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THEME 1:
REGULATORY FRAMEWORKS AND LAW ENFORCEMENT IN NEW FORMS OF EMPLOYMENT

REPORT PREPARED BY:

Catherine Dow
Professor Marilyn Pittard
Stephen Sempill
Assoc Prof John Howe
Miriam Cullen

Professor Marilyn Pittard and Miriam Cullen are from the Law School, Monash University (Australia).

Assoc Prof John Howe, Stephen Sempill and Catherine Dow are from the Law School, University of Melbourne (Australia).

Rapporteur: Professor Rosemary Owens
Law School
The University of Adelaide (Australia)
INTRODUCTION

The failure of employers to comply with legal obligations owed to their employees has remained a largely unresolved area in Australian industrial law.\(^1\) Government enforcement of these obligations has had a long and troubled history.\(^2\) While industrial legislation has always provided for remedies and penalties for breaches of minimum conditions, government enforcement of these obligations has been regarded as poor, ineffectual and hampered by ‘structural and political obstacles’.\(^3\) Notwithstanding these problems, enforcement of labour standards has attracted little academic attention. As Goodwin notes, ‘to argue that there is a paucity of academic industrial relations research on the enforcement of minimum labour standards is to make an understatement.’\(^4\)

The last decade has seen a dramatic shift in the regulation and enforcement of labour relations. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘Work Choices’) brought about fundamental and deep seated changes to the system if conciliation and arbitration which had existed for a century. The role of unions, once central to the enforcement of minimum standards, has been severely curtailed.\(^5\) In place of the traditional conciliation and arbitrations systems, Work Choices, as Merkel J observes, ‘increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct.’\(^6\) The curtailment of union enforcement and the increasing codification of employment standards has brought government enforcement out of the shadows and placed it firmly in the centre of the enforcement scheme. The new labour regulation at national level, *Fair Work Act 2009* (Cth), which will be fully operative by 1 January 2010, is introducing better protections for labour in the form of minimum conditions; and collective agreements that will leave employees better of overall.\(^7\) The enforcement scheme will, however, remain largely the same, although there have been some institutional changes.

In this report, in responding to the Questionnaire we endeavour to capture this shift and examine whether it is likely to extend to the capture and curtailment of use of non-standard and informal employment arrangements.

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\(^3\) Lee, above n 1, 1.


Part 1 The Informal Economy and Precarious Employment

1.1 The Definitions of the ‘Informal Economy’ and ‘Precarious Work’

1.1.1 Are the expressions ‘informal economy’ and ‘precarious work’ (or alternative expressions for similar concepts) used in your country?

Yes, although as discussed below, neither term is found within Australian legislation.

1.1.2 What is understood by each of these concepts in your country? What is the main difference or distinction between these concepts? What, if any, is the overlap between them?

There has been increasing commentary in Australia regarding the rise of ‘non-standard’ or ‘atypical’ work. There are a number of terms used to describe work that falls outside the traditional male breadwinner norm, including ‘non-standard’, ‘atypical’, ‘contingent’, ‘precarious’ and ‘informal’. 8 Although the words ‘non-standard’ and ‘atypical’ are more commonly used in Australia and provide a useful means of categorising work that does not constitute a standard employment relationship. Fudge and Owens warn that these terms are an oversimplification which ‘can be misleading and risks perpetuating the notion that there is a simple binary divide between the ‘old’ and the ‘new’ forms of work.’ 9 Instead, ‘precarious work’ is a phrase which encompasses various factors that may not always fit neatly into the standard/non-standard dichotomy. Fudge and Owens explain that: 10

Precariousness is a complex notion, and involves four dimensions: (1) the degree of certainty of continuing employment; (2) control over the labour process, which is linked to the presence or absence of trade unions and professional associations and relates to control over working conditions, wages, and the pace of work; (3) the degree of regulatory protection; and (4) income level.

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Precarious work is necessarily a flexible concept, with many of its identifying features able to ‘intersect in numerous ways’, and precariousness manifesting in a variety of working situations. In Australia, casual employment, part-time employment, independent contracting, outworking and informal work arrangements often constitute precarious work. Whilst the nature of these working arrangements varies, ‘all tend to be distinguished by low wages, few benefits, the absence of collective representation, and little job security’.\(^\text{12}\)

There is relatively little commentary regarding informal work in Australia, and few uniquely Australian definitions of the term. The ILO has defined informal economy work as activities that are:\(^\text{13}\)

in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome or imposes excessive costs.

As can be seen from the definition of precarious work above, the lack of ‘regulatory protection’ accorded to informal workers often places them within the broader concept of precarious work. In Australia, those who work ‘cash in hand’ or ‘off the books’ without any formal record keeping or pay slips form part of the informal economy, along with those who are entitled to regulatory protection but do not receive these entitlements in practice.

1.1.3 What are the main criteria used in your country to characterise
 a) the ‘informal economy’, and
 b) ‘precarious work’?

As discussed above, informal economy workers are understood to be those workers who in law or practice remain excluded from labour regulation. The criteria used to determine precarious work is also previously mentioned. Independent contractors, casual workers, part-time workers and outworkers are often engaged in precarious work, despite a framework of legal protections. The criteria used to identify these workers are outlined briefly below.

Australian law is premised on an ‘important distinction’ between a *contract of employment* whereby a worker consents ‘to perform work for someone else’s organisation in a subordinate capacity’ and a *contract for services*, ‘where the


worker concerned has their own business and is effectively performing work for clients or customers of that business.'\(^{14}\) Those engaged by a contract of employment are employees and receive protections contained in the Fair Work Act 2009 (Cth), including rights to basic employment standards and industrial action. Those engaged by a contract for services are often independent contractors and receive more restricted rights under the Independent Contractors Act 2006 (Cth).

The distinction between employees and independent contractors is contained in common law only, and involves a multi-factor test which balances factors such as:

- the degree and nature of control exercised over the worker (or more especially the right to exercise such control);
- the mode of remuneration;
- responsibility for the provision and maintenance of tools or equipment;
- the extent of the obligation to work for the organisation; and
- any capacity for the worker to delegate work to others.

The question of ‘control’ is a particularly important factor.\(^{15}\)

Although control is identified as an important factor, there are no rules governing a priority of competing factors, or any fixed understandings of which combination of factors is required to characterise a particular working arrangement. Instead, the decision is based on ‘overall impression’.\(^{16}\)

Casual employees are entitled to protections contained in the Fair Work Act 2009 (Cth). However unlike permanent employees, they receive lower minimum standards of employment (for example fewer leave entitlements), in exchange for salary loading. There is no statutory definition of casual employee in the Fair Work Act. Awards usually define casual workers as those ‘engaged and paid’ as a casual, giving employers ‘discretion to take a person on as a casual, regardless of whether their job is a temporary or irregular one.’\(^{17}\) Although some casual workers enjoy the flexibility of casual employment, Stewart notes that for an increasing number of casual workers, the insecurity and lack of protection is not a choice, but the only job type available.\(^{18}\)

Not all part-time workers are precarious workers, however in many cases low income and restricted career advancement opportunities make this work precarious. In Australia, part-time workers only receive around ‘30 per cent of average weekly earnings’ of full time employees. As Anne Junor explains,


precarious work often eventuates when part-time work is ‘employer-initiated’, rather than specifically requested by the employee.19

Another category of workers frequently engaged in precarious work are outworkers, those workers who work outside the employer’s premises and who may be treated as contractors by the employer, although in many instances may technically be employees. Although they receive specific protection under federal and territory laws,20 they are ‘usually paid at piece rates rather than receiving a regular wage, and have little or no control over the amount of work they receive’.21 Enforcement is also a significant challenge, with many outworkers working in the informal economy.

1.1.4 What other criteria are used to identify those engaged in the ‘informal economy’ or in ‘precarious work’? What is the relative weight given to the various criteria – ie, which of the criteria are most important?

See above.

1.2 The Size of the ‘Informal Economy’

1.2.1 What is the estimated size of the ‘informal economy’ in your country? (Please present this information as the proportion of workers, and if possible the proportion of enterprises, in your country that are estimated as participating in the informal economy)?

As discussed below in 1.4.1 and 1.4.3, there is very little data available on the size or composition of the informal economy in Australia. It has been acknowledged that the informal sector is expanding.22

1.2.2 How does your country measure the phenomenon of the ‘informal economy’?

See above.

1.2.3 How reliable are the statistics?

See above regarding statistics on the informal economy. For discussion of the reliability of statistics regarding precarious work, please see 1.3 below.

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20 For further information see Michael Rawling, ‘The Impact of Federal Legislation upon the Scope of State Jurisdiction to Regulate Outwork’, forthcoming article in the AJLL.


1.2.4 Have there been criticisms of the way this information is classified and gathered?

The lack of data has been criticised from time to time, mainly by researchers.

1.3 **The Size of ‘Precarious Work’**

1.3.1 What is the estimated size of the phenomenon of ‘precarious work’ in your country? (Please present this information as the proportion of workers, and if possible the proportion of enterprises, in your country that are estimated as participating in the ‘precarious work’)?

The Australian Bureau of Statistics (ABS) found that in November 2008, there ‘were approximately 10.7 million employed people, aged 15 years and over’.\textsuperscript{23} Of these, 62% ‘were employees with paid leave entitlements’.\textsuperscript{24} Approximately two million of the people aged 15 years and over ‘were employees without paid leave entitlements’ (casual employees), suggesting some form of precariousness; one million were independent contractors, who also often experience precariousness; and 1.1 million were ‘other business operators’.\textsuperscript{25} Approximately 29% of employees worked part time. Part-time workers were significantly less likely to receive paid leave entitlements.\textsuperscript{26}

Most employees who were full-time workers in their main job had paid leave entitlements (90%). By comparison, of the 2.5 million part-time workers, less than half (43%) had paid leave entitlements.\textsuperscript{27}

Whilst standard employment arrangements have declined in Australia, the incidence of precarious work has risen.\textsuperscript{28}

1.3.2 How does your country measure the phenomenon of ‘precarious work’?

As discussed above, recent surveys conducted by the ABS have defined employment categories as those employed with paid leave entitlements, those employed without paid leave entitlements, independent contractors and other business operators. These categories are further subdivided into part-time and

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\textsuperscript{23} ABS, *Forms of Employment*, Cat 6359.0, November 2008, 5.
\textsuperscript{24} ABS, *Forms of Employment*, Cat 6359.0, November 2008, 5.
\textsuperscript{25} ABS, *Forms of Employment*, Cat 6359.0, November 2008, 5.
\textsuperscript{26} ABS, *Forms of Employment*, Cat 6359.0, November 2008, 5.
\textsuperscript{27} ABS, *Forms of Employment*, Cat 6359.0, November 2008, 5.
full-time workers. Although these categories do not directly correlate with the precarious/non precarious divide, they provide a useful indication.

1.3.3 How reliable are the statistics?

There has been some commentary regarding the reliability of statistics showing the prevalence of precarious work. Not only is the definition of precarious work contested, but ABS data is premised only on a person’s ‘main job in paid employment’. Also, definitions of categories have changed over time, making long term comparisons difficult.

1.3.4 Have there been criticisms of the way this information is classified and gathered?

See above.

1.4 The Impact of Social and Economic Changes on the ‘Informal Economy’ and ‘Precarious Work’

1.4.1 Have there been any changes in
a) the size of the enterprises, and
b) the composition of the labour market
in the ‘informal economy’ and ‘precarious work’ in recent years? Have these changes been significant?

Yes. In Australia, as in much of the industrialised world, there has been a marked growth in ‘non-standard’ or ‘atypical’ employment. As discussed above, these terms are used to describe working arrangements that depart from the traditional paradigm of paid work. This traditional paradigm is that of a person engaged in a single occupation over a lengthy and consistent period, working on the premises of his or her employer.

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There is a difficulty in identifying accurate statistics on the numbers of workers engaged in non-standard or precarious work (see, 1.3 above). Likewise, statistics are not readily available on the size or composition of the informal economy (see 1.2 above). The traditional model of the employee with paid leave entitlements now comprises little more than a bare majority of all employed persons. With the alarming growth in ‘atypical’ employment, the nomenclature ‘non-standard employment’ is fast becoming a misnomer.

In Australia it is increasingly common for workers to be engaged on a fractional or part-time basis or to work in alternative environments; as outworkers or homeworkers. In 2008, 29% of those employed worked part-time compared to just 17% in 1982. Employment growth has been most concentrated among casual employees, labour hire workers or self employed contractors. At least 10% of the workforce now operate as self-employed contractors.

According to an Australian Bureau of Statistics report, over the past twenty years there has been:

- a gradual increase in overall participation in the labour market (60.4% to 63.6%);
- a significant increase in female participation in the labour market (44.7% to 55.7%); and
- a decline in male participation (76.7% to 71.6%).

1.4.2 What are the main social factors that have promoted these changes? In answering this please identify any significant differences between social factors affecting the ‘informal economy’ and social factors affecting ‘precarious work’.

A combination of social and economic factors has promoted the dramatic shift towards precarious employment. As discussed below at 1.4.5, economic globalisation has had a profound impact on employment. The dominance of neo-liberal ideology has changed the way many people think about the employment relationship and the role of the state in the regulation of labour.

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41 See, for example, Judy Fudge, ‘Precarious Employment in Australia and Canada: The Road to Labour law Reform’ (2006) 19 AJLL 105.
The move towards new, more flexible modes of employment has coincided with increased female participation in the workforce and challenged traditional social attitudes relating to the sexual division of labour. Today, more women are returning to work after childbirth and having fewer children at more advanced ages than previous generations. This further emphasizes a cultural shift in how people perceive employment and their expectations surrounding job security and entitlements. For some women, casual employment may better suit their lifestyle and allow them to achieve a balance between work and family responsibilities (notwithstanding the growth of female participation in the labour force, domestic work still falls predominantly on women). The fall in union density may also be a contributing factor to the increase in precarious employment.

The benefits of globalisation and labour market flexibility have not been distributed equally. The ‘social dimension’ of globalisation has resulted in a rise in precarious work, with women making up the majority of those people in it. As mentioned above, for some women part-time or casual work may be the preferred mode of employment. Many women, however, find themselves in precarious employment as this is the only type of employment offered to them. Likewise, young people also make up a large proportion of part-time and casual employment. This may be because it allows them to balance work with study but is also due to the type of employment on offer.

1.4.3 Is there a predominance of certain groups working in the ‘informal economy’ (for instance, certain racial or ethnic groups, men or women, older/younger workers, able/disabled workers, particular size or types of enterprise)? How does this compare to the social picture of the labour market more generally?

There is very little data available on the size or composition of the informal economy in Australia. Much of the informal economy is compromised of migrants working illegally. This, like any illegal phenomena, is hard to measure. The government estimates that 50% of illegal immigrants are engaged in paid employment. Those without appropriate working visas often work precariously, for low wages without legal protection. This type of employment is common in industries where there is an acute labour shortage – for example, the fruit harvesting industry. Other areas of the economy where informal work is commonplace include the textile, clothing and footwear industries. Within these industries, many migrant women workers perform home-based labour outside of the formal economy (more at 4.3 below).

44 See, ILO World Commission on the Social Dimension of Globalisation
45 Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace, Department of Immigration and Multicultural Affairs, Canberra, 1999, P 18.
46 See, for example, Peter Mares, ‘Seasonal migrant labour: a boon for Australian country towns?’ available at www.latrobe.edu.au/csrc/2ndconference/refereed

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1.4.4 Is there a predominance of certain groups working in ‘precarious work’ (for instance, certain racial or ethnic groups, men or women, older/younger workers, able/disabled workers, particular size or types of enterprise)? How does this compare to the social picture of the labour market more generally?

Yes. As mentioned above, the incidence of precarious work is growing in Australia. In 2003, the proportion of employees engaged in full-time permanent work was 61%, down from 75% in 1988. The proportion of people engaged in casual employment has grown for both men and women. Women, however, are more likely to be engaged in part-time work. In 2000, 46% of all employed women were employed on a part-time basis. Job growth among women has also outpaced men in relation to low-skilled occupations.

1.4.5 What are the economic factors that have prompted changes in the informal economy in recent years? Specifically what role has been played by each of the following:

- economic growth or downturn
- unemployment rates
- privatization or re-organisation of state owned enterprises
- trade agreements or other international relations
- other economic factors?

Australia has undergone a period of significant labour market reform, ostensibly aimed at the de-regulation of labour law. Much of the legal reform has taken place in the backdrop of sustained economic growth and low levels of unemployment. There have also been reforms in other areas of public policy, such as the regulation of social welfare, which has seen the tightening of conditions relating to unemployment benefits; designed to encourage people into the labour market.

Many state owned enterprises have been privatized, including banks, utility companies and essential services – resulting in a reduction in the number of people employed in the government sector. The public sector has also undergone a planned reduction in size under the coalition government.

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The economy has undergone significant transformation. Globalisation and neo-liberal theory have been central to economic reforms that have changed the economy and promoted new modes of employment. Both of the Australia’s major political parties have, with differing levels of enthusiasm, embraced neo-liberal theory and enacted economic policies supporting globalization, including privatization, de-regulation and the signing of free trade agreements. As a result, the ‘new economy’ has transformed old models of work. The impact on workers has been profound. For many workers, globalisation has increased inequality and insecurity.

As Creighton and Stewart observe, within the new economy employers are attempting to achieve ever more flexibility over the ways in which work is organised. By engaging workers in casual or other non-standard employment relationships, the employer is able to respond to fluctuations in the market. This can occur through limiting the number of hours an employer engages a worker or by dismissing workers. The law supports this flexibility by making it cheaper to hire casuals and contractors (in terms of overall employment benefits) and by making it easier for such workers to be dismissed at short notice.

Part 2. ‘Informal Economy’ and ‘Precarious Work’ - The Regulatory Framework

2.1 The Legal System and the ‘Informal Economy’ and ‘Precarious Work’

2.1.1 What are the main legal changes or factors that have promoted changes in the ‘informal economy’ and the incidence of ‘precarious work’ in recent years?

The main legal factors which have promoted changes in the ‘informal economy’ and the incidence of ‘precarious work’ in recent years include:

- the definition of ‘employee’ which enables businesses to structure the form of engagement of staff to fall outside legal protection given to employees;
- the exclusion of casual employees from unfair dismissal protection under federal legislation; and
- the exclusion of true casual employees from entitlements to some basic labour protections, such as annual leave, sick leave, and notice periods for termination of employment.

2.1.2 Do existing laws (other than labour law) influence enterprises and workers in their decisions to enter or stay in the ‘informal economy’ or ‘precarious work’? If so, indicate the major legal influences and how they operate. In doing so you may wish, for example, to refer to the impact of corporations law, taxation law, social security/welfare law, family law, criminal law, migration law, or any other area of law.

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There are many laws which have an influence on enterprises and their decisions to enter or stay in the informal economy. Such laws include those identified and briefly explained below:

- Labour Laws:
  - enable casual workers to be outside some minimum protections;
  - enable labour to be engaged as contractors rather than employees thereby placing them outside the scope of the legislation;
  - may encourage short-term contract arrangements to avoid the operation of unfair dismissal protection;

Although attention to law enforcement and compliance to labour standards has been increased in very recent years, there remain problems of identifying employers’ failure to meet, or breach of, labour standards. Moreover workers may be reluctant to expose breaches for fear of losing their sole source of income. Thus even where the law provides minimum protections and standards, enforcement may be an issue.

- Migration Laws:
  - permit short term (up to four years) work visas in certain nominated industries (457 visas). However, there have been serious instances of exploitation of workers sponsored under this scheme. The federal government is in the process of reforming the law in this area.
  - migrant workers who remain in Australia for longer than the period for which their visas permit can be hard to trace, and may not want to be located. As a result, these workers are vulnerable to exploitation.

- Tax Law:
  - Some workers may constitute ‘employees’ under taxation legislation but not meet the relevant definition of ‘employee’ for labour law purposes.

2.2 The Purpose of Labour Law

2.2.1 What is/are the main policy goal(s) or purpose(s) of labour law regulation in your country? Have these goal(s)/purpose(s) changed in recent years? Have some goals/purposes become more predominant than they were previously?

The main purpose of labour law regulation in Australia is to govern the nature and scope of the employment relationship. The traditional perception is that relations between labour and capital should not be regulated solely by market forces. The inequality of bargaining power between labour and capital means that individual employees would be vulnerable to severe exploitation if left subject to market regulation alone. Labour law, therefore, has traditionally sought to correct imperfections in the market and to protect the vulnerable through the establishment of minimum standards of employment.

Significantly, in recent years there has been a shift in regulatory goals towards the promotion of a neo-liberal economic agenda – emphasising deregulation, efficiency, flexibility and individualisation. The recent enactment of *Fair Work Act 2009* (Cth) attempts to redress the problems created by the deregulated approach and to introduce (or reintroduce) minimum protections and safeguards for employees.

2.2.2 To what extent are the goals or purposes of labour law supported or subverted by legal regulation in other areas – for example, in social security, corporations law, or the law in another area? If possible illustrate your answer with some examples.

As mentioned above, the regulation of labour is intertwined with many other areas of law. For example, the Australian social security system provides a regular income to people who are unemployed. This has the potential to interfere with the operation of the labour market because it constitutes alternative income not based upon employment. The dollar amount of individual benefits may also impact on the regulation of labour law in relation to minimum wages and so forth.

Labour law is supplemented by migration laws which permit short term (up to four years) work visas for migrant workers in certain nominated industries (457 visas). Minimum standards of employment also apply to migrant workers. For example, under reforms which are operative from September 2009, the government has determined that temporary visa holders must be paid market rates and, generally speaking, cannot be paid less than local workers.

The Commonwealth’s power to legislate in the area of labour law is premised on the corporations power contained in the Commonwealth Constitution. Laws regulating corporations also have implications for labour law. For example, if a company goes into liquidation it becomes difficult if not impossible to enforce any breaches of labour law committed before the company failed.

2.3 What is the scope of labour law?

2.3.1 What is the scope of labour law in your country? That is, how does labour law define the workers and enterprises it intends to cover?

The majority of Australian workplaces are covered by the *Fair Work Act*. The constitutional foundation for this legislation rests significantly upon the corporations power of the Commonwealth Constitution. This means that the legislation covers, among others, workers employed by constitutional corporations, corporations which are trading, foreign or financial corporations formed under the Corporations Law. Currently, federal legislation regulates between 70 and 80 per cent of the Australian workforce. Generally, people considered ‘workers’ for the purpose of labour law are those who are either employees or independent contractors.
2.3.2 Has there been a failure to formalise labour law protections and extend them to the new workers (such as those who work in the 'informal economy' or have 'precarious work') or has there been a 'de-formalisation' so that these workers have been excluded from the scope of labour law?

To a large extent the regulation of employment is still based upon the traditional paradigm of the ‘standard employee’ (discussed above). To a large extent, the law has not responded to changes in the composition of the labour market, resulting in many workers being engaged in precarious work without the benefit of full legal protection. This is because they are legally not employees or because it is hard to enforce the labour law standards (for a number of reasons which are explored elsewhere).

2.3.3 If there are deficiencies in the scope of protection offered by labour law to what extent are these the consequence of policy failure or of inadequate interpretation by judicial or other state actors (such as tribunals)?

Labour law has undergone significant legislative reform in recent years. Notwithstanding the opportunity to address these issues, the legislature has failed to introduce adequate provisions to cure deficiencies in the legal protection of precarious workers and those working in the informal economy. That is not to say they have been ignored. For example, there are rights to long term casual workers and rights of entry to workplace premises by union officials, without notice, if there are suspected breaches of the labour standards in respect of textile clothing and footwear outworkers.

2.4 Minimum standards/basic labour rights

2.4.1 Are there minimum standards or basic labour rights guaranteed to workers in your country? What are the most important of these standards or rights?

Minimum labour standards are guaranteed for most Australian workers in award entitlements and legislated standards. Better terms and conditions can be negotiated collectively or individually.

The most important of these standards or rights are:
- Minimum wages;
- Holiday (annual leave);
- Sick leave;
- Carers and personal leave;
- Long service leave;
- Redundancy pay;
- Parental leave;
- Community service leave;
- Notice periods required to terminate the employment relationship;
- Maximum weekly hours of work plus reasonable additional hours;
- Family-life balance- flexible working arrangements; and
• Unfair dismissal protection and protection from discriminatory dismissal.

2.4.2 Which workers are entitled to the enjoyment of these standards or rights by law? Please comment generally on the position of workers in the ‘informal economy’ or ‘precarious workers’.

Generally, workers who are 'employees' are entitled to protection by these laws.

Workers who are independent contractors (who provide their services for monetary reward, are not subject to the control/supervision of their principal, who do not work exclusively for their employer etc – see previous discussion) are generally outside the protection of labour laws. However, there are mechanisms in place for reviewing the contracts of independent contractors in certain circumstances and especially where the contracting arrangement is a sham.

"Informal economy" workers are effectively beyond the reach of these laws notwithstanding the obligation of their employers to comply. Enforcement and compliance remain major problems in this regard.

'Precarious workers' who work as independent contractors will generally fall outside the scope of current protective laws. However, where they are casual workers or seasonal workers, some provisions may apply. For example, longer term casual workers have unfair dismissal protection.

2.4.3 Which groups are precluded from a legal entitlement to the minimum standards or basic labour rights? Does this arise from specified exemptions? In which case which groups are exempted? And from which rights?

Independent contractors are precluded from minimum labour standards. This is because the definition of 'employee' excludes those contracting for services (see 1.1.3) and these protections apply only to employees, not independent contractors.

Non-corporate employers (apart from those in the State of Victoria) may not have to comply with some basic national standards as Federal law is applied to corporate employees. Non-corporate employers, for example, partnerships, may be bound by State legislation.

There are specific exceptions in some cases. These include:

• Employees on fixed term contracts or contracts for a specified task are excluded from unfair dismissal laws.

• Casual workers are excluded from provisions such as unfair dismissal protection; parental leave entitlements; flexible work arrangements; annual leave; redundancy pay. Workers who are engaged on a systematic basis for a twelve month period and expect continuous
employment may be outside the category of true casual employee and eligible for these benefits.\textsuperscript{54} 

- Employers of a certain size. For example, redundancy pay is not payable by employers which engage fewer than 15 employees.\textsuperscript{55} 
- Workers on training arrangements may be precluded from unfair dismissal protection.\textsuperscript{56} 

For a period of about three years between March 2006 and end of June 2009, there was a major exclusion from unfair dismissal laws under Work Choices: employees of employers which engaged 101 or more employees were excluded from unfair dismissal protection. This represented a virtual dismantling of unfair dismissal protection to workers, given the size of Australian businesses.\textsuperscript{57}

2.4.4 Does the law setting out minimum standards or basic labour rights expressly address the needs of workers in the ‘informal economy’ or ‘precarious work’ at all? What form does this regulation take?

Attention to precarious workers is given in the context mainly of casual employment. While true casual workers may have the most basic rights such as minimum rates of pay, they are generally excluded from other rights such as paid annual leave and sick leave. However, where the casual worker has been engaged on a regular and systematic basis for a sequence of periods of employment during at least 12 months and reasonably expects on-going work, they attain a right to certain other basic labour rights.\textsuperscript{58}

2.5 Human Rights and Anti-discrimination Law

2.5.1 What is the scope of anti-discrimination law in your country? That is, how does anti-discrimination law define the workers and enterprises it intends to cover? Is this intended coverage wider than that of labour law?

Australia’s human rights and anti-discrimination laws are embodied in numerous pieces of legislation both at the federal and state level. They seek to promote the principle of equal opportunity by proscribing forms of discrimination on the basis of certain characteristics such as gender, race and religion among others. These laws generally apply to discrimination in a broad range of contexts, including in education and the provision of goods and services. The laws are therefore intended to apply in a wider context than only labour law but nevertheless they have a significant impact on employment. In this context it is unlawful to discriminate (on particular grounds) in relation to

\textsuperscript{54} See, eg, \textit{Fair Work Act 2009 (Cth)} s 12 ‘long term casual employee’ and s 67.
\textsuperscript{55} \textit{Fair Work Act 2009 (Cth)} ss 23 and 121.
\textsuperscript{56} \textit{Fair Work Act 2009 (Cth)} s 386(2)(b)(i).
\textsuperscript{58} \textit{Fair Work Act 2009 (Cth)} s 12 ‘long term casual employee’.
inter alia hiring or terminating employees, as well as determining pay and conditions, promotion and training. Most legislation is also broad enough to cover non-employees, such as independent contractors and volunteers, as well as unions, and trade associations among others.

At the federal level, there are five main statutes dealing with anti-discrimination and human rights law. These are:

* Age Discrimination Act 2004
* Disability Discrimination Act 1992
* Racial Discrimination Act 1975
* Sex Discrimination Act 1984

Each State and Territory has its own anti-discrimination laws. As with the federal laws, these deal with disparate grounds of discrimination, including race, gender, sexual orientation, marital status, pregnancy, age, and disability.

2.6 Independent contractors

2.6.1 Has there been an increase in the number of independent contractors in recent years?

In November 2008, there were 967,100 independent contractors in Australia.\(^{59}\) Because this figure reflects only those who listed ‘independent contractor’ as their ‘main job’, the figure could be much higher. As discussed above in 1.3, because the ABS have changed their categories for measuring forms of employment, it is difficult to determine whether there has been an increase in independent contracting in recent years.

2.6.2 To what extent do independent contractors work in a ‘black’ or ‘cash economy’?

a) What is the evidence of this?
b) What appear to be the most significant social, economic and/or legal factors determining this?

As discussed above in 1.4.1 and 1.4.3, there is very little data available on the size or composition of the informal economy in Australia; therefore it is difficult to assess the extent to which independent contractors work in a ‘black’ or ‘cash economy’.

2.6.3 Is there any evidence that some of those who contract independently for work are more akin to precarious workers than independent entrepreneurs?

As discussed in 1.1.3, the common law distinction between independent contractors and dependent employees is based on a multi-factor test. There is a

significant volume of commentary regarding would-be employers who attempt to disguise employment relationships as contracts for services in order to escape the obligations they would otherwise owe to employees. These obligations include superannuation, paid leave, award provisions and unfair dismissal protections.\(^{60}\) Where this occurs, independent contractors suffer a high degree of precariousness.

Independent contractors may also be vulnerable where they obtain their work from one principal. This economic dependence may occur in industries such as transport where owner-drivers need a steady source of income to meet business commitments, mainly repayments on the purchase of their vehicles.

Workers will sometimes prefer to be hired as independent contractors rather than employees due to ‘the feeling of independence’ and tax advantages possible; however, often they have little choice.\(^{61}\) Hirers attempt to disguise employment relations by drafting contracts to include as many of the factors akin to independent contracting as possible, for example by ‘downplaying any element of control’ and explicitly describing the worker as an independent contractor.\(^{62}\) Although federal legislation prohibits such ‘sham’ arrangements and there are many cases where the court has exposed and overturned disguised employment relationships, the practice continues.\(^{63}\)

a) what does the statistical evidence reveal about the pay and working conditions of independent contractors? In particular how many of these workers are estimated to receive an income below that of minimum pay standards?

This is difficult to answer. There are few studies that evaluate the pay or work conditions of independent contractors. Independent contractors are not governed by the minimum pay standards for employees set out in the \textit{Fair Work Act 2009}, but as discussed below, they have the right to contest unfair contracts under the \textit{Independent Contractors Act 2006 (Cth)} and the \textit{Trade Practices Act 1974 (Cth)}.

\section*{2.6.4 Are independent contractors governed by labour law or some other area of law (for example, corporations law)?}

Independent contractors are governed by the \textit{Independent Contractors Act 2006 (Cth), the Trade Practices Act 1974 (Cth)} and state laws that are not excluded by virtue of section 8 of the \textit{Independent Contractors Act}.\(^{64}\)

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2.6.5 What, if any, are the work related standards or rights to which independent contractors are entitled?

The *Independent Contractors Act 2006* (Cth) prevents states and territories from legislating to include independent contractors as employees for the purposes of industrial regulation. Section 8 of the Act lists several ‘workplace relations matters’ that are excluded from state jurisdiction, including leave, remuneration and industrial action. This means that all independent contractors (except those groups whose state entitlements are expressly preserved in the *Independent Contractors Act*, for example outworkers) are governed by federal legislation. Some state laws are also preserved in section 8, for example laws relating to discrimination, superannuation and child labour.

The *Independent Contractors Act* also prevents states from legislating with regard to the fairness of contracts. The *Independent Contractors Act* does contain provisions for review of unfair contracts, however this assessment is now made by the Federal Court and Federal Magistrates Court.

Some protections for independent contractors are also contained in the *Trade Practices Act 1974* (Cth) (the TPA). The TPA ‘prohibits unconscionable dealing in small business dealings’. It includes consideration of the relative bargaining strengths of the parties and ‘the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer’.

2.6.6 Is it possible for independent contractors to take any form of collective action to enforce better working conditions?

Collective bargaining rights, along with other protections contained within the *Fair Work Act 2009* (Cth) are only applicable for employees at common law, not independent contractors. As mentioned above, the *Independent Contractors Act 2006* (Cth) has worked to curtail state power to legislate for

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the inclusion of independent contractors in industrial matters. Collective bargaining by independent contractors can be seen as a contravention of section 45(2) of the Trade Practices Act 1974 (Cth) in three ways: as a collective boycott, price fixing or a contract that lessens competition.\textsuperscript{71} Recent amendments to the Act provide independent contractors with exemption from these provisions if a collective bargaining notice is lodged with the Australian Competition and Consumer Commission (the ACCC), and the ACCC does not object.\textsuperscript{72}

Trade unions are expressly excluded from this process. If a collective bargaining notice is lodged by a trade union, an officer of a trade union, or a person acting at the direction of a trade union, it will be deemed invalid.\textsuperscript{73}

Importantly, when deciding whether to object to a collective bargaining notice, the ACCC must consider whether the ‘public detriment from the proposed conduct would outweigh any public benefit’. The personal situation or working conditions of the independent contractors is a private matter, and therefore not a relevant consideration.\textsuperscript{74} McCrystal notes that whilst the collective bargaining notification scheme provides independent contractors with a limited right to collective bargaining, they may still be subject to common law prohibitions including the restraint of trade doctrine. Furthermore, a lack of information and awareness about the notification scheme presents a practical barrier to accessing collective bargaining rights.\textsuperscript{75}

2.7 Agricultural and Seasonal Workers

2.7.1 Have the numbers working in agriculture generally and in seasonal work in the agricultural sector increased or decreased in recent years? In responding to this question please outline any social or economic factors which have been significant in shaping this sector of the labour market?

Over the past decade Australia has enjoyed a sustained period of economic growth and relatively low unemployment. During this time there has been a significant labour shortage in many sectors of the economy. The agricultural sector, in particular, has experienced acute difficulties in attracting workers. Primary producers predominantly rely on a mixture of legal and

undocumented (illegal) workers to meet labour demands.\textsuperscript{76} The legal workers consist of family members, locals, students, itinerant retirees and backpackers and tourists working under the Working Holiday Maker Scheme (WHM), which allows certain tourists to work for a single employer for a period of three months. There are also a significant number of ‘illegal’ workers, including those claiming government benefits, tourists without appropriate working visas and unauthorised migrants. These workers largely fall outside the scope of labour law protection.

There has been a recently introduced pilot scheme to bring in temporary workers from the Pacific region to work as agricultural workers to assist in the seasonal labour shortage (see further 2.7.2 below).

2.7.3 Are all agricultural and seasonal workers entitled to the full protection of all standards and rights under labour law?
   a. Which agricultural or seasonal workers are excluded from the protection of labour law? And in relation to which standards or rights?

Seasonal workers are expressly excluded from unfair dismissal provisions under the federal \textit{Fair Work Act 2009}, s 386(2) (a). This provision is intended to apply to workers such as fruit pickers or retail workers engaged for the Christmas period to work for an uncertain duration. Most seasonal workers will be employed on a casual basis and covered by a relevant award and are entitled to the same protection as ordinary workers.

2.7.2 Do agricultural and seasonal workers enjoy standards of pay and conditions comparable to workers in urban areas? If not, why not?

Seasonal workers are entitled to the same pay as other Australian workers. However, many seasonal workers, especially those working illegally, do not enjoy the same standards of pay and conditions as those working in the formal economy. To address the issues of labour shortages and illegal employment in the agriculture sector, the federal Government in 2008 announced a pilot scheme to allow 2,500 workers from the Pacific Islands to work in horticulture and viticulture.

2.8 Migrant workers

2.8.1 Can labour shortages be met by migrant workers?

In some areas, labour shortages are being met by migrant workers. The temporary 457 visa scheme referred to earlier limits the categories of employees who can be engaged by sponsoring employers. This list is always under review. It includes a wide range or workers and industries, including IT workers and hairdressers.

\textsuperscript{76} Peter Mares, ‘Seasonal migrant labour: a boon for Australian country towns?’ available at www.latrobe.edu.au/csrc/2ndconference/refereed
2.8.2 Are there any restrictions placed on the employment of migrant workers – in relation to certain kinds of work? or in certain sectors? or for certain classifications of work relations (e.g. labour hire)?

Yes, pursuant to regulations made under the Migration Act 1958 (Cth), the visa scheme restricts the type of workers, the industry sector and the period of entry to the country. For example workers can enter for 3 months to maximum of 4 years; and there are nominated skills positions (which are in the Australian Standard Classification of Occupations (ASCO) codes which employers must establish they need to fill with short term overseas labour.\(^77\)

2.8.3 Are there different laws, rules or norms, to cover migrant workers when compared with other workers? What are the main differences established?

Yes. The main difference relates to minimum pay. The minimum pay to some groups on visa arrangements may have been higher than the minimum rate of pay employers are obliged to pay Australian workers under Minimum Salary Level provisions which were in place. Recent changes to enable the market rate to be paid may address this issue.

2.8.4 Does your country recognise production in certain ‘export zones’? Is the legal regulation applicable to these workers different from that which applies to workers elsewhere? What are the main differences?

No.

2.9 Sex Work

2.9.1 Is sex work lawful in your country? Does the law distinguish between various forms of sex work?

The legal status of sex work is governed by State and Territory legislation. Sex work occurs in Australia in a variety of legalised, criminalised and decriminalised contexts.\(^78\) Prostitution is legal in all jurisdictions except Western Australia and South Australia. In Victoria, for example, sex work is governed by the Prostitution Control Act 1994. This Act allows sex work to occur in ‘in-house establishments’, brothels and through escort or call-out agencies.\(^79\) Sex work in other contexts, such as street-based prostitution, remains criminalised.

2.9.2 How does your country regulate sex workers?

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\(^77\) See Department of Immigration and Citizenship web site for ASCO codes current listings: http://www.immi.gov.au/skills/skill-code.htm


\(^79\) Ibid.
As mentioned above in 2.9.1, the various State and Territory governments regulate the legality of sex work. The federal government has criminal laws relating to sex-trafficking.

2.9.3 Are workers in the sex industry entitled to the protection of labour law? Can they enforce their rights under labour law?

Federal industrial legislation regulates the employment of sex workers where there is an employment relationship in circumstances such as in-house and agency establishments. Labour law may apply even where the work is illegal (see *Phillipa v Carmel*).  

Notwithstanding the fact that sex workers are technically afforded the same protection as any other employees under the law, many (if not most) sex workers find themselves outside the scope of protection. This is because the vast majority of workers are described by employers as sub-contactors, rather than employees. The enforcement of rights under labour law would likely be difficult for various reasons including *inter alia* the difficulty of organising workers, social stigma and the demographic of workers.

2.9.4 Has sexual slavery been recognised as a problem in your country?

Yes, sexual slavery has been recognised as a significant problem in Australia. It is estimated that, at a minimum, 300 women are trafficked to Australia each year to work as sex slaves. The majority of these women come from Southeast Asia, South Korea, Taiwan and China. In recognition of this problem, legislation has been enacted to deal with the issue (see below).

2.9.5 What regulations exist to deal with sexual slavery? Are these laws part of the general labour law system, or part of a different regulatory sphere (for example, migration law or the criminal law)?

Australia prohibits sex and labour trafficking and sex slavery under the Commonwealth Criminal Code (Div 270 and 271). These laws exist independently of labour law and are regulated by the criminal law. The penalties for sexual slavery are severe - see *Wei Tang*, a case involving five Thai women working in a brothel in Melbourne.

2.10 Home-based Workers

2.10.1 Has the incidence of home-based work increased or decreased in recent years?

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82 Although estimates vary and due to the insidious nature of trafficking it is difficult to determine with any accuracy.
a. What definition of home-based work is used when gathering statistics in your country? Is this adequate?
b. What factors have been identified in bringing about changes in home-based work in recent years?
c. What proportion of home-based workers work in their own home and what proportion work in the home of another?

In the year 2000, the estimate was that there were one million home-based workers.\(^{84}\)

There are problems accessing and obtaining true and accurate data on home-based workers. Home-based work can occur in a variety of ways—e.g., independent contractors working from or out of home or employees who are permitted to work at home for all of the working week or employees who work from home for the majority or some of their working time. This variety of home-based work means that meaningful accurate data is difficult to obtain and the line between true home-based workers and workers who spend a period working from home is blurred.

It is estimated that in Australia there has been an increase in such workers due to many factors, including agreements which permit workers to undertake work at or from home.

2.10.2 What are the most common forms of work undertaken by home-based workers in your country?

The most common form of home-based work in Australia has traditionally been in the clothing and textile industry. Increasingly technology has enabled work to take place at home in some sectors, including the IT industry, although this may not be for the whole of the working week. Domestic work and home care work would by definition take place at home. Domestic work would be only covered by minimum labour standards if the domestic helper is classified as an 'employee'.

2.10.3 Are all home-based workers entitled to the protection of labour standards and labour law?

a. Which home-based workers are excluded from the protection of labour law? And in relation to which standards or rights?

Not all home-based workers are entitled to the protection of labour standards and labour law. The basis of the entitlement depends on the classification of the worker as an employee, as previously discussed. For example, domestic work would be only covered by minimum labour standards if the domestic helper is classified as an 'employee'. Thus independent contractors among others will fall outside labour law protection (see above).

2.10.4 Are all home-based workers entitled to the protection of other laws which regulate the workplace, such as anti-discrimination law, or occupational health and safety laws?
   a. Which home-based workers are excluded? And in relation to which standards or rights?

Yes. Anti-discrimination and occupational health and safety laws generally cover both employees and contractors.

2.10.5 Are home-based workers who are employed to do domestic work entitled to protections under the law?
   a. Is any distinction made in relation to these workers according to whether they are employed by an enterprise, or directly by the person in whose home they work?

They will be covered under federal and labour law regulation where they are engaged by the corporate employer (or individual, partnership or non-corporate employer in Victoria) and are classified legally as 'employees'.

Where they are hired by individuals or partnerships or non-corporate employers (other than in Victoria), they will fall back on the state law which has various provisions for minimum standards but is not uniform across the nation. It will be recalled (see earlier section) that federal labour laws rely on the corporations power in the Constitution. Thus corporate employers are bound by federal laws (as well as all Victorian employers) and the non-corporate employers (other than in Victoria) come under state laws.

2.11 Volunteers

2.11.1 Has there been an increase or a decrease in the number of volunteer workers in your country in recent years?

What constitutes ‘genuine’ or truly voluntary work is difficult to define and the boundary between paid employment and voluntary work is often blurred. That said, there has been a significant increase in the number of people who engage in volunteer work in Australia. According to the Australian Bureau of Statistics, 32% of people aged 18 and over volunteered in the year 2000. This compares to only 24% in 1995. Women and men participate in volunteer work in roughly the same proportions. On average, people volunteer for approximately 72 hours per year. It is estimated that in the year 2000, the value of volunteer work totalled some $42 billion.\(^{85}\)

2.11.2 In which sector(s) of the economy are most volunteer workers to be found?

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a. Is there a predominance of paid or volunteer workers in the particular sectors?

Volunteer workers are found in a wide variety of sectors, including the Arts, Sports, Welfare/Community, Religious, Health, Environment and Animal Welfare. Most volunteer work (56%) involves fundraising. Other significant activities include management, teaching and administrative work.  

2.11.3 Does the legal system provide any rights or protections to volunteer workers?
   a. Are the protections enshrined in labour law or elsewhere?
   b. Do all volunteers receive the protection of the law? Which volunteers are protected and which are excluded?
   c. And in relation to which particular standards or rights do any exclusions operate?

In Australia, the law relating to the regulation of volunteer work is complex, varied and patchy. Certain areas of work have traditionally been covered by statute, such as emergency service volunteers. Likewise, volunteer work in schools and by school students is covered by legislation, such as the Education Act 1958 (Vic).

Other than these specific examples, there is a notable absence of legislation to cover volunteers in the workforce more generally. Indeed, the Fair Work Act does not apply to volunteers unless they are under a contract of employment. Volunteers in NSW are, however, covered by anti-discrimination legislation. Certain industrial awards also regulate volunteers within particular sectors. Further, certain rights and protections may exist under the law of contracts.

2.12 Child Workers

2.12.1 Has there been an increase or a decrease in the number of children working in your country in recent years?

In recent years, there has been a significant increase in the number of children working while still attending school. Over 10% of children aged 10-14 engage in some form of work, half of these children are employed. Of those between 16-19 years, the figure rises to 60%.

2.12.2 Which sector(s) of the economy are most child workers to be found?
   a. Is there a predominance of child or adult workers in the particular sectors?

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86 Ibid
87 See, for example, Andrew Stewart, ‘Making the working world work better for kids’ (2008) A Report for the NSW Commission for Children and Young People.
A recent Australian report found that child labour occurs in a wide variety of contexts and is best described as 'temporary, fragmented and shifting.' The report found most children work for employers but many also worked for families. The most common areas of employment were in babysitting, sales work, leaflet/newspaper delivery, gardening and cleaning work. The type of work children perform typically changes with age. For example, older children, aged 16 and above, primarily work in the fast food industry.

2.12.3 Does labour law have special regulations relating to the employment of children in your country?
   a. Is the employment of children prohibited? Under a certain age? In certain sectors?

See answer to 2.12.4 below.

2.12.4 Does the labour law system provide any special protections to child workers?
   a. In relation to which particular standards or rights?

The regulation of child labour is subject to general labour laws governed by the States and Territories. Young people may also be protected by, among other things, awards, anti-discrimination laws, health and safety laws, minimum standards. The federal *Fair Work Act* is almost silent on the issue of child labour.

Child labour laws in Australia are complex. Each State and Territory has different laws governing the employment of young people. Generally, all jurisdictions outlaw the employment of school-aged children during school hours, although school leaving ages vary among the States and Territories. The two largest states, New South Wales and Victoria, prohibit the employment of people under the age of 15 without an official permit. These states also ban employment in certain industries and apply special rules for work within the entertainment industry.

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2.13 Enterprises and the ‘Informal Economy’ and ‘Precarious Work’

2.13.1 To what extent has the size or nature of business determined the development of an ‘informal economy’ or ‘precarious work’?

a. Are those who work for small enterprises exempted from protections of the law? If so why? What are the costs of and the barriers to, being regulated for people who wish to develop a small enterprise?

The Fair Work Act 2009 (Cth) (replacing the Workplace Relations Act 1996) contains some marked differences in the protections accorded to employees employed by small business employers. Division 3 of the Fair Work Act accords unfair dismissal provisions to those employees who have completed the requisite minimum period of employment and are either covered by a modern award, an enterprise agreement or receive an income less than the high income threshold.98 The minimum period of employment differs for employees working for a small business employer (six months employment is required for general workers to qualify for protection from unfair dismissal, whilst twelve months of employment is required for small business employers).99 Importantly, small business employers are also exempt from unfair dismissal provisions if they act consistently with the Small Business Dismissal Code.100 Small business employers are also exempt from paying redundancy pay.101

It should be noted, however, as previously discussed, that for a period of three years (2006 to 2009) the business exemption from unfair dismissal laws applied to most businesses—due to the fact that only employers which engaged 101 or more employees (computed by aggregating part time and fulltime employees etc). This freed most businesses from the obligation to dismiss fairly.

b. What is the purpose of the exemptions?

The objects of the unfair dismissal provisions of the Fair Work Act include the aim to ‘establish a framework for dealing with unfair dismissal that balances … the needs of business (including small business)… and… the needs of employers’.102

c. What is the relevant size of the enterprise required for exemptions? Does this size vary in relation to different exemptions?

See above and below at 2.13.2.

98 Fair Work Act 2009 (Cth) s 382.
99 Fair Work Act 2009 (Cth) s 383.
100 Fair Work Act 2009 (Cth) ss 385(c), s388.
101 Fair Work Act 2009 (Cth) s 121.
102 Fair Work Act 2009 (Cth) s 381.
d. What has been the impact of the exemptions?

It is difficult to evaluate the impact of these exemptions given that they have only been in operation for a short time. Previously the exemptions were far broader, and resulted in increased precariousness for many Australian workers. This is borne out in a number of studies undertaken into Work Choices.103

2.13.2 How is the size of the enterprise determined? Are there any difficulties in determining it? In enforcing labour standards who carries the burden of proving the size of the enterprise? Does this make a difference to the effectiveness of the law?

Section 23 of the Fair Work Act 2009 (Cth) defines small business employers as those that at a particular time employ fewer than 15 employees. Importantly, casual employees are not included in the count unless they are employed ‘on a regular and systematic basis’. When calculating the number of employees, ‘associated entities are taken to be one entity’.

2.13.3 Can enterprises easily rearrange their size in order to escape labour standards?

Given that associated entities are included when calculating the number of employees by an employer,104 there are some mechanisms to protect against the rearrangement of businesses to attract the small business exemptions.

1.4 Is there any regulatory collision – say between corporate law and labour law – which operates to prevent workers from the full enjoyment of labour protections?

Generally no. Federal regulation of labour standards under the Fair Work Act 2009 (Cth) is premised on the corporations power contained in the Australian constitution.

Part 3. Organisation and Representation of Workers in the ‘Informal Economy’ and ‘Precarious Work’

3.1 The Role of Trade Unions

3.1.1 To what extent have trade unions, individually or collectively, sought to improve the work conditions of those in the ‘informal economy’ and those in ‘precarious work’?


104 Fair Work Act 2009 (Cth) s 23(4).
There have been a number of campaigns by trade unions on behalf of groups of workers that are often engaged in precarious employment. In the late 1990s and early 2000s a number of unions sought to improve the work conditions of casual workers by limiting the rights of employers to engage casuals. The unions sought a ruling that employers could only engage casuals where ‘the work involved was clearly of a temporary or irregular nature’. This campaign was not successful, with tribunals creating a right for long-term casuals to request conversion to permanent status, but refusing to prohibit the employment of long-term casuals.

A more successful campaign by trade unions and other community groups has been in regard to the working conditions of outworkers. As discussed in 1.1.3, outworkers are often precariously engaged. Although some outworkers may be employees, as a result of trade union and community group campaigns, many state laws contain deeming provisions ensuring that all outworkers are employees, regardless of whether they are independent contractors or not. Furthermore, the campaigns have resulted in federal legislative provisions exempting state outworker protections that would normally be overridden by federal legislation. Stewart attributes the success of this campaign to various strategies including cases involving the enforcement of award protections, working with major retailers to promote ethical production processes, and pressuring the government to adopt an improved regulatory model. There are still some problems with the protection of outworkers in Australia (see 4.3.1 below).

A further example of trade union support for the rights of informal and precarious workers is the telephone lines that offer free advice and referrals for both union and non-union members. These include the ACTU Workers’ Line in the past, and the phone service and blog now offered by Unions Australia.

3.1.2 Is there scope for the trade unions to provide services to workers in the ‘informal economy’ and in ‘precarious work’?

Collective bargaining rights, along with other protections contained within the Fair Work Act 2009 (Cth) are only applicable for employees at common

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107 Andrew Stewart, Stewart’s Guide to Employment Law, Federation Press, Sydney, 2008, 61. For more details regarding the campaign, see Michael Rawling, ‘The Impact of Federal Legislation upon the Scope of State Jurisdiction to Regulate Outwork’, forthcoming article in the AJLL.
Whilst this includes some precarious workers, such as part-time and casual employees, independent contractors and informal workers fall outside the scope of many protections, making it difficult for unions to assist. There have also been limits on the types of matters that could be included in agreements and awards; it has been difficult to regulate the engagement of contractors or outworkers through awards and agreements. For example, the definition of employment matters has made it difficult to include prohibitions on the engagement of contractors in agreements.

3.1.3 What are the practical barriers, if any, to trade unions representing workers in the ‘informal economy’ and in ‘precarious work’?

In addition to the legal barriers to trade unions assisting informal and precarious workers, there are many practical barriers. Precarious and informal workers often form part of a fragmented workforce, with individual workers situated in disparate locations (for example home based workers) or numerous small enterprises. This makes enforcement, organising and collective bargaining particularly challenging. Declining rates of trade union membership is another practical obstacle. It is also essential to recall the close connection between informality, precariousness and poverty, and consider how this impacts on workers’ ability and willingness to organise:

When faced with such economic hardship, workers tend to focus more on their immediate day to day survival and less on medium- to long-term commitments. Workers with insecure and casual employment contracts may also be afraid to undertake action that could jeopardize their jobs.

As discussed in 2.7 and 2.8, there are migrant workers in Australia. Several factors that make it difficult to protect migrant workers engaged in informal or precarious employment. Migrant workers are at particular risk and because they are isolated and away from their families and support networks, ‘they are more easily exploited as well.’ Commonly, they are ‘unaware of the legal rights they do have’, and sometimes they are misled or uninformed of the work they will be carrying out upon arrival. This isolation and

114 Ibid. This form of deception potentially amounts to offences of trafficking in persons under div 271 of the Criminal Code (Cth).
powerlessness, coupled with extreme power imbalances between worker and employer, raises particular challenges to organisation and collective bargaining.

3.1.4 Are there any legal or bureaucratic regulations which restrict trade unions from reaching, or extending their mandate to, workers in the ‘informal economy’ or ‘precarious work’?

Yes. Please see 3.1.2 and 2.6.6 above.

3.2 The Role of Other Organisations

3.2.1 Does the labour law in your country recognise a variety of worker representatives beyond traditional trade unions?

Under section 176 of the *Fair Work Act*, an employee may appoint a person to be their representative in collective bargaining processes, as long as they do so in writing. It is therefore not only trade unions who can represent employees. However under the new bargaining laws in the *Fair Work Act*, the trade union is the ‘default’ position – that is, if the employee does not nominate another person as bargaining representative the union will be the representative.

3.2.2 Have there been attempts by other (non-trade union) organisations to improve the working conditions of those in the ‘informal economy’ or ‘precarious work’? Describe these and briefly evaluate their success.

Yes. As discussed in 3.1.1, a number of non-trade union organisations were involved in the successful campaign to protect outworker rights. Various organisations including FairWear and Asian Women at Work lobbied extensively to improve outworker working conditions.115

3.2.3 Have there been any examples of productive collaborations between trade unions and other organisations to improve the working conditions of those in the informal economy? Describe these and briefly evaluate their success.

Yes. Please see the above discussion of the campaign for outworker rights, which was instrumental in obtaining and retaining state protections for outworkers.

3.1.5 Is there any evidence of workers self organising in the ‘informal economy’?

a. Do the laws facilitate the representation of ‘informal economy’ workers or are there any constraints in the law regarding the organisation of workers which militate against those in the ‘informal economy’ acting collectively?

b. Could such organisations register?

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115 Michael Rawling, ‘The Impact of Federal Legislation upon the Scope of State Jurisdiction to Regulate Outwork’, forthcoming article in the *AJLL*.
There is very little evidence of workers self organising in the ‘informal economy’. Because such workers by definition fall outside the scope of labour protections, legislation does not facilitate collective bargaining for such workers. Further, the dispersal of these workers geographically and in small and disparate workplaces impedes such organisation. Where the workers retreat ‘underground’, e.g. because they are not remaining in the country lawfully, there are obvious barriers to organise.

3.3 Collective Action in the ‘Informal Economy’ and for ‘Precarious Work’

3.3.1 Are there any examples where workers in the ‘informal economy’ or those in ‘precarious work’ have taken collective action to enforce or improve labour standards or rights? What institutional supports from the state, if any, have been available to support these workers?

There is very little evidence of this in Australia, aside from those precarious workers that are employees (part-time and casuals) and thus included in general collective bargaining processes.

3.3.2 Is there any capacity under the legal system to extend the benefits of collective bargaining to those working in the ‘informal economy’ or in ‘precarious work’?

Those precarious workers classified as employees will receive some benefits from general collective bargaining processes. Independent contractors can also receive benefits through their own collective bargaining processes, as discussed in 2.6.6.


4.1 The Enforcement of Labour Law Generally

4.1.1 Briefly describe the regulatory structure that is in place in your country to enforce labour laws generally, identifying all the different elements (e.g. self-regulation, managerial discretion, mediation, arbitration – public or private, tribunal or judicial hearing) of this structure and indicating their relative importance in the regulatory structure.

Enforcement of labour standards is generally undertaken through court proceedings by the individual, his or her union or the relevant government agency (currently known as the Fair Work Ombudsman).

The regulatory arm for compliance which has received a funding boost in the last two years is the Fair Work Ombudsman. It investigates complaints about
non-compliance, attempts to resolve these and prosecutes employers where appropriate.

Enforcement for breaching awards or legislation is judicial and is undertaken in the Federal Court or the Federal Magistrates Court. There may be mediation if the union is involved to negotiate a settlement.

4.3 Labour Law Enforcement in the ‘Informal Economy’ and ‘Precarious Work’

4.3.1 Are labour standards and rights enforced in the ‘informal economy’?
If so describe the enforcement process in the different sectors?
   a. Have any special enforcement mechanisms been developed to meet the needs of certain workers – for example, home-based workers? migrant workers?

There are a growing number of people engaged in home-based work. In 2000, there were an estimated 1 million home-based workers in Australia.\(^{116}\) Traditionally, these workers were assumed to be independent contractors and therefore not afforded the legal protections offered to employees. The practice was widespread in certain industries, in particular, the textile, clothing and footwear industries. For many decades, these industries formed a large part of the unregulated ‘informal economy’ and were synonymous with long hours and poor pay.\(^{117}\) As a result of campaigning by unions and pressure groups, home-based workers were gradually recognised as employees owed full protection under the law (see 3.1.1 above). Legislation has since been amended in some but not all Australian jurisdictions to make it clear that home-based workers in these industries are ‘employees’ for the purposes of the legislation.\(^{118}\)

These legislative developments, however, may be criticised for adopting definitions of home-based work that are either ‘over-inclusive’ or ‘under-inclusive’ in scope. Moreover, the amendments arguably lack the sophistication necessary to deal with the unique challenges of regulating home-based work. Home-based work is often organised through complex supply chains and, by its very nature, is difficult to regulate and enforce. While unions and government do play a role in enforcing minimum standards for home-based workers, it is likely that these efforts only scratch the surface.

People working illegally in both the formal and informal economies create another challenge for enforcement. The plight of migrant workers varies according to their legal status. Here, the operation of immigration law and policy can be seen to play a key role in shaping and regulating the labour

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\(^{117}\) See, for example, Fair Wear http://www.fairwear.org.au/engine.php

\(^{118}\) See, eg, _Industrial Relations Act 1999_ (Qld) Sch 5.
market. Unauthorised workers have few protections and the enforcement of the law in this area is problematic. There have been some enforcement cases in the courts where employers have not met the required labour conditions for the 457 (temporary) visa holders and the migrant workers have been shown to be in very precarious positions; in some instances they have been close to being the slave of their employers.\footnote{M Pittard, ‘Temporary Overseas Workers and Employment Standards’, paper delivered to Australian Labour Law Association National Conference, November 2008}

4.3.2 How effective is the enforcement of labour standards in the different sectors of the ‘informal economy’?

a. What is the mechanism/objective criteria by which this can be judged?

There is little research on the effectiveness of enforcement in the informal economy.

4.3.3 What obstacles exist to workers in the ‘informal economy’ getting an effective remedy when there has been a breach of labour standards or rights?

‘Informal economy’ workers, even if within the ambit of the law, may have difficulties enforcing compliance with minimum rights and standards. Those working illegally are unlikely to seek to enforce rights for fear of repercussions.

4.3.4 Are there some standards or rights that are more difficult to enforce than others?

Yes. Enforcement relating to straightforward standards, such as pay, is relatively easy to enforce. The government enforcement agency, currently the Fair Work Ombudsman, is active in the enforcement and recovery of wages. There are many standards, however, that remain more difficult to enforce. For example, standards relating to maximum working hours are vague and difficult to ensure compliance with. Some standards and rights lack adequate enforcement mechanism. For example, the new right to request flexible working hours under the \textit{Fair Work Act} has been criticised for its lack of enforceability.\footnote{See, Beth Gaze, Submission to the Inquiry into the Fair Work Bill (2009) https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=6cc9a75a-1871-4b4b-9db6-746f40b3d3c}

4.3.5 Is there a problem of lack of access to law enforcement mechanisms?

a. If so, what are the main reasons for this – are they legal? financial? organisational? practical? other?

Workers are able to complain to the government agency, the Fair Work Ombudsman. This agency may then pursue the matter, seek to remedy any
breach of the law, obtain compensation for the aggrieved worker or seek a penalty through the courts. The Fair Work Ombudsman will not usually pursue matters relating to the underpayment of wages under the amount of $10,000.

Workers may also seek to enforce their rights through a union or privately in the courts. Private enforcement through the courts can be (prohibitively) expensive and there will often be long delays. Further, many workers are reluctant to enforce their rights while there is still an employment relationship for fear of repercussions.

4.3.6 If someone is unable to access a remedy what do they do?

If someone is unable to access a remedy they may seek to resolve the matter with their employer or with the assistance of a union or other representative.

4.4 Anti-discrimination Law Enforcement in the ‘Informal Economy’ and ‘Precarious Work’

4.3.1 How effective has anti-discrimination been in securing protection for those working in the ‘informal economy’ or in ‘precarious work’?
There is little data or evidence on this.

4.3.2 What is the relationship of anti-discrimination law and labour law vis a vis those in the ‘informal economy’ and ‘precarious work’? What are the advantages of the worker pursuing a remedy in one area rather than the other? Can workers pursue simultaneously remedies in different areas? Provide examples if possible.
The main overlap of discrimination laws and labour laws is in the area of termination of employment. There is no special protection for precarious work with respect to termination of employment in either legislative regime.

4.3.3 Do labour law and anti-discrimination law sometimes conflict? If so which takes precedence?

There may be the possibility of pursuing a claim under anti-discrimination law and labour laws. The pros and cons of each, including some differences in remedies, would need to be assessed and addressed. Which takes precedence may be a difficult question of law and may give rise to lack of clarity and certainty. Generally, federal law prevails over state law.

4.5 The Role of Trade Unions in the Enforcement of Labour Standards

4.5.1 What is the role of the trade unions in the enforcement of labour standards and rights?

a. How effective has that role been in extending protection to, or enforcing existing protections for, those working in the ‘informal economy’ and those in ‘precarious work’?
b. Have trade unions been more effective in some areas than others? If yes, explain why this is so?

Unions have traditionally played a central role in enforcing standards and rights. Under the conciliation and arbitration system, unions performed an important enforcement function. State institutions, such as the Arbitration Inspectorate had not played an active or effective role in enforcing standards. Instead, the process of enforcing terms of awards and agreements was largely carried out by unions.

More recently, under the *Workplace Relations Act* and now the *Fair Work Act*, the power of unions to effectively enforce agreements was curtailed. In its place, the Workplace Ombudsman (now the Fair Work Ombudsman) began to play a more central role in enforcement. In this respect, workplace inspectors are performing some of the functions traditionally played by unions while exercising right of entry to workplaces for the purpose of monitoring compliance with industrial instruments.\(^\text{121}\)

It is difficult to determine how effective union enforcement has been in relation to those working in precarious employment or the informal economy. Union enforcement has been most successful in areas which have traditionally maintained high levels of union membership, such as manufacturing, construction and the public sector. Those working in the informal economy and precarious workers are less likely to be members of a union. As mentioned above, unions, together with other groups, have been instrumental in improving the rights and conditions of marginalised employees, such as outworkers in the textile, clothing and footwear industries.

4.5.2 What rights do trade unions have to enter workplaces?

4.5.3 Have there been any changes in the legal system that have enhanced or diminished the role that trade unions play in enforcement and the consequential impact on the enforcement of labour standards and rights?

Prior to the Work Choices amendments, the provision of the *Workplace Relations Act* gave broad powers to trade union officials to enter workplaces for the purposes of investigating breaches of the Act. After Work Choices, there were restrictions on right of entry: a union must first obtain a permit under s 740 prior to seeking to exercise a right of entry. Section 742 of the Act sets out mandatory conditions that permit holders must meet in order for them to be deemed ‘fit and proper’ persons. Owners of premises must be given at least 24 hours notice of a specified date of entry. Permits may also be issues for the purposes of holding discussions with employees – but only during meal breaks and with employees who ‘wish to participate’: s 760-761.

As mentioned above, these restrictions on union right of entry represented a legislative preference for reduced trade union involvement in the workplace. The enforcement role traditionally played by unions was picked up, in part, by the state. Union right of entry was a hotly contested debate and the *Fair Work Act* 2009, which will be fully operative from 1 January 2010, is giving unions greater rights of entry. The right of entry provisions are operative from 1 July 2009. In essence, they enable an official of the union to enter where that official has a valid entry permit; where proper notice is given of entry; and where the official is seeking entry for certain specific purposes. The reasons are for the purpose of investigating a suspected breach of the Act or of an industrial instrument and to hold discussions with employees. There may also be a right of entry under occupational health and safety laws (state laws). The union must have members or potential members in the workplace to enable entry.

Interestingly there are special provisions designed to strengthen entry in respect of suspected contraventions in relation to textile clothing and footwear outworkers—no notice is required to enter the premises for these purposes.  

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**Part 5 Prospects for the Future**

5.1. What can be identified as the greatest challenge(s) for labour law vis a vis the regulation of

a) those working in the ‘informal economy’?

b) those in ‘precarious work’?

The regulation of precarious workers and those in the informal economy remains a significant issue in Australian law. While labour law is undergoing fundamental and major transformation at the time of writing this report, it is likely that the law relating to precarious workers and those in the informal economy will continue to lack adequate protections.

5.2 Please present here any other information in relation to your country’s law and practice which relates to this theme and which you consider significant but which has not been addressed in this questionnaire.

Not applicable. Relevant areas have been covered.

5.3 Please indicate any difficulties you have had with answering this questionnaire.

Several aspects of this questionnaire were difficult to answer. In Australia, there is little research available on workers in the informal economy. It is

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122 See *Fair Work Act 2009 (Cth)* Part 3-4, Division 2, Subdivision AA
therefore difficult to provide detailed information or statistics relating to these workers.

Another area of significant difficulty arises from the fact that federal labour law has undergone significant legislative changes – these have not completely concluded at the time of writing. In the last 12 years, we have witnessed some of the most dramatic changes to labour law in the country’s history. The Coalition government (Liberal/National) radically transformed the legislative framework governing the law of work with the passage of the Workplace Relations Act 1996 (Cth), and then, in 2005 with the Workplace Relations Amendment (Work Choices) Act 2005 (Cth), introduced another wave of major changes away from awards and arbitration to individual bargaining and agreements.

The federal Labor government was elected in 2007 on a platform of reversing many of the more controversial aspects of the previous government’s reforms. The Fair Work Act came into operation on 1 July 2009 but not all of its provisions are yet in force; some will operate from 1 January 2010.

The law then is in a state of change, with transitional legislation too. One feature of this is that awards which provide for minimum conditions (and underpin collective agreements) are in the process of being modernised. That process should conclude by 31 December 2009. It does mean that conditions of work for outworkers and home-based workers, to the extent that they are employees and covered by modernised awards, will change. In addition there may be changed minimum conditions for part time workers.

It has therefore been difficult both to keep pace with the changing nature of labour law regulation and to predict the effect of the recent significant reforms. The report has been re-written twice to accommodate the changes.