

# Fixed-Term Work in Australia

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Over the past couple of decades, the phenomenon of non-standard work in Australia has attracted increased attention. This has been driven by growth in the number of workers now working under non-standard arrangements, and a fear that such arrangements entail deficiencies in employment security, income security, representational rights and workplace health and safety compared with the standard employment relationship which prevailed in the postwar decades. The 'standard' employment relationship generally refers to work that is undertaken pursuant to a contract of employment, that was full-time, full-year and of indefinite duration terminable by reasonable notice, and undertaken for one employer on that employer's premises.<sup>1</sup> 'Non-standard' employment relationships deviate from standard employment along one or more dimensions, and thus include self-employment and independent contracting, part-time work, casual work, fixed-term work or agency-based work. These forms of employment are structurally heterogeneous and not mutually exclusively; as the term *non-standard* implies, they are best defined by what they are not.<sup>2</sup> Fixed-term employment accounts for a minor, though significant, part of the phenomenon of non-standard work in Australia. The regulatory status of fixed-term employees in Australia has been complicated in recent years in that the federal industrial relations statute was substantially re-written in 1996, 2006 and again in 2009.

## I. General overview of fixed-term employment in the labour market

### (a) *How many, and who?*

Employees on fixed-term contracts comprise those employed for a specified period or for the duration of a specific task. Yet it is difficult to measure accurately the numbers of Australian employees that fall into this category of restricted tenure employment. Current Australian statistical practice is to develop a taxonomy of mutually exclusive employment forms.<sup>3</sup> Workers are first divided into 'employees' and 'own account' workers. 'Employees' are further divided into 'workers with leave entitlements' and 'workers without leave entitlements'. Workers with and without leave entitlements are further divided into those with

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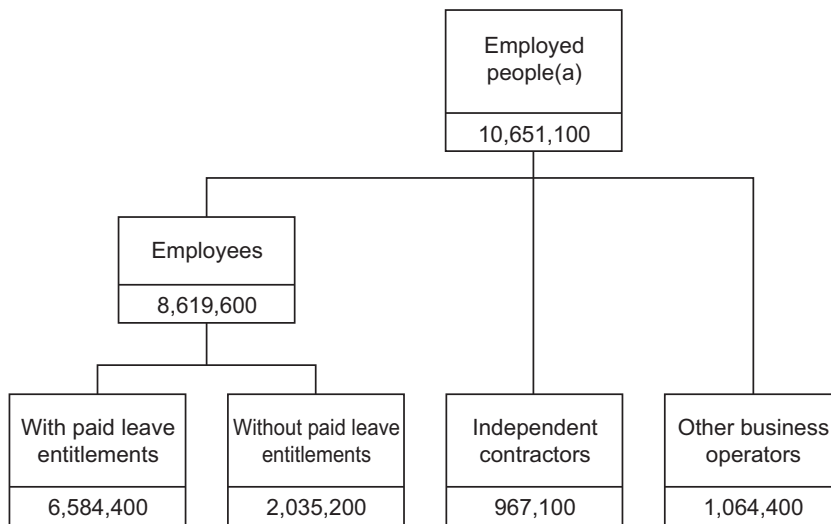
<sup>1</sup> See, eg, E Cordova, 'From Full-time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour relations?' (1986) 125 *International Labour Review* 641; G Bosch, 'Towards a New Standard Employment Relationship in Western Europe' (2004) 42 *British Journal of Industrial Relations* 617.

<sup>2</sup> L Vosko, 'Gender Differentiation and the Standard/Non-Standard Employment Distinction: A Genealogy of Policy Interventions in Canada' in D Juteau (ed), *Social Differentiation: Patterns and Process*, University of Toronto Press, Toronto, 2003.

<sup>3</sup> Australian Bureau of Statistics, *Forms of Employment*, Cat no 6359.0, November 2008.

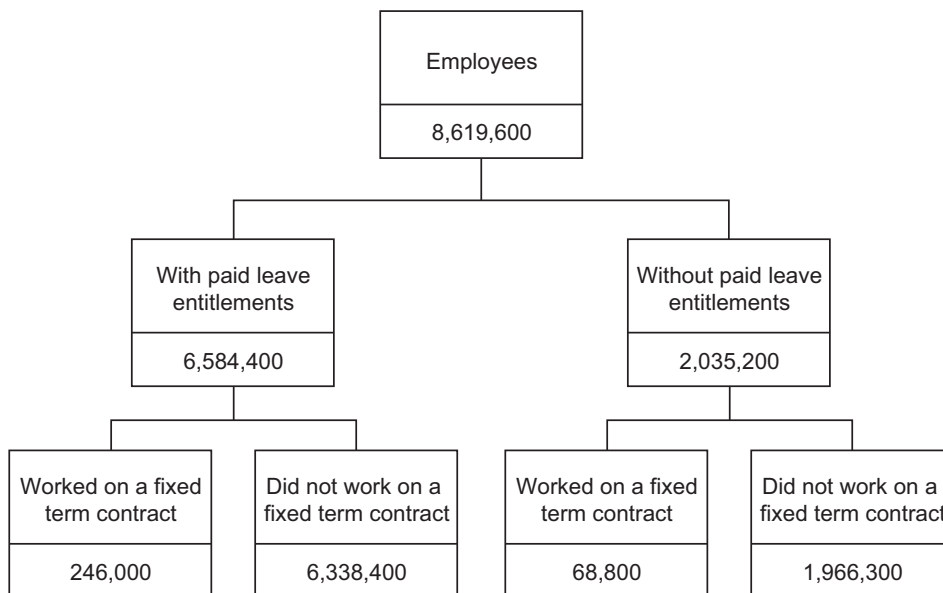
a fixed term contract and those with an ongoing contract. (The categories of ‘workers with leave entitlements’ and ‘workers without leave entitlements’ reflect a peculiar aspect of Australian labour regulation which I will return to below).

**Figure 1: from FOES 2008**



(a) Excludes people who were contributing family workers in their main job.

**Figure 2: from FOES 2008**



A Forms of Employment Survey ('FOES') using this taxonomy was first conducted in August 1998, then in 2001, 2004 and 2006, and has been conducted on an annual basis since. The most recently reported survey, conducted in 2008, found 3.6 per cent of all employees (or 2.9 per cent of all employed persons) to be fixed-term.<sup>4</sup> According to the FOES data, the number of fixed-term employees increased from 1998 to 2001, then declined to 2004, and rose again to 2008.<sup>5</sup> However, fixed-term employees as a proportion of employees has remained relatively stable, with a slight decline from 2001.

However, other attempts to calculate the incidence and prevalence of fixed term employment at various times in the past decade or so have produced some markedly divergent results. An irregular ABS survey on employment arrangements and superannuation (ie, pensions) which used the same taxonomy and survey question as regards fixed-term work as that used in FOES came up with consistently higher figures: 286,000 fixed-term employees in 2000 and 588,800 fixed term employees (6.5 per cent of employees) in 2007,<sup>6</sup> compared with the 190,800 identified by the FOES in 2001 and the 314,800 in 2008. Furthermore, panel data from the Household, Income and Labour Dynamics Australia ('HILDA') survey, sponsored by the federal Department of Families, Housing, Community Services and Indigenous Affairs, produces higher numbers still, estimating fixed-term employees as accounting for 8.7 per cent of employees in 2001 and 7.9 per cent in 2004.<sup>7</sup>

**Table 1: from Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, Melbourne, 2006**

HILDA		2001	2002	2003	2004
Fixed-term employees <sup>a</sup>	'000	651.0	722.6	675.1	643.3
As a proportion of employees <sup>b</sup>	%	8.7	9.4	8.5	7.9
As a proportion of employed persons	%	7.1	7.7	7.1	6.6

<sup>a</sup> Persons aged 15 years and over. <sup>b</sup> Excluding persons who answered 'other' to the question about their contract of employment.

Source: Productivity Commission estimates based on the HILDA survey, 2001-04, release 4.0.

<sup>4</sup> Ibid.

<sup>5</sup> The growth between 1998 and 2001 may be partially explained by the fact that the 1998 survey only enquired as to whether an employee's employment had a finishing *date*, whereas subsequent surveys have asked whether the employment has a finishing date *or event*. The survey goes on to ask whether the finishing date or event is less than five years away, and whether the reason for having a finishing date or event is that the employee is on a fixed-term contract.

<sup>6</sup> Australian Bureau of Statistics, *Employment Arrangements and Superannuation, Australia*, Cat no 6361.0, June 2000; Australian Bureau of Statistics, *Employment Arrangements, Retirement and Superannuation, Australia*, Cat no 6361.0, April – July 2007.

<sup>7</sup> M Wooden and D Warren, *The Characteristics of Casual and Fixed-Term Employment: Evidence from the HILDA Survey*, Melbourne Institute Working Paper No 15/03, University of Melbourne, 2003; Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, Melbourne, 2006, p 130.

The difference between the employment arrangements and superannuation surveys and the FOES is probably attributable to the fact that although both surveys made similarly worded inquiries as regards fixed-term employment, the employment arrangements and superannuation survey was conducted by personal interview, whereas the FOES follows the Any Responsible Adult ('ARA') method, whereby information about all members of a household is obtained from the first responsible adult with whom the interviewer makes contact, and as a result survey respondents may not be well-informed about the employment arrangements of other household members. The use of the ARA method would also explain some of the divergence between the FOES data and the HILDA data, with HILDA data obtained from personal, face-to-face interviewing with each household member.<sup>8</sup> Further, it is likely that fixed-term employees who expect their contract to be renewed may not report to the ABS that their contract had a finishing date or event, again giving an under-estimation of the prevalence of fixed term contracts.<sup>9</sup> The alternative approach taken by HILDA is simply to ask workers which employment arrangement best characterises their job: permanent or ongoing; casual; or fixed-term. The HILDA questionnaire in fact does not define fixed-term employment at all, whether by reference to a finishing date or event, or completed task, or in terms of expectation of renewal, and it is unclear whether relying on self-identification in this way could lead to either under- or over-estimation of the number of fixed-term employees.<sup>10</sup>

Survey data from the late 1990s suggested that compared with ongoing employees, fixed-term employees are more likely to be female, young, and working in professional occupations in the education, health and cultural and recreational services sectors and twice as likely as ongoing employees to be employed in the public sector.<sup>11</sup>

***(b) The relation between fixed-term employment and other non-standard working arrangements***

Regardless of which of the competing estimates one chooses, what is clear is that fixed-term employees as a proportion of the workforce are outnumbered by independent contractors (around 10 per cent of employed persons), part-time workers and, much more significantly, by employees 'without leave entitlements'. This last group experienced particularly strong growth from the mid-1980s to the mid-1990s, and moderate growth thereafter, and now account for around 60 per cent of non-standard work.<sup>12</sup>

<sup>8</sup> Productivity Commission, above n 7, p 131.

<sup>9</sup> That is, the FOES asks workers whether their job has a set finishing date and only then goes onto ask whether this is because it is a fixed-term contract: see n 5, above.

<sup>10</sup> Productivity Commission, above n 7, p 132.

<sup>11</sup> M Waite and L Will, *Fixed-Term Employees in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, 2002. Note that these differences between fixed-term employees and ongoing employees are not as marked as the differences between casual workers and ongoing employees: Wooden and Warren, above n 7. On casual employees, see the discussion in the following section. HILDA survey data from 2003 showed fixed-term workers accounted for 17 per cent of employment in the education sector, 16.6 per cent in cultural and recreational services, 12.5 per cent in government administration and defence, and nearly 10 per cent in health and community services: Productivity Commission, above n 7, p 145.

<sup>12</sup> See I Campbell, 'Australia: Institutional Changes and Workforce Fragmentation' in S Lee and F Eyraud (eds), *Globalization, Flexibilization and Working Conditions in Asia and the Pacific*, Chandos Publishing, Oxford, 2008, p 134.

This last category needs to be explained. A regulatory artefact of the early Australian award system and the largely pre-industrial economy of the first decades of the twentieth century is the notion of a ‘casual’ worker who is denied basic entitlements. From the 1920s the Australian arbitration court expressed a preference that workers be hired on ongoing contracts. But broad swathes of the workforce remained employed outside of ongoing contracts. These included those working regularly for extended periods at the one trade which was seasonal in nature (eg, shearers, meat preservers, flour millers); those working regularly for extended periods at the one trade but with a series of different employers such that the year was broken by periods of looking for the next job (eg, builders labourers); and those working at the one trade in chronically overstocked trades and who were thus subject to the call system (eg, waterside workers). As well, provision was made so that even in those trades considered regular, ‘casual hands’ could be taken on to meet periods of increased demand (eg, coal miners, textile workers).<sup>13</sup> In these cases, the general principle of ongoing hiring was modified, but with the workers being paid an hourly pay rate with a ‘loading’ that was meant to ensure they received a similar annual income to a worker engaged in ongoing, uninterrupted employment.<sup>14</sup> Thus a broad and heterogenous group called ‘casual’ existed outside of weekly hire provisions, defined largely by their access to a ‘casual loading’. As ongoing employees were granted rights to various forms of leave — most notably annual leave — ‘casual’ employees were in turn denied these.<sup>15</sup> From the early 1980s Australian national statistics distinguished between ‘permanent’ and ‘casual’ employees precisely by measuring the presence or absence of leave entitlements.

However, the contrasting language of ‘casual’ and ‘permanent’ was somewhat confusing. The term ‘casual’ told us little about the employee’s length of tenure or regularity of hours and income. This was because ‘casual’ employment had begun to refer to what employees *got*, by way of leave entitlements, rather than what they *did*,<sup>16</sup> and by the last decade of the twentieth century a significant proportion of ‘casuals’ were working fairly stable and predictable hours for the one enterprise over long periods. Rather than use casual labour as supplementary labour in fluctuating periods of peak demand, in many sectors employers have recently made significant use of casual employment provisions, notwithstanding that the true

<sup>13</sup> See Commonwealth of Australia, Royal Commission on National Insurance, *Second Progress Report: Unemployment*, Parl Paper No. 79 (1926-28), pp 7-8; G Anderson, *Fixation of Wages in Australia*, Macmillan, Melbourne, 1929, p 490.

<sup>14</sup> See, for the first example of the Arbitration Court’s approach, *Waterside Workers Award* (1914) 8 CAR 53. The Court would consider the ‘normal conditions of an industry and the earnings of men of average competency engaged in that industry’. If work averaged out over a year meant they would earn less than the annual equivalent of the basic wage, the court calculated the appropriate hourly loading: Anderson, above n 13, p 490. By the second half of the 1920s, this higher rate was written into awards covering wharf workers, builders’ labourers, shearers, flour mill workers and those working in the meat export and sugar industries.

<sup>15</sup> One week’s annual leave, when introduced, was seen as accruing at one day for every two calendar months of service: see the *Commercial Printing Award* at (1935) 36 CAR 760-61. The Arbitration Court declined to extend annual leave to casual employees on the grounds that employees who were getting a casual loading on the basis of pleading ‘intermittency’ could hardly claim to also be in need of the rest and recuperation required by continuous or permanent employees and which it was annual leave’s purpose to address: see *Ship Carpenters and Joiners Case* (1942) 48 CAR 279.

<sup>16</sup> J Buchanan, ‘Paradoxes of Significance: Australian Casualisation and Labour Productivity’, Paper presented to ACTU, RMIT and Age Conference, *Work Interrupted: Casual and Insecure Employment in Australia*, (Melbourne, 2 August 2004).

nature of the contract may be for regular part-time or full-time employment.<sup>17</sup> While the growth in casual employment partly reflects a growth the type of work arrangements that characterise, say, the hospitality or retail industries, the significant proportion of casuals working fairly stable and predictable hours for the one enterprise over long periods suggests many employers are not so much seeking to avoid long-term attachments to employees as seeking to avoid the regulatory obligations that go with such attachments.<sup>18</sup> Equally unsatisfactory with the statistical dichotomy between ‘permanent’ and ‘casual’ workers was that most fixed-term employees, not being ‘casual’, were included within the category of ‘permanent’. The more recent statistical nomenclature of employees ‘with/without leave entitlements’ now better reflects the survey question.<sup>19</sup>

Some mention need also be made as regards agency work. Agency work represents one way firms might source workers for a fixed term. The use of agency ‘temps’ grew in the postwar labour market as a way of allowing enterprises to source holiday replacement workers. In this guise, the focus was often on secretarial work. Also, agency work has been common for a long time in other sectors, such as nursing and theatrical employment, and attempts to commercialise domestic service provision by hiring out daily domestic workers date from the interwar period and have become again become increasingly common.<sup>20</sup> The use of short-term temporary work to provide enterprise flexibility both during temporary vacancies or when demand temporarily increases is still a major factor driving the use of labour hire, and agencies now offer a range of staff beyond the categories that originally dominated the agency sector. In the late 1980s, also, specialist firms arose to offer contract labour as a replacement for existing employees in a number of highly unionised and dispute prone industries such as building, construction and shearing.<sup>21</sup> By constructing the legal relationships between the worker and the agency on the one hand and the host enterprise on the other in such a way that the worker was not an employee of either the agency or the host enterprise, agency labour could be used as a way of undermining union control and providing staff at highly competitive rates of pay.<sup>22</sup>

In many instances, however, a person is engaged either as an ongoing, fixed term or casual employee of an agency and is then on-hired by that agency under a commercial

<sup>17</sup> On the relationship between the award category of ‘casual’ and the underlying contract of employment, see the discussion in A O’Donnell, ‘Non-Standard Workers in Australia: Counts and Controversies’ (2004) 17 *Australian Journal of Labour Law* 89 at 97ff.

<sup>18</sup> Buchanan, above n 16. See also R Owens, ‘The “Long term or Permanent Casual”: An Oxymoron or a “Well Enough Understood Australianism” in the Law’ (2001) 15 *Australian Bulletin of Labour* 118.

<sup>19</sup> One further problem with the old statistical collection was the inclusion of owner-managers of incorporated enterprises in the count of casual employees. That is, although the principle of separate legal corporate personality means a formal contract of employment may exist between a legal corporate entity and its proprietor or controlling shareholder, and such an owner-manager is unlikely to give themselves paid leave, the resulting ‘employee’ in such a circumstance appears not to share the legal and organisational subordination we associate with the traditional employee. Moreover, a consequence of classifying many owner operators of an incorporated business as ‘casual employees’ and those of an unincorporated business as ‘own account’ workers is that shifts in the relative numbers of each category may reflect less changes in people’s actual work arrangements as changes in the ease and advantages of incorporating limited liability companies. More recent survey data separates out owner-managers of incorporated enterprises as a stand alone grouping.

<sup>20</sup> See B Higman, *Domestic Service in Australia*, Melbourne University Press, Melbourne, 2002, p 108.

<sup>21</sup> R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper No 76, ACIRRT, University of Sydney, Sydney, 2002.

<sup>22</sup> *Building Workers Industrial Union of Australia v Odco* (1991) 29 FCR 104; C Fenwick, ‘Shooting for Trouble? Contract Labour Hire in the Victorian Building Industry’ (1992) 5 *Australian Journal of Labour Law* 237.

agreement to another business that then controls the conduct of that employee's work for its own ends. So although there is no formal employment relationship between the worker and the user or host enterprise, many agency workers are engaged by the agency on a casual rather than a permanent basis.<sup>23</sup>

The most recent figures from the FOES indicate 131,400, or 1.2 per cent of all employed persons, are agency workers. This represents a drop from the 2002 figure of 161,800 workers. Again, the HILDA data yields a higher figure, with estimates of 276,400 agency workers (3 per cent of employed persons) in 2001 and 301,000 (3.1 per cent of employed persons) in 2004, and is generally accepted as a more accurate measure.<sup>24</sup>

### **(c) Fixed-term Employment and 'Temporary' Work in Australia**

Definitional problems with the category of 'casual' employees in particular make it difficult to get an overall estimate of temporary work in 'Australia'. Fixed-term work can definitely be regarded as a subset of temporary employment, but confusion also arises because the contractual distinction between indefinite contracts terminable by notice and fixed-term contracts might not accurately capture the vernacular distinction between 'temporary' and other jobs. Actual or expected job tenure can be influenced by a host of extra-regulatory and extra-contractual factors (including the business cycle, technological change, workers' choices to quit, etc.). However, rather than reflecting actual tenure or even contractual duration, the juxtaposition between temporary and permanent employment that characterises much discussion in labour law has purchase, I would suggest, primarily as a way of highlighting differences in employment protection. There is a case to be made, then, in reaching a count of temporary employment in Australia, to aggregate those jobs which, regardless of their extended tenure (or prospect of extended tenure), grant relatively unfettered power to the employer to terminate by virtue of the job's regulatory classification. This would include fixed-term jobs; those casuals who are excluded from protection from unfair dismissal; and all employees serving less than the minimum term before qualifying for protection against unfair dismissal: six months for general employees, and 12 months for employees of a small business (ie, a business that employs fewer than 15 employees).<sup>25</sup> Arguably, if we accept that 'permanency' has been important as the main channel for building up a host of core industrial entitlements, including paid leave and notice provisions, then 'temporary' or non-permanent work could be defined to encompass all work which does not attract such entitlements — that is, casual work in general, along with work that is of actual limited contractual duration.<sup>26</sup>

<sup>23</sup> NSW Department of Industrial Relations, *Labour Hire Task Force: Final Report*, p 27.

<sup>24</sup> Australian Bureau of Statistics, above n 3; Productivity Commission, above n 7, p 139; P Laplagne et al., *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne, 2005, pp 37-38.

<sup>25</sup> See n 55, below. This means the position of nominally 'permanent' workers on indefinite contracts who haven't accrued enough service to reach the threshold may be as precarious as casual or fixed-term workers in terms of ongoing job security: an important point made by J Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123.

<sup>26</sup> J Burgess and I Campbell, 'Casual Work in Australia and Temporary Work in Europe: Developing a Cross-National Comparison' (2001) 15 *Work, Employment and Society* 171. In contrast, the OECD has shifted from relying on figures for casual employment *per se* as a measurement of 'temporary' work in Australia which gave Australia an extraordinarily *high* incidence of temporary employment (see, eg, 'Recent Labour Market Developments and Prospects' [1996] *OECD Employment Outlook*) to relying solely on the figures for fixed-term work and excluding casual employees from the count altogether, thus giving Australia a very *low* incidence of

**(d) Fixed Term Work in Historical Perspective**

It is difficult to get trend data as to the incidence of fixed-term work. We have already noted, for example, that from the early 1980s to the late 1990s, the category of fixed-term work was subsumed by the statistical category of ‘permanent’ work. Since then we have seen the incidence of fixed-term work remain relatively stable.

Putting fixed-term work in a longer-run perspective, we can observe that the nature of Australian economic development meant that the standard employment relationship, whilst, as noted above, emerging from regulatory initiatives in the first half of the 20<sup>th</sup> century, only became predominant after the Second World War. Prior to that period, rural employment, the meat and flour industries and building work in the construction industry were characterised by seasonal fluctuations; the boot trade and textile industries relied extensively on short-time work and rostering; and continuous work in the steel industry was supplemented by casual employment of men seeking work gathered at the smelter gates.<sup>27</sup> This volatile labour market, based on the prevalence of small, technologically unsophisticated workplaces, operating on batch production, with seasonal instability in many industries, dated back to at least the late nineteenth century. Whereas some clerical and supervisory staff, or employees of certain large organizations, may have enjoyed ongoing employment,<sup>28</sup> workers on the shop floor tended to bear the brunt of fluctuations, with women and juveniles in particular providing a large pool of short-term, casual labour.<sup>29</sup> Large mass production firms remained the exception: by the 1920s family-owned and managed firms still dominated the economy, with the average number of wage earners per establishment in Australia in 1929 only 15.6.<sup>30</sup> Contracts for the supply of labour were often organised in such a way as to transfer the risk of shortage of work onto the worker through piece work arrangements,<sup>31</sup> or by characterising the work

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temporary employment by international standards (see ‘Taking the Measure of Temporary Employment’ [2002] *OECD Employment Outlook*). Leah Vosko also excludes casuals from her count of temporary employment in Australia (except for those casuals employed through a temporary help agency): L Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment*, Oxford University Press, Oxford, 2010, pp 132 and 239. Neither approach seems particularly satisfactory. In the OECD’s case, the collection of data on temporary work from other OECD countries explicitly allowed for the enumeration of ‘on call’ workers as well as those on fixed-term contracts, but in the case of Australia the incidence of ‘on call’ work appears as zero. It seems odd to claim that Australia, with its high rate of casual employment, has no ‘on call’ workers amongst those designated ‘casual’, although the number would be difficult to quantify. Moreover, if we take differences in levels of employment protection as the distinguishing feature between ‘temporary’ and ‘permanent’ work then Australia’s limited use of fixed-term contracts, as indicated by the OECD data, probably reflects the fact that most forms of casual employment offer alternative means for employers to both access a pool of ‘on call’ workers and evade the reach of employment protection legislation.

<sup>27</sup> Commonwealth of Australia, Royal Commission on National Insurance, above n 13, pp 7-8.

<sup>28</sup> A Seltzer and A Sammartino, ‘Internal Labour Markets: Evidence From Two Large Australian Employers’ (2009) 49 *Australian Economic History Review* 107.

<sup>29</sup> J Lee and C Fahey, ‘A Boom for Whom? Some Developments in the Australian Labour Market, 1870-1891’ (1986) 50 *Labour History* 1; S H Fisher, ‘An Accumulation of Misery’ (1981) 40 *Labour History* 16

<sup>30</sup> C Wright, *The Management of Labour: A History of Australian Employers*, Oxford University Press, Melbourne, 1995, p 16. Comparable figures for Canada were 25.3; for the United States, 41.9. In any case, early factory production often merely brought under one roof artisans who continued to labour in a self-contained way as contractors, and the distinction between the ‘inside worker’ and the outworker was not clearly fixed: Wright, pp 18-19; G Linge, *Industrial Awakening: A Geography of Australian Manufacturing 1788-1890*, (1979) pp 203, 298, 482.

<sup>31</sup> *Amalgamated Miners’ Association, Wrightville v Great Cobar Ltd* [1907] AR(NSW) 53 at 57-58.



relationships as a leasing arrangement,<sup>32</sup> partnership<sup>33</sup> or a contract for purchase and sale.<sup>34</sup> The economy as a whole remained oriented predominantly toward primary production, with the rural sector providing 60 per cent of the national product even in the 1930s, which implied seasonal fluctuations as regards both the distribution and processing of a wide range of products.

It was only by the 1940s that long-term employment relations progressively displaced forms of intermediate labour subcontracting, casual labour and so on. The need to rationalise production and limit absenteeism and turnover during World War II and acute labour shortages after the War meant that labour management practices changed markedly during the 1940s.<sup>35</sup> The offer of long-term stable employment, greater job security, rewards for seniority, common enterprise policies with company-wide job descriptions and procedures, formalised work rules and pay scales and centralised personnel departments that regularised both external hiring and internal promotion, were seen as ways to attract and retain all grades of labour and to reduce industrial unrest resulting from trade unions' increased bargaining power and became generalised from the late 1940s onwards.<sup>36</sup>

## II. Historic development of fixed-term contract regulations

The regulation of fixed-term work in Australia has proceeded through a mix of contractual principles, statutory intervention and the operation of industrial awards and collective agreements. The nature of the underlying contract is perhaps where the notion of a 'fixed term' seems to have greatest conceptual purchase: under ordinary contractual principles a contract for a specified period or for the completion of a specified task will automatically end when the period expires or the task is completed, without any requirement that either party terminate it.<sup>37</sup> Whether employment continues depends on there being a new contract put in place. Any attempt to terminate a fixed term contract before its expiry (absent grounds for summary termination, mainly involving employee misconduct) will amount to a breach of

<sup>32</sup> *Re Kahn* [1904] AR(NSW) 387, where hairdressing proprietors entered agreements with journeymen hairdressers whereby the former leased chairs to the latter, took the entire takings and retained a proportion as 'rental' while paying the 'balance' to the journeymen. The court concluded the relationship was thereby one of lessor and lessee rather than employer and employee.

<sup>33</sup> *Henwood v Holmes* [1910] AR(NSW) 451.

<sup>34</sup> V Clarke, *The Labour Movement in Australasia: A Study in Social Democracy* (first published 1906, 1970 ed) 197-198.

<sup>35</sup> Wright, above n 30, pp 44-50.

<sup>36</sup> *Ibid.*, pp 50-65. Another response, prevalent in the automotive and steel industries, was to rely on a steady stream of newly-arrived immigrant labour to address the problem of high turnover: C Lever-Tracy and M Quinlan, *A Divided Working Class: Ethnic Segmentation and Industrial Conflict in Australia*, Routledge, 1988, pp 103, 196-7; R Tierney, 'The Pursuit of Serviceable Labour in Australian Capitalism: The Economic and Political Contexts of Immigration Policy in the Early Fifties, with Particular Reference to Southern Italians' (1998) 71 *Labour History* 137.

<sup>37</sup> C Sappideen et al., *Macken's Law of Employment*, 6th ed, Lawbook Co, Sydney, 2009, p 333. B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press, Sydney, 2005, give contemporary examples of fixed-term contracts: term of employment of personal assistant to MP impliedly linked to MP's term of office: *Wilson v South Australian Superannuation Board* (1995) 62 IR 83; seasonal employment may be linked to season: *Watson v Elson* [2003] SAIRCComm 33.

contract giving rise to damages,<sup>38</sup> unless the fixed term contract also provides for termination before expiry given an agreed period of notice.<sup>39</sup>

At one level, the notion of the fixed-term contract only makes sense in the context of there being scope for open-ended contracts of indefinite duration. In the 19th century contracts of hiring could be of long or short duration and where there was no express duration there was a presumption of yearly hiring. It was only with the demise of the presumption of yearly hiring by the second half of the nineteenth century that contracts with no express duration were presumed to be of indefinite duration terminable by notice. What counted as adequate notice depended on employee status, industry custom and payment period.<sup>40</sup> In fact, as Freedland has pointed out, according to this typology the 'notice rule' seems integral to the concept of the contract of employment of 'indefinite' duration. But once this is recognised, the conceptual distinction between the two types of contract is muddled: indefinite contracts, in the absence of any procedural restraints on termination, can be thought of as rolling fixed-term contracts in which the term is defined by the period of notice. That is, the employer is just as free to exercise the power of termination by notice (which might be quite short) as it would be to exercise a power of non-renewal of a fixed-term contract.<sup>41</sup>

These contractual understandings of the employment relationship have always in Australia existed within, and have been modified by, the context of statutory provisions. Up to the close of the nineteenth century, much wage-dependent labour was covered by master and servant legislation.<sup>42</sup> The legislation tended to enforce fixed-term contracts, with strong sanctions against workers absconding prior to the expiration of their term. However, the length of contracts could vary markedly. In the second half of the 19<sup>th</sup> century, urban employment was probably dominated by weekly to monthly hirings, whereas three to six month contracts were the norm in rural areas. Thus in the cities, workers were less likely to run foul of the legislation for absconding, and most actions under the legislation in the cities

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<sup>38</sup> The amount of damages usually awarded would be equal to the amount the employee would have earned if the contract had continued until its fixed term.

<sup>39</sup> Creighton and Stewart, above n 37, at para [15.07]. Once a broad and unconditional right to terminate a fixed-term contract prior to expiry (eg, by giving notice) is granted in the contract, it may be inappropriate to say that such a contract is for a specified period, in that its duration becomes indeterminate rather than specified. However, the term 'fixed term contract' might still be applicable, as there is a fixed 'outer limit' to the duration of the contract. This may seem like a largely semantic point at this stage, but it takes on significance when we consider fixed-term employees protection under unfair dismissal legislation, below, at nn 57-58.

<sup>40</sup> S Churches, 'The Presumption of a Yearly Term in a General Contract of Employment and the Plight of the Modern Manager or The Black Death and the Malady Lingers On' (1978) 10 *University of Queensland Law Journal* 195; S Jacoby, 'The Duration of Indefinite Employment Contracts in the United States and England: A Historical Analysis' (1982) 5 *Comparative Labor Law Journal* 85.

<sup>41</sup> M Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, pp 307-308.

<sup>42</sup> Master and servant legislation was imported into the Australian colonies in the nineteenth century, but the colonial Acts tended to be cast wider in their coverage than the British Acts, to be more coercive and to specify harsher penalties. Sections of the labour force that fell outside of British statutes were included in the colonial laws, including dressmakers, laundresses and skilled rural labourers such as shepherds: see M Quinlan, 'Pre-Arbitral Labour Legislation in Australia and Its Implications for the Introduction of Compulsory Arbitration' in S Macintyre and R Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914*, Oxford University Press, Melbourne, 1989, pp 31-32; M Quinlan, 'Australia, 1788-1902: A Workingman's Paradise?' in D Hay and P Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955*, University of North Carolina Press, Chapel Hill, 2004.

were employee-initiated actions to recover wages, whilst in rural areas employer-initiated actions for absconding were more common.<sup>43</sup>

In the first decade of the twentieth century the masters and servants regime was overtaken by the establishment of compulsory arbitration of industrial disputes. A federal arbitral tribunal was established in 1904, initially called the Arbitration Court, more recently the Australian Industrial Relations Commission. The result of arbitration was a legally binding determination of employers' and employees' respective rights and duties known as an award. Awards set a range of minimum standards that had quasi-judicial force: most importantly wage rates, but also overtime rates, allowances, standard hours, leave entitlements and, as we have seen, forms of hiring, amongst a range of other matters. Awards were usually multi-employer in kind, so the fixing of wages and conditions was overwhelmingly centralised and uniform across industries and occupations. In practice, the application of award standards did not depend on whether an employee was a trade union member or not.

The prevalence of fixed-term employment was largely eclipsed under award regulation. As I have noted, early award regulation attempted to systematise terms of engagement according to the nature of working arrangements. Where the 'normal conditions' of work were regular and continuous, the Arbitration Court expressed a preference for 'weekly hire' provisions. The typical weekly hire clause provided for the payment of a weekly wage, with payment for public holidays and absence from work on account of ill health for up to six days per year, with employment terminable by a week's notice on either side (while preserving the common law right to summarily dismiss for misconduct, neglect of duty, malingering etc).<sup>44</sup> While some awards still gave recognition to casual hiring, it was cast as the exception. Weekly hiring came to signify a kind of 'permanent' or open-ended employment and by the late 1920s applied to core workforces comprising blacksmiths, engineers, carpenters and joiners in shops, coopers, wool workers, manufacturing grocers' employees, timber workers, furniture trades employees, liquor and allied trades employees, storemen and packers and workers in the printing industry, clothing industry, meat industry and food preserving industry.<sup>45</sup>

As we've seen, employing someone 'casually' outside of the weekly hire provisions involved the employer paying a loading. But awards did more than this as regards casual and other forms of non-standard employment. As well as imposing a casual loading, many awards up until the 1980s specified proportional limits or quotas on the number of casual workers, confined casual employment to part-time hours, and sometimes set restrictions on how long and under what conditions casuals could be used. Awards were also used to restrict the proportion of fixed-term jobs relative to full-time, ongoing employment or to limit the maximum duration of fixed-term appointments.<sup>46</sup>

In 1987 Australia moved toward a two-tier system of wage bargaining in which the second tier of wage increases was determined on an enterprise-by-enterprise basis according to restructuring and efficiency principles. Many of these second tier agreements allowed for the increased use of non-standard employment and restrictions on the use of non-standard

<sup>43</sup> R McQueen, 'Master and Servant Legislation in the 19th Century Australian Colonies' in D Kirkby (ed), *Law and History*, vol 4, School of Legal Studies, La Trobe University, 1987.

<sup>44</sup> See *Australian Timber Workers' Union v John Sharp and Sons Ltd* (1920) 14 CAR 811 at 887, 836.

<sup>45</sup> Anderson, above n 13, p 491.

<sup>46</sup> See the examples given in J Romeyn, *Flexible Working-Time Arrangements: Fixed-Term and Temporary Employment*, Industrial Relations Research Series, No 13, Department of Industrial Relations, 1994, pp 97-99.

employment were relaxed or removed. A range of new employment statuses were provided for in some awards, such as ‘seasonal’ or ‘short-term’ employment which attracted annual leave and sick leave entitlements. In the first half of the 1990s the Labor government pressured the federal tribunal to adopt enterprise bargaining and legislated specifically for union and *non-union* based agreements in the 1993 amendments to the *Industrial Relations Act*. As a result there began a steady evolution of bargaining at workplace level and enterprise agreements began to open up more flexible arrangements in the scheduling of work, and in the ordinary hours of work, and in the use of part-time, casual and fixed-term labour.

The award-making powers of the federal tribunal were substantially constrained by the *Workplace Relations Act 1996* enacted by the incoming Liberal/National Coalition government. ‘Type of employment’ remained one of twenty ‘allowable’ award matters under the Act, but the federal tribunal was expressly precluded from using this provision to make an award limiting the ‘number or proportion of employees that an employer could employ in a particular type of employment’.<sup>47</sup> Instead, enterprise-level collective agreements were increasingly utilised to regulate the circumstances in which non-standard contracts may be used. Examples included limits on the total period of employment under successive fixed term contracts, and provisions giving fixed-term or casual contract workers an option to convert to continuing employment, and attempts to set the terms and conditions of staff supplied to the enterprise through labour hire agencies.

Legislative changes in 2006 went further. The federal statute gave more or less open-ended power government to make regulations that could prescribe prohibited content in *agreements*. The resulting regulations were highly prescriptive about what the parties to an employment relationship could and could not bargain for. Prohibited material included dismissal protection, certain union security arrangements and, importantly, terms that restricted or regulated the conditions of temporary agency workers.<sup>48</sup>

### III. Current regulations and problems concerning fixed-term contracts

#### (a) *Regulating the use of fixed-term employment*

Many of the features of the 2006 legislation have been repealed since the election of a federal Labor government at the end of 2007. The Australian Industrial Relations Commission has been replaced by a new body, Fair Work Australia, which is able to make

<sup>47</sup> *Workplace Relations Act 1996* (Cth) s 89A(4). See, eg, *National Tertiary Education Industry Union v Australian Higher Education Industrial Association* (1997) 74 IR 326, cited in A Forsyth, ‘The European Framework Agreement on Fixed-term Work: An Australian Perspective’ (1999) 15 *The International Journal of Comparative Labour Law and Industrial Relations* 161 at 166: the union claim for giving fixed-term employees in the higher education sector the right to convert to continuing status; imposing limits on the circumstances in which fixed-term contracts could be utilised; and granting fixed-term employees entitlement to notice and severance pay were upheld in the final award, but not the union’s claim for the maintenance of an acceptable ratio of fixed-term to permanent employees.

<sup>48</sup> *Workplace Relations Act 2006* (Cth) s 356; Workplace Relations Regulations 2006, reg 8.5, 8.6, 8.7, and 8.8). The inclusion of prohibited content did not render the agreement void, but the offending clause was unenforceable. A person could be fined for recklessly including prohibited content in an agreement or even proposing its inclusion: see A Stewart, *Stewart’s Guide to Employment Law*, 2nd ed, Federation Press, Sydney, 2009 at 8.25.

industry awards.<sup>49</sup> The ‘safety net’ underpinning collective bargaining now comprises ten statutory employment standards together with ten standards drawn from these industry-sector awards. Terms relating to ‘type of employment’ are again permissible in awards, and now there is no restriction on Fair Work Australia’s powers to set limits on the numbers or proportion of employees that an employer may employ in a particular type of employment. Awards and agreements containing provisions covering fixed-term or fixed-project employment often provide that such work should be limited to replacements for people on extended leave (such as maternity leave or sabbatical leave); limited to a certain time period; used for full-time or a part-time employees who declare an intention to retire and request a fixed-term contract expiring on or around the relevant retirement date (ie a ‘pre-retirement contract’; and/or that certain funds not be used for permanent employment.<sup>50</sup>

However, award conditions now do not apply to ‘high income’ employees — the relevant threshold is set by regulation, and commenced at \$108,300 in July 2009 and is indexed annually.

Collective agreements can only deal with ‘permitted matters’, which includes matters pertaining to the relationship between an employer and its employees.<sup>51</sup> Accordingly, an agreement should be able to regulate the terms on which fixed-term employees are engaged, but an outright prohibition on their engagement is likely to be held not to be a matter pertaining to the employment relationship.<sup>52</sup>

So the position in Australia now is that the use of fixed-term contracts can be regulated on an industry or occupational basis, via awards, or on an enterprise basis, via collective agreements.<sup>53</sup> A comment should also be made as regards penalties for employer breaches of awards and agreements. Penalties are limited to fines, or orders for payments to employees where there is under-payment. Accordingly, if a person is engaged as a fixed-term employee in circumstances not permitted by a collective agreement, for example, there is no capacity for a court to order the employer to treat the fixed-term employment as continuing employment. Instead, the employer will incur a monetary penalty but the fixed-term employee’s employment can still be validly terminated in accordance with the terms of the contract.<sup>54</sup>

### ***(b) Regulating the conditions of fixed-term employees***

As noted above, minimum labour standards are now guaranteed for most Australian workers in award entitlements and legislated standards (the latter are referred to as the National Employment Standards or ‘NES’). Better terms and conditions can be negotiated collectively. The most important of these standards or rights are:

- Minimum wages;
- Annual recreation leave;

<sup>49</sup> Because the Constitutional basis of Fair Work Australia’s powers have changed, there is no longer a requirement that the award be made in settlement of an industrial dispute.

<sup>50</sup> CCH, *Australian Employment Law Guide*, [6-580].

<sup>51</sup> *Fair Work Act 2009* (Cth), s 172(1).

<sup>52</sup> See Stewart, above n 48, at 8.28-8.29.

<sup>53</sup> An example is the 2009 collective agreement at my own institution of higher education, which has 11 pages of terms dealing with the engagement of fixed-term employees, including limits on the circumstances which allow for their engagement, notice provisions, severance provisions, advancement and circumstances in which a fixed-term employee has the right to further employment. However, it is difficult to know how many agreements actually make provision for fixed-term employment and its regulation. In 1999, 7.7 per cent of agreements were estimated to have such provisions: Forsyth, above n 47.

<sup>54</sup> *NTEIU v University of Wollongong* [2002] FCA 31.

- Sick leave;
- Carers and personal leave;
- Long service leave;
- Redundancy pay;
- Unpaid parental leave;
- Community service leave;
- Notice periods required to terminate the employment relationship;
- Maximum weekly hours of work plus reasonable additional hours;
- Flexible working arrangements; and
- Unfair dismissal protection and protection from discriminatory dismissal.

Generally, workers who are ‘employees’ are entitled to protection by these laws. Paid annual and personal/carer’s leave accrues progressively during an employee’s year of service. For fixed-term and fixed-task contracts, paid annual leave and personal/carer’s leave must be provided during the period of service. Fixed-term and fixed-task employees are also entitled to unpaid carer’s leave and unpaid compassionate leave under the NES.

In this way fixed term employees, in terms of the benefits, look more like ongoing employees than they do casual employees.<sup>55</sup>

### ***(c) Termination and the application of unfair dismissal regulation***

As mentioned, the *Fair Work Act 2009* (Cth) allows employees to bring a complaint that the termination of their employment was ‘harsh, unjust or unreasonable’, that the required notice period was not given, or that the termination was based on certain ‘prohibited grounds’ (usually to do with unlawful discrimination). However, not all employees are covered by these provisions. Fixed-term and fixed-task employees are generally excluded from the federal unfair dismissal provisions of the *Fair Work Act 2009*, which provides that employees engaged under an employment contract for a specified period of time or task, whose employment terminates at the end of the time or task, will not be taken to have been ‘dismissed’.<sup>56</sup> However, as already noted,<sup>57</sup> in some circumstances, a fixed-term contract will not be for a ‘specified period of time’ and hence not the type of contract which is excluded by the Act. The distinction between a contract for a ‘specified period of time’ and a ‘fixed-term contract’ applies where a fixed-term contract contains a notice of termination clause or some other provision which provides for a broad or unconditional right of termination during the contract’s term. In such a case, the contract cannot be considered a contract for a ‘specified time’, but will still be classed as a fixed-term contract. Similarly, the courts have held that contracts which contain provision for early termination will be prevented from being characterised as contracts for a ‘specified task’, even though they may still be fixed-task

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<sup>55</sup> Casual workers are also excluded from provisions such as unfair dismissal protection; parental leave entitlements; flexible work arrangements; annual leave; redundancy pay, although workers who are engaged on a systematic basis for a twelve month period and expect continuous employment may fall outside the category of true casual employee and be eligible for these benefits.

<sup>56</sup> *Fair Work Act 2009* (Cth), s 386(2)(a). This exclusion has characterised federal unfair dismissal protections since they were introduced in legislation in the early 1990s and reflect the terms of the ILO Convention on the Termination of Employment on which the provisions were originally modelled.

<sup>57</sup> See above, at n 39.

contracts.<sup>58</sup> Furthermore, where a fixed-term employee is dismissed prematurely (that is, before the end of the contract's term), then the exclusion will not apply. Thus a worker with a genuine 'specified time' or 'specified task' contract enjoys a strong degree of certainty as to his or her tenure. For short-term contracts, this may put the worker in a stronger position than someone with an ongoing or 'permanent' contract, as the latter can be dismissed with notice prior to their completing the requisite period of minimum service required by the unfair dismissal provisions.<sup>59</sup> By contrast, if a fixed-term contract does allow for termination by notice, then the employee enjoys the same protections against unfair dismissal as an ongoing employee — subject, again, to having met the requisite period of minimum service.

The legislation also provides that fixed-term employees are not excluded if a substantial purpose of the employee's engagement under the fixed-term or fixed-task contract was to avoid the employer's obligations under the unfair dismissal provisions.<sup>60</sup>

In some limited circumstances, where there is a series of consecutive fixed-term contracts coupled with an expectation of further employment and the employer does not provide such further employment, the employment may, depending on the exact circumstances, be regarded as continuous rather than fixed-term or fixed-task, and thereby not be excluded from the unfair dismissal provisions.<sup>61</sup>

Under the *Fair Work Act*, employees engaged for a specified term or task are excluded not only from unfair dismissal protection, but also from two other termination protections contained in the NES: minimum notice of termination and redundancy pay.<sup>62</sup> They are also excluded from the provisions requiring employers to notify and consult with unions before implementing redundancies in the workplace.<sup>63</sup>

#### **(d) A note about temporary migration**

Access of non-residents to Australia is governed by the Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth). The Australian immigration program has generally been geared toward permanent settlement rather than temporary 'guestworker' schemes. Yet the dominant trend in international migration in the past few decades has been for temporary movements to increase at the expense of permanent settlement.<sup>64</sup> Much of this movement has been of low-skilled temporary workers, and Australia has rarely sought to recruit such workers in significant numbers.<sup>65</sup> Consistent with other initiatives to internationalise the Australian economy, the rules relating to the temporary entry of skilled labour into Australia were radically simplified in 1996, establishing a single 'business temporary entry' visa class,

<sup>58</sup> *Esam and Organ v SPC Ardmona Operations Ltd* (2005) 56 AILR ¶100-345(16).

<sup>59</sup> See above, n 25.

<sup>60</sup> *Fair Work Act 2009* (Cth) s 386(3).

<sup>61</sup> *D'Lima v Board of Management of Princess Margaret Hospital for Children* (1995) AILR 3-173; but cf. *Department of Justice v Lunn* (AIRC, PR974185, 27 November 2006).

<sup>62</sup> *Fair Work Act 2009* (Cth) s 123. The normal scale of payments for redundancy is found at s 119(2).

<sup>63</sup> *Fair Work Act 2009* (Cth) s 534(1)(a). For the standard requirements regarding consultation, see ss 530-533.

<sup>64</sup> T Rod and L Williams, 'Migration Intensification in the APEC Region 1981-1994' in P J Lloyd and L Williams (Eds), *International Trade and Migration in the APEC Region*, Oxford University Press, Melbourne, 1996.

<sup>65</sup> This contrasts with other countries of 'permanent settlement' such as the United States and New Zealand, which have made provision for the importation of temporary low-skilled labour from specific source countries: Mexico in the case of the United States; Pacific island nations in the case of New Zealand. Mention should be made, however, of young holiday makers who are granted working rights within Australia and who are often prepared to undertake low-skilled and low-paid work.

subdivided into short-term entry visas (for three months or less) and long-term entry visas (between three months and four years).<sup>66</sup> In the case of long term business entry, an employer must apply for acceptance as a sponsor, lodge a nomination describing the activities to be undertaken by the sponsored immigrant worker, and the sponsored immigrant must then apply for a visa on the basis of the sponsorship. The employer must also make a number of undertakings relating to compliance with Australian industrial relations laws and conditions of employment.<sup>67</sup>

Once sponsorship has been approved, overseas recruits are nominated according to the nature of the activity they are to perform. Employers can recruit foreign workers to perform a 'key activity', that is, an activity essential to the overall operations of the employer and which requires specialised skills or knowledge.<sup>68</sup> If the employee is found to perform such a key activity, then the requirement of labour market testing (ie, advertising for an Australian worker) is waived. The scheme expressly excludes unskilled activities, or activities in the skilled trades and professions where there is an oversupply of practitioners. Since September 2009 the nominated salary for the position must also adhere to obligations regarding market salary rates for Subclass 457 visa holders: that the terms and conditions of employment provided to primary Subclass 457 visa holders are no less favourable than the terms and conditions provided to Australians to perform equivalent work in the workplace at the same location. In contrast to permanent entry which is 'capped' each year, there are no restrictions on the number of temporary arrivals in any given year.

***(e) A note about the Australian Public Service***

The Australian Public Service (ie, civil service) has traditionally had its employment relations regulated by a separate statutory regime. In the last decades of the twentieth century, the Service underwent substantial organisational and cultural change.<sup>69</sup> The Liberal/National Coalition government introduced a bill in 1997 which aimed to give agency heads unconstrained powers of engagement and termination, including the right to terminate fixed-term contracts by notice. However, the bill was amended and the resulting *Public Service Act 1999* (Cth) and Public Service Regulations 1999 specified ongoing employment as the usual basis for engagement and allowed for regulations both limiting the circumstances in which fixed-term contracts could be used and prescribing the grounds or procedure applicable to the termination of non-ongoing contract.<sup>70</sup> The *Act* states that fixed-term employment should not be used for positions where the need for the work to be done is ongoing. Where the period or the duration of the task is reasonably estimated to exceed 12 months, access to employment must be offered to all eligible members of the community, the vacancy must be advertised in the Commonwealth Gazette and competitive selection processes must be followed. In contrast, an employee can be engaged on a fixed-term basis for up to 12 months without a vacancy being advertised and following a selection process that involves only an objective assessment

<sup>66</sup> There remains, however, a range of employment-related temporary entry visas for various specialised positions such as visiting academic, media and film staff, religious worker, public lecturer, sport, entertainment, foreign government agency and so on: see Schedules 1 and 2 of the Migration Regulations 1994 (Cth). The numbers arriving under such visas are relatively small.

<sup>67</sup> Migration Regulations 1994 (Cth), reg 1.20D(2).

<sup>68</sup> Ibid, Division 1.4A.

<sup>69</sup> See P Weeks, 'The Reshaping of Australian Public Service Employment Law' in P Weeks and M Pittard (eds), *Public Sector Employment in the Twenty-First Century*, ANU e-press, 2007

<sup>70</sup> Ibid, p 29.



of the person's suitability.<sup>71</sup>

Prior to 1977, Heads of Departments were appointed to permanent positions, and could only be dismissed because of misconduct. If a department was abolished, the person would be redeployed elsewhere in the Service.<sup>72</sup> Since 1977, Heads have been appointed for a fixed-term of up to five years, although during the 1980s there was a presumption that at the end of a term, Heads (by this stage called Secretaries) would be rotated between Departments. Since 1994, at the expiry of a Secretary's term there has been no obligation to find a position for the former Secretary. In the absence of a new appointment, the former Secretary is retired from the Service.<sup>73</sup>

By 30 June 2001, non-ongoing employment (defined as persons engaged for either a specific term or a specific task, or for duties that were irregular or intermittent) accounted for 9 per cent of employment in the Service. This represented a fall in the incidence of non-ongoing employment from 13.7 per cent of Public Service employment in 1993.<sup>74</sup>

#### IV. Conclusions

The regulation of fixed-term work in Australia has attracted much less attention than the regulation of casual work. The latter in Australia is much more prevalent as a form of non-standard employment, and also entails more significant derogations from the 'standard employment relationship' than does fixed-term employment. Nevertheless, regulatory strategies as regards fixed-term employment do largely track those as regards casual employment. In particular, the move from relatively centralised award-based regulation toward collective bargaining at the enterprise level, along with a greater ideological emphasis on the competitiveness and efficiency of business, and a desire to increase employment by offering flexible work arrangements to those otherwise excluded from labour market participation, have resulted in a shift in the approach of Australian labour law to the issue of non-standard employment, although current trends produce a complex picture.

Australian labour law has largely moved from trying to restrict the prevalence of fixed-term work to trying to somehow harmonise entitlements as between certain groups of workers. The result has been a form of what Vosko calls 'standard employment relationship'-centrism<sup>75</sup> — that is, the more non-standard workers' work arrangements begin to 'look like' standard work arrangements — especially as regards the duration and regularity of their work relationship — the more they are extended many of the entitlements and protections associated with standard employment. So systematic and regular casuals are granted unfair dismissal protection, as are those fixed-term employees whose actual underlying work arrangements suggest an ongoing employment relationship but whose engagement has been constructed as a sham series of fixed-term engagements.

Fixed-term employment thus becomes normalised, but subject to the proviso that fixed-term employees obtain many of the equivalent benefits as comparable ongoing employees.<sup>76</sup> Of course, the 'comparable' ongoing employee will be one who has been in ongoing employment for a similar duration to the fixed-term contract, and to the extent that benefits

<sup>71</sup> Waite and Will, above n 11, p 7.

<sup>72</sup> Weeks, above n 69, p36.

<sup>73</sup> Ibid, p 37.

<sup>74</sup> Waite and Will, above n 11, p 17.

<sup>75</sup> Vosko, above n 26.

<sup>76</sup> Cf. J Murray, 'Normalising Temporary Work' (1999) 28 *Industrial Law Journal* 269,

accrue with *continuity* of service, the fixed-term employee will be denied these in many instances, depending on the duration of the fixed-term contract.<sup>77</sup> Further, the most prominent area where the fixed-term employee will usually not share the entitlements enjoyed by an employee with an ongoing contract is that regarding protection against dismissal and redundancy.

In contrast to this general phenomenon, in some sectors unions have reiterated an approach based on the limitation of fixed-term work, using collective agreements to regulate the circumstances in which recourse can be had to fixed-term work by employers (although outright prohibition or quotas are unlikely due to the permitted content of collective agreements), along with notice provisions and/or certain rights to convert to ongoing work. This has involved a conscious strategy on the part of trade unions to bargain around issues to do with precarious and non-standard work rather than merely pursue better entitlements for a core of standard workers, and has been most apparent in those sectors where fixed-term work became most prevalent, such as higher education.<sup>78</sup> One problem with the current approach, as mentioned, is that where a fixed-term contract is made in breach of the terms of a collective agreement, there is no inherent jurisdiction under the federal industrial relations statute to deem such a contract to be one of indefinite duration. Further, the problems associated with entitlements based on continuity of service remain unless addressed by a general or, at least, sectoral scheme of portability of entitlements.

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<sup>77</sup> In some instances, where there is a succession of fixed-term contracts *with the one employer*, the employer and employee may agree that entitlements accrued under an earlier contract be carried over to the succeeding contract.

<sup>78</sup> As we saw, the *Public Service Act (Cth)* also regulates recourse to fixed-term work in the civil service.