List of some of the industries and occupations that the AWU covers:

- Agriculture
- Aluminium
- Ammunition
- Aquaculture
- Asphalt
- Bitumen
- Bowling greens and Greenkeepers
- Construction (Civil and Metal Engineering)
- Coal
- Coal (Brown)
- Carpenters and Joiners
- Catering
- Cement and Concrete Products
- Cemeteries
- Chemicals
- Coffins
- Concrete
- Copper
- Cotton
- Dairying
- Dredging
- Drugs and Pharmaceuticals
- Dry Cleaning and Laundry
- Engineering
- Entertainment and Leisure
- Event services
- Exhibition industry
- Explosives
- Farming
- Fertilisers
- Fish and fishing
- Fitters
- Forgers
- Foundries
- Fruit growing, picking and packing
- Funeral industry
- Furniture
- Gas Industry
- Glass
- Golf
- Grains
- Grape growing (Viticulture)
- Gunsmiths
- Hairdressers and Beauty Parlours
- Horse Training and Racing
- Horticulture
- Hydrocarbons
- Instrument makers
- Landscaping

- Laundry Machine Operators
- Maintenance
- Meat and Poultry
- Metal industry
- Metalliferous mining
- Minerals
- Non-ferrous metals
- Oil refining
- Oil distillation
- Ores
- Oysters
- Paper
- Pastoral
- Patternmakers
- Pests and vermin
- Pipe fitters
- Plastic moulding
- Poultry farming
- Recycling
- Riggers
- Road making
- Rope and cordage
- Safe makers
- Salt
- Scaffolders
- Sewerage Shearing and shed hands
- Ship building and repairing
- Ski workers
- Soap
- Steel
- Stone quarrying
- Sugar
- Synthetic yarn
- Tea
- Tea packing
- Ten Pin Bowling
- Tennis courts
- Timber
- Tobacco
- Toys
- Turners
- Undertakers
- Vegetables
- Vegetable oils
- Viticulture
- Water
- Welders
- Wine
- Wire
- Wool sorters and Scourer