Closing the "Casual Loophole": A Solution in Search of a Problem

Innes Willox, Chief Executive, Australian Industry Group

As published in the *Australian Financial Review* as 'Labor reinvents casuals 'problem', 10 August 2023

The Federal Government's latest plan to attack very longstanding and accepted practices around casual employment, that it defines as "loopholes", is without doubt a solution in search of a problem.

A loophole is defined as a small mistake which allows people to do something that would otherwise be illegal (Collins). There is nothing illegal about employing casual workers.

Initially the casual "problem" that needed fixing, as defined by the Government and unions, was allegedly one of increasing casualisation and the growing insecurity of work.

The facts have put this tired claim to rest as a complete myth. The rate of casualisation in Australia's workforce has not increased for over twenty years, and in fact it is lower today than it was in 2002.

So growing casualisation proved to not even be a thing, let alone a problem.

But now we purportedly have a new 'problem'. It's "the permanent casual worker loophole" (Tony Burke AFR 8 August).

It is no longer growing casualisation that we should deal with through legislation, but the fact that "there are casual employee workers forced to work as permanent casual workers." It is defined by Workplace Relations Minister Burke as the problem of "a worker who's classified as a casual – because of what's written on their employment agreement – but is working regular rosters for extended periods of time."

What appears to be the focus of the Government's concern is casual employees working predictable and regular hours. That this is a problem that needs addressing will be news to the many casuals who enjoy having regular work.

Critically, the Government is apparently going to solve this so-called problem by taking two steps. It is going to change the definition of a casual employee. And, it is going to give casual workers a new right to convert to be a permanent employee if they don't meet that definition.

Employers are left scratching their heads. Why is this necessary?

Casual employees already have very clear rights to request conversion to permanent employment. The rights were inserted into the Fair Work Act by the previous Government, following extensive negotiations between employer groups and unions. They are largely based on an approach determined to be fair by the Fair Work Commission in a major case in only 2017.

Casual conversion is already a well-established practice. Employers already offer casual employees the opportunity to be converted from casual to permanent employment and employers cannot unreasonably refuse.

Very few employees actually take up the opportunity. They prefer to work as casuals. They particularly like the 25% casual loading in lieu of leave entitlements.

What is hidden in the rhetoric appears to be a plan to radically change the very notion of who can be engaged as a casual employee in the first place.

The Government is set to create a mighty mess in the process.

It wants to overrule casual employment contracts agreed to by an employer and an employee.

It wants to overturn the very nature of what has long been considered casual employment in Australia.

It will potentially put at risk the ability of employers to offer causal employees a regular pattern of work and in so doing reduce job security.

The difficulties inherent in this have been exposed in recent landmark court cases.

In brief, a few years ago the Federal Court decided (wrongly as it turned out) that matters such as working patterns should be considered when determining who is a casual.

This created considerable uncertainty for businesses and employees. It unleashed class actions, with law firms hoping for a big payday in the tens of billions of dollars.

Fortunately, the High Court rejected the flawed reasoning of the Federal Court by ruling that it was the employment contract that mattered and not broader considerations. Importantly,

it clarified that having a reasonable expectation of continuing employment on a regular and systematic basis is entirely consistent with the nature of casual employment.

Unfortunately, the Labor Government wants to reopen this mess. It seems intent on reinstating the kind of flawed approach that was rejected by the High Court and dealt with in legislation.

The proposal won't just be a problem for employers.

If the Government gets its way, a big risk is that many employers will offer fewer opportunities for casuals to undertake a regular pattern of work.

This won't just hurt the many young workers who make up the majority of casuals, but also the many older workers who value regular casual hours and also the ability to take time away from work, when it suits.

What is the problem? It remains a mystery.