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FIGHTING INEQUALITY IN AUSTRALIA

"FLEXIBLE ONGOING" EMPLOYMENT: SOLVING A PROBLEM THAT DOESN'T EXIST

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About Per Capita

Per Capita is an independent progressive think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia based on fairness, shared prosperity, community and social justice.

Our research is rigorous, evidence-based and long-term in its outlook. We consider the national challenges of the next decade rather than the next election cycle. We ask original questions and offer fresh solutions, drawing on new thinking in social science, economics and public policy.

Our audience is the interested public, not just experts and policy makers. We engage all Australians who want to see rigorous thinking and evidence-based analysis applied to the issues facing our future.

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Introduction

The New South Wales Business Chamber (NSWBC) and Australian Business Industrial (ABI) have applied to the Fair Work Commission (FWC) for the designation of a new class of employee: 'perma-flexi'. Under this proposal, the casual loading would be cut from 25% to 10%, with employees able to accrue leave at a pro-rata rate but only rostered on when business requirements demanded their labour. The proposal would apply to workers employed under the Social, Community, Home Care and Disability Services Industry Award 2010 (SCHDSI award). The employer organisations have indicated that similar applications in respect of other awards may soon follow.

The NSWBC's application to the FWC is said to be a response to the Full Court of the Federal Court of Australia decision in *WorkPac vs Skene*.[1] In that decision the Court held that a WorkPac employee who had been designated as casual was, in fact, a permanent employee and was thus entitled to the associated benefits including sick leave and annual leave.

The NSWBC has repeatedly referred to this as a case of "double-dipping"[2] based on the claim that the employee was paid a casual loading to compensate for not having leave entitlements but was then given leave entitlements by the Full Court.

Unions have responded negatively to the NSWBC proposal. They maintain that the unilateral designation of employment status by employers will compound existing problems associated with lengthy periods of casual employment and that permanent employees would be moved into the new perma-flexi category, resulting in an increasingly insecure and casualised workforce.

This paper outlines the context within which the perma-flexi proposal arose, the *WorkPac vs. Skene* decision, and the NSWBC's concerns about "double dipping".

It then examines the nature of casual work in Australia and provides an analysis of how the proposed perma-flexi category would affect workers in Australia.

We analyse the potential benefits and risks for workers should the perma-flexi category be introduced, look at potential benefits for employers and ask whether the NSWBC may have had other motivations for its proposal.

We conclude that the perma-flexi proposal is a solution to a problem that doesn't exist. The NSWBC appears to have opportunistically used *WorkPac vs. Skene* to justify the introduction of yet another avenue for employers to reduce fixed wage costs and shift business risk onto employees by further casualising the workforce.

Finally, we offer some alternative solutions to some of the genuine problems that exist within Australia's industrial relations system.

[1] http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2018/2018fcafc0131

[2] https://www.nswbusinesschamber.com.au/Media-Centre/Resources/December-2018/Business-owners-breathe-a-sigh-of-relief-%E2%80%93-casual

Background

WorkPac vs. Skene

Mr Skene was employed as a dump-truck operator in a central Queensland mine by the labour hire company WorkPac Pty Limited (WorkPac) from 20 July 2010 to 23 April 2012. His contract classified him as a casual employee and he was paid a flat rate per hour, initially $50 and later $55. He was a fly-in, fly-out (FIFO) worker whose accommodation and flights were organised by the mine, and he did not receive any paid leave. During his period of employment with WorkPac he took only seven days' unpaid leave.

Mr Skene's roster was set 12 months in advance and he was given a full year's roster at the start of each year. He worked a regular pattern of seven days on, seven days off, with every shift lasting 12.5 hours, and he worked alongside the same crew on every shift. His contract specified he could be terminated with one hour's notice.

When Mr. Skene's employment as a casual employee was terminated on 23 April 2012, he did not receive any payment in lieu for unused annual leave. He applied to the Federal Circuit Court (the Court) seeking compensation and the imposition of penalties upon WorkPac for breaching the Fair Work Act and its enterprise agreement. He argued that WorkPac had wrongly categorised him as a casual employee and, since his working patterns were those of a permanent employee, he should be able to claim annual leave entitlements. The Court found that Mr. Skene was not a casual employee for the purposes of the Fair work Act and consequently the exclusion from annual leave in the National Employment Standards for casual employees did not apply. WorkPac appealed.

On appeal, the Full Federal Court held that:

- Mr. Skene's hours of work were regular, repeated, and set 12 months in advance
- Mr. Skene was not a casual employee because there was a "firm advance commitment" to an agreed pattern and duration of work
- Casual employment is characterised by:
    - Irregular work patterns
    - Intermittent and unpredictable work
    - Lack of continuity
    - Uncertainty as to the period of employment
    - Flexibility on the part of both employer and employee
- As a permanent employee, Mr. Skene was owed payment for accrued annual leave of $21,000 plus $6,700 interest

"Double dipping"

Immediately following the decision in the *WorkPac vs Skene* case, employer and industry groups claimed that it would allow casual employees to "double dip".[3]

They argued that businesses faced "significantly adverse consequences" as a result of the Court's decision, including the possibility of having to pay their casual workers both a casual loading of 25% and

[3] https://www.aigroup.com.au/policy-and-research/mediacentre/releases/WorkPac-v-Skene-double-dipping-13Sept/

paid leave entitlements.[4] This meant that casual employees would now be able to "double dip" by claiming both the casual loading and annual leave entitlements.

This "double dipping" argument was repeated by Federal Workplace Relations Minister Kelly O'Dwyer[5] in December 2018, when she announced her Government's intention to create a regulation by which employers found to have wrongly categorised employees as casual would be able to ask the court to offset any casual loadings paid to an employee against any order to backpay that employee for entitlements such as annual leave.

However, the argument made by employers about "double dipping" is a fallacy.

The Court did not decide that casual employees could claim both the 25% loading and the annual leave entitlement. In fact, the Court found that the company had not paid Mr. Skene a casual loading at all. It said (emphasis added):

> Like the contract under consideration in *MacMahon* (see at [67]), **Mr Skene's contract did not allocate any part of the rate of pay to a casual loading or as monies in lieu of paid annual leave**.[6]

The Court decided that Mr. Skene was wrongly categorised as a casual employee, and thus was entitled to an accrued annual leave payment.

Moreover, the Minister's proposed solution of creating a new regulation is unnecessary. The Court in its judgement did allow WorkPac to offset the cost of back-paying Mr Skene his annual leave entitlements against any casual loading they had paid him, since Mr. Skene had made his argument on the basis that he was not a casual employee. The problem for WorkPac was that they were unable to show that they had paid Mr. Skene a casual loading, as his contract did not specify that his flat hourly rate included a casual loading amount. The Court dealt explicitly with the "double dipping" argument and rejected it as fallacious. In the words of the Court, "no 'double dipping' is possible."[7]

It is apparent that the NSWBC's measures against so-called "double dipping" are really measures to evade the consequences of misclassifying and underpaying employees. In short, the NSWBC is proposing the creation of a new, highly insecure employment category as a solution to a problem that does not exist in our current employment law.

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[4] https://www.nswbusinesschamber.com.au/Media-Centre/Resources/October-2018/Amid-concerns-about-casual-employee-%E2%80%98double-dippin

[5] https://www.smh.com.au/politics/federal/kelly-o-dwyer-unveils-bold-solution-to-casual-worker-double-dipping-20181210-p50lb2.html

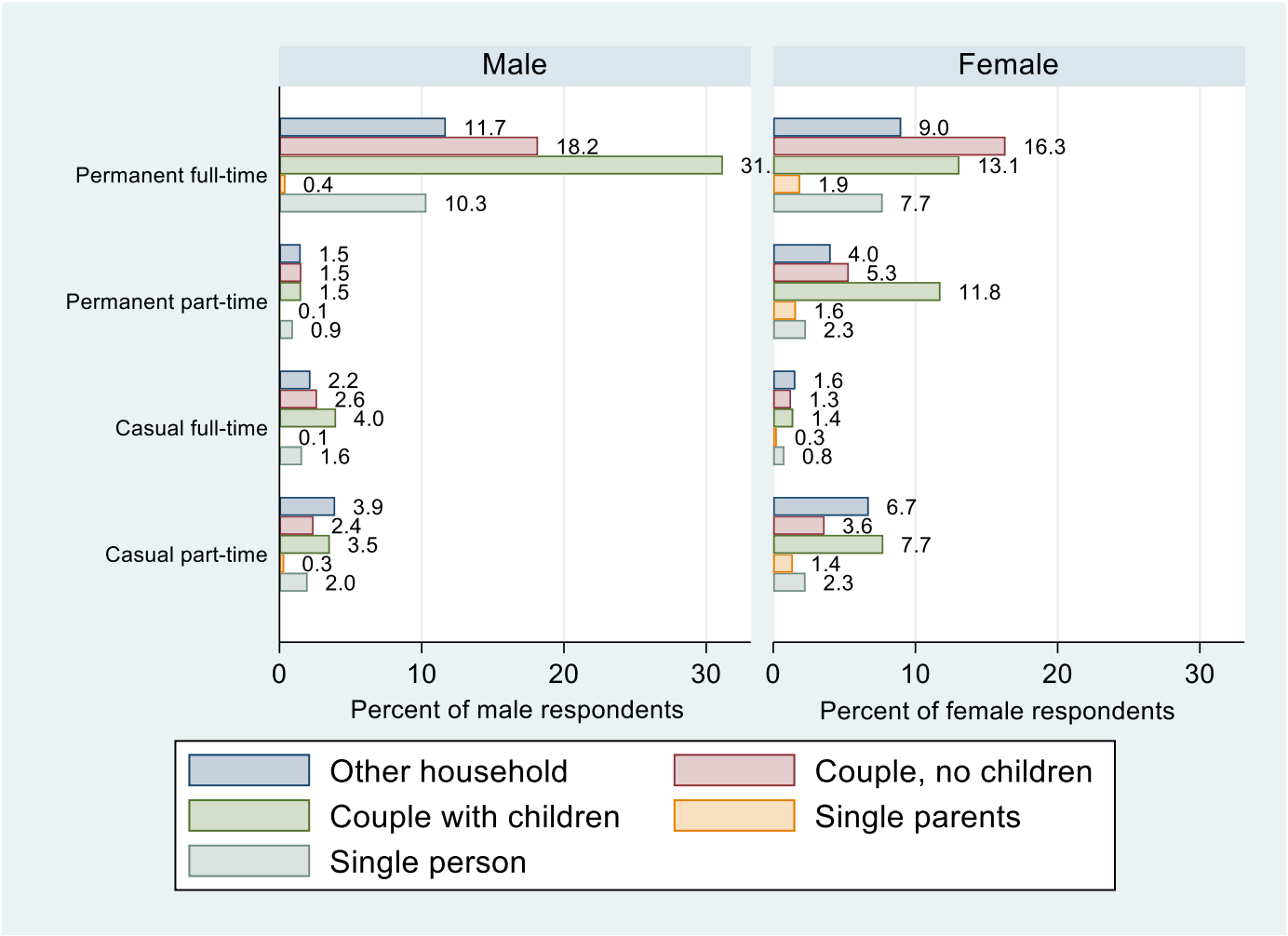
[6] http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2018/2018fcafc0131, paragraph [147]

[7] http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2018/2018fcafc0131, paragraph [146]

Casual work in Australia

Employees in Australia currently fall under three main categories: casual, permanent part-time and permanent full-time. However, some employees classified as casual regularly work full-time hours. The distribution of workers in these four categories varies greatly by gender and household type (see Figure 1).

Figure 1. Labour force status by household and gender (2017). Data from HILDA wave 17.



Industries with the greatest proportion of casual workers are also the lowest paid industries in Australia (see Table 1).

Table 1. Percentage of workers in each industry by employment category, ranked by percentage of casuals (2017). Shading shows the five industries with the lowest median hourly pay rate (From HILDA Wave 17).

Industry	Casual part-time	Casual full-time	Permanent full-time	Permanent part-time	Median pay ($/hour)
Accommodation and Food Services	57	10	22	11	21.25
Arts and Recreation Services	41	8	39	11	26.32
Retail Trade	35	4	39	22	22.84
Administrative and Support Service	24	9	55	12	25
Agriculture, Forestry and Fishing	21	31	41	6	23.18
Other Services	18	9	64	9	25.00
Education and Training	17	3	58	22	34
Health Care and Social Assistance	14	4	50	32	31.43
Transport, Postal and Warehousing	13	13	65	9	28.74
Information Media and Telecommunications	13	7	68	12	31.41
Manufacturing	9	10	75	6	28.11
Rental, Hiring and Real Estate Services	8	9	70	13	27.14
Construction	8	20	70	3	30.00
Wholesale Trade	8	6	80	6	27.10
Professional, Scientific and Technical	7	5	78	10	33.75
Public Administration and Safety	4	5	80	10	38.97
Financial and Insurance Services	3	3	78	16	36.84
Electricity, Gas, Water and Waste Services	2	9	86	2	38.45
Mining	2	16	79	3	49.76

As outlined by the court in the *WorkPac vs Skene* decision, casual employment is characterised by irregular work patterns, intermittent and unpredictable work, lack of continuity, uncertainty as to the period of employment, and flexibility on the part of both employer and employee.

Employment that does not have these characteristics is classified as permanent.

There are currently both underemployment (part-time or casual workers who would like more hours of work) and overemployment (workers who would like to work fewer hours) problems in the Australian workforce with more than 23% workers overemployed and almost 16% underemployed in 2017 (HILDA Wave 17). The distribution of underemployment and overemployment varies greatly by gender, age, whether studying or not and the presence of dependent children in the household.

Costs and benefits of casual work

For workers

Australia is facing a crisis of insecure work. Less than half of Australians have a permanent, full-time, paid job, with the right to paid leave. A quarter of all employees, and more than half of young employees (aged 15-24), are casual employees.

Casual work offers flexibility to arrange work around other commitments, but the sacrifices are also high. Casual employees are unable to predict and budget for their hours and earnings week to week. They must accept the prospect of being dismissed without notice. Their real wages have fallen 26% in the last five years, while real wages for those in permanent full-time work have grown.[8] If sickness or family emergency forces time off, they lose their pay. The precariousness of their work makes it harder to be approved for a rent application, apply for a mortgage or bank loan, or generally plan for their future.

This does not mean all casual workers hate their job, or even that all casual workers want more hours (although about a third do).[9] However, many casual workers want more security in their work,[10] whether that means more hours, more regular hours, guaranteed minimum hours, sick pay, or annual leave.

For employers

Businesses enjoy the workforce flexibility that comes with hiring casual staff. It enables employers to deal with fluctuations in demand and unpredicted busy or quiet periods by employing staff they can call on when needed but are not obliged to keep on when they are not. They do not have to pay any of the benefits or entitlements associated with permanent employment and can therefore budget for staff in a way that is purely responsive to demand.

This means that any perceived threat to an employer's ability to use casual workers is a threat to the profitability of the business. Casual workers seeking more security in the form of regular minimum hours or leave entitlements is problematic for employers because it limits their ability to be responsive when business is unpredictable.

[8] https://www.futurework.org.au/the_dimensions_of_insecure_work

[9] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia#_Toc504135088

[10] Markey, R. & Mcivor, J. Regulating casual employment in Australia. J. Ind. Relations 60, 593–618 (2018).

Analysis of the perma-flexi proposal

Possible benefits for workers

Potential for greater certainty for casual employees

We know that many casually employed workers in Australia would prefer more secure work[11]. The potential for perma-flexi contracts that commit to substantial minimum hours and leave entitlements could improve the capacity of casual employees to secure bank loans, manage household budgets and plan for the future.

However, under the current proposal, the minimum guaranteed hours are between one and three per engagement. There is no meaningful difference between this proposal and the conditions offered by the notorious "zero hours contracts" that have created a highly insecure labour market amongst the lowest paid workers in the United Kingdom.[12] There is a real risk that the proposed claim will, instead of making casual employment more secure, merely undermine the security of permanent employment in the SCHDSI award.

Paid leave entitlements

The lack of paid leave entitlements for casual workers contributes significantly to the precarity of their employment. In theory, casual workers are compensated for this by a 25% wage loading. As we shall see, though, this loading is not always paid fairly to casual staff. This makes permanent employment and paid leave entitlements an attractive alternative for casual workers.

However, in situations where workers don't have much power in the workplace, they can be reluctant to make use of entitlements for fear of either losing shifts or losing their employment altogether.[13]

Significant risks

The fallacy of casual loading

Almost all Modern Awards of the Fair Work Commission specify that casual employees should receive a 25% casual loading.[14] This means that in exchange for giving up paid leave, predictable or regular hours, and the right to notice prior to termination, casual employees are supposed be paid 25% more than permanent employees doing the same job.[15]

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[11] Markey, R. & Mcivor, J. Regulating casual employment in Australia. J. Ind. Relations 60, 593–618 (2018).
[12] Pennycook, Cory & Alakeson, *A Matter of Time: the rise of zero-hours contracts*, Resolution Foundation, 25 June 2013 https://www.resolutionfoundation.org/app/uploads/2014/08/A_Matter_of_Time_-_The_rise_of_zero-hours_contracts_final_1.pdf
[13] Pennycook, Cory & Alakeson, *A Matter of Time: the rise of zero-hours contracts*, Resolution Foundation, 25 June 2013, Pp18. https://www.resolutionfoundation.org/app/uploads/2014/08/A_Matter_of_Time_-_The_rise_of_zero-hours_contracts_final_1.pdf
[14] https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages
[15] https://www.australianunions.org.au/casual_workers_factsheet

The perma-flexi proposal rests on the premise that casual employees are currently paid this 25% casual loading. This premise is a dangerous assumption; as the *WorkPac vs Skene* decision showed, employers designate employees as casuals without specifying or paying a casual loading.

In fact, the latest research on casual loading indicates that the full 25% rate is very rarely applied.[16] The Centre for Workplace Leadership at the University of Melbourne has used Australian Bureau of Statistics data to demonstrate that casual loading actually paid averages between 4% and 5%. Of the occupations examined, only school teachers came close to a 25% loading rate, at 22%.

Workers in some of Australia's lowest paid professions, including sales assistants, hospitality workers, personal carers, cleaners, laundry workers, food preparation assistants, and some labourers, received casual loading of 5% or less. Office clerks, packers, and sports and fitness workers were actually paid less than permanent workers, receiving no casual loading at all. These occupations account for more than half of all adult casual employees.

It is clear that casual employees in Australia are not being adequately compensated for sacrificing paid leave entitlements. In fact, a 2017 study found that, over the long term, casual work in Australia actually results in a wage *penalty* of 4% to 10%.[17]

The NSWBC's proposal to switch casual employees over to perma-flexi, by reducing the casual loading from 25% to 10%, would in practice reduce the wages of those employed on a casual basis below those paid to permanent employees even further. The casual loading argument, like the 'double dipping' argument, is a fallacy.

Permanent staff may be moved to perma-flexi

Were the Fair Work Commission to agree to the NSWBC's application and create a perma-flexi employment category, strong incentives would exist for many employers to shift their workforces from permanent conditions onto the perma-flexi arrangements, particularly for businesses that have volatile workloads.

The NSWBC Chief Executive Stephen Cartwright dismissed this possibility as "conspiracy theory" and said "[W]hy would anyone do it, when they have to pay an extra 10 per cent?"[18].

In fact, any business would have an incentive to do this if, as a result, an employee currently employed full-time would work four or more hours per week less, on average, than they currently do or if it would avoid paying six hours of overtime (or any combination of the two averaged over time).

[16] https://theconversation.com/the-costs-of-a-casual-job-are-now-outweighing-any-pay-benefits-82207

[17] https://journals.sagepub.com/doi/10.1177/0018726716686666

[18] https://www.smh.com.au/politics/federal/employers-apply-for-creation-of-new-permaflexi-worker-category-20190227-p510im.html

The opportunity to send workers home and not pay them, or to contact them and tell them to not come in tomorrow, would be appealing to many employers who experience occasional but unpredictable quiet periods in their businesses.

This kind of 'flexibility' is already successfully sold to business owners by labour hire companies in order to reduce the "ongoing burden of fixed costs":

> *"Businesses need to be nimble and respond to sudden changes. Having a flexible workforce means companies can respond to economic conditions without the ongoing burden of fixed costs. An agile business is an efficient business."*[19]

All casualisation of work is essentially a process of shifting business risk from the employer to the employee. An employer who employs workers on a permanent basis must manage the risk associated with fluctuating workloads through business management.

By shifting the workforce to 'flexible' conditions, a large part of this risk is transferred from the business owner to the worker: when the amount of work required to service the business drops, the worker receives reduced hours, and the employer has reduced wage costs.

Equally, under the 'flexible' working conditions afforded by labour hire and casualised work, when the business demands additional hours, employers are able to bring in additional labour without paying the overtime loading that would be due to permanent part- or full-time staff.

Even if an employer could not forcibly move individual workers from permanent to perma-flexi conditions immediately following the creation of the latter employment category, it would be possible to shift an entire workforce into perma-flexi roles over time. Once the underpinning award is varied to provide to perma-flexi employment, this could be achieved by shifting recruitment to perma-flexi arrangements, and by ceasing to offer permanent part-time roles on the expiry of current Enterprise Bargaining Agreements (EBAs) and offering only perma-flexi positions under a new EBA.

If this became common practice in an industry, workers seeking employment in that industry would have little choice but to accept a perma-flexi position and the insecurity and reduced industrial power that it entails.

Permanent staff who move from permanent to perma-flexi under the above scenarios would have lower incomes, no overtime, reduced worker power, reduced capacity for financial planning and would find it harder to secure bank loans.

While around a quarter of employees would prefer fewer hours,[20] many of these are currently working more than 38 hours per week (an average of 46 hours). Of those working less than 40 hours per week, only 22% would prefer fewer hours. For most of these workers, permanent part-time arrangements would likely be preferable to perma-flexi, particularly if the minimum hours in the contract are only those currently available to casual employees as the NSWBC propose. That said, there are likely to be a small number of permanent employees who would find the possibility of a 10% loading and fewer work hours to be

[19] https://www.laboursolutions.com.au/blog/2016/03/22/a-flexible-future-why-businesses-need-a-flexible-workforce-labour-now/

[20] HILDA 2015

attractive, particularly in instances where they have a strong and trusting relationship with their employer. However, this also assumes that they will actually receive the full loading in practice which, as we have seen, is far from guaranteed.

Reduced worker power

When employers have the unilateral capacity to reduce work hours it gives them additional power over their employees. This is a demonstrated feature of the employment relationship under zero hours contracts in the UK.[21] There is a genuine risk that employees on a perma-flexi award who request better pay or conditions, or who join their union, will have their hours reduced to the minimum set out in the contract with no recourse for appeal.

This reduction in worker bargaining power would have a wage suppression effect across the industry. As we have shown, just such a wage suppression effect reduces the hourly rates received by casual workers, often eroding or eliminating their casual loading. Given the recent history of poor wage growth in Australia, any changes that further reduce the bargaining power of workers should be resisted unless carefully considered safeguards are in place or compensating measures are also implemented.

Benefits for employers: what's the real motivation?

Certainty for businesses who have long-term casual staff in the wake of WorkPac vs Skene

There is reportedly widespread concern among employers about the ramifications of *WorkPac vs Skene* for their liabilities.

However, the *Workpac vs Skene* judgement simply reinforced a long line of existing court authority about the true nature of casual employment. Casual employees already have the right to request conversion from to permanent full-time or permanent part-time employment. Long-term casual staff who have variable shifts week to week may still be legitimately classified as casual.

A response to the threat of losing 'labour hire' advantages under a federal Labor government

The current Labor Opposition is promising to establish "a national labour hire licensing scheme to regulate the labour hire industry and ensure that minimum legal standards are met. Labor will also legislate to guarantee that labour hire workers receive the same pay and conditions as directly employed workers doing the same work."[22]

Should Labor win the upcoming federal election and legislate these labour hire changes, employers currently making use of cheap labour hire will see their labour costs rise. Therefore, we suggest it is likely that the proposed perma-flexi category is an attempt to provide employers another method to reduce labour costs in anticipation of a tightening of industrial relations regulations under a future Labor Government.

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[21] Pennycook, Cory & Alakeson, *Op Cit.*
[22] A Fair Go for Australia. Labor's National Platform: https://www.alp.org.au/media/1539/2018_alp_national_platform_constitution.pdf

Conclusion

The perma-flexi proposal is essentially a solution to a problem that doesn't exist.

The problem of 'double dipping' that the NSWBC and other employer groups have repeatedly described and decried is not real. That problem was solved in the very same judgement that the NSWBC asserts created it when the Court explicitly ruled out such an occurrence by specifying that any back-paid leave entitlements could be offset against any casual loading paid.

Given how clear the judgement was on this issue, it is unlikely that the NSWBC mistakenly believed double dipping was a real problem. The NSWBC appears to have opportunistically used *WorkPac vs. Skene* to justify the introduction of yet another avenue for employers to reduce fixed wage costs and shift business risk onto employees by further casualising the workforce.

There are many genuine problems that exist within Australia's industrial relations system, but the creation of a perma-flexi employment category is likely to exacerbate more of them than it resolves. Reducing casual loading from 25% to 10%, in a context where casual loading is rarely paid, in reality means reducing casual pay even further. Some casual workers may be willing to trade this for leave entitlements, but for others this may represent an unaffordable hit to their income. Employees seeking security in the form of guaranteed minimum hours are likely to be disappointed too, as the current proposal only guarantees between one and three hours per week; the same as for casual employees. This undermines the notion that there is any real permanency associated with perma-flexi at all.

Furthermore, the creation of the perma-flexi employment category would substantially increase the incidence of insecure work as many permanent full-time staff will likely be moved to perma-flexi contracts. This would far outweigh any beneficial changes for casual staff who convert to perma-flexi.

Instead of creating a new employment category, we should begin by ensuring that current employment classifications and associated loadings and entitlements are properly implemented and enforced.

Alternative solutions

The effective and accurate application of current employment categories would solve many of the problems associated with casual work. It is clear that many employees currently classified as casual would more accurately be classified as permanent part-time and some as permanent full-time. The recent addition of casual conversion clauses in awards should go some way to correcting the misclassification of many workers, assuming the education of employers and employees regarding these changes has been effective.

In addition, the full payment of the 25% casual loading would properly compensate those who are genuinely employed as casuals for their lack of paid leave entitlements and the precarity of their employment. This is not straightforward as many employers, particularly in small-medium sized businesses, may find establishing appropriate pay scales for casuals to be difficult.

Casual employees, by the very nature of their employment status, have little bargaining power compared to permanent employees and, as a result, tend to be paid a lower hourly rate than permanent employees with equivalent tasks, responsibilities and experience. One way to address this problem is to broaden collective bargaining to the industry level so that the pay of employees of small and medium sized businesses are aligned with the rest of their industry.

Similarly, a significant proportion of overemployment would be resolved if the expectation of unpaid overtime was reduced. A third of full-time permanent employees who would like fewer hours are working more than 38 hours per week (HILDA Wave 17). More than 40% of women with children who are in a couple relationship and work full-time would like to work less hours.

Making part-time work more available to both men and women would help address both the overemployment problem and the underemployment problem. This requires a significant cultural shift in the Australian industrial relations landscape.