20 May 2021

Select Committee on Job Security
Department of the Senate
PO Box 6100
Canberra ACT 2600

Lodged via email: jobseceurity.sen@aph.gov.au

Dear Select Committee,

Submission to the Job Security Inquiry

Thank you for the opportunity to make this brief submission on behalf of the Mining and Energy Division of the Construction, Forestry, Maritime, Mining and Energy Union.

This union represents around 20,000 workers employed primarily in the coal industry, but also in metal ore mining, power stations and coal ports.

The union has been involved in seeking to protect its members and fellow workers against job insecurity for over 100 years. And despite the fact that we have an industrial Award in coal mining that does not provide for casual employment, we have nevertheless witnessed very large growth in the proportion of casual employment in the industry.

As the Minerals Council of Australia has noted in its submission into this Inquiry, casual mineworkers are paid less than permanent mineworkers, as they typically are across most industries, and despite the alleged presence of "casual loading".

As also noted by the Minerals Council, but in its tax and royalties report[1] issued on 17 May, the profits of the industry have increased steeply in recent years. There appears to be no correlation between industry profitability and the rate of casualisation – it has increased steadily over the decades despite wide variations in profitability. The industry has sought to turn labour costs into a highly-variable cost that can be dispensed with at will via higher casualisation rates.

[1] See minerals.org.au

There is some dispute over the rate of casualisation in the mining industry. While the Minerals Council cites ABS data that has it at 16%, it is the lived experience of members of this union that casual labour hire is easily around 30% of all coal mining jobs in New South Wales and is routinely over 50% in Queensland. The reason for this discrepancy between the official data and lived experience is not known. One possible reason is that casual labour hire in mining may not be classified by the labour hire providers as work in the mining industry.

There is data available supporting the union view in the coal industry - on both the proportion of casual employment and the substantial pay difference suffered by casual workers provided. It was provided by the Coal Mining Industry (Long Service Leave Funding) Corporation to the Australian Attorney-General's working group on casual and part-time employment in 2020. The Committee may wish to access this information.

The union already has a substantial body of work in the public arena of which it is either the author or a major contributor. This work is presented to the Inquiry.

Extensive litigation

The union was a driving force behind the well-known line of Federal Court cases in the Williams v MacMahon Mining Services[2], Workpac v Skene[3] and Workpac v Rossato[4] cases, the latter two being Full Court judgments, where the Court ruled that it was the character of the work – not the mere designation applied by the employer - that determined whether work was genuinely casual. Accordingly, when the work patterns and arrangements applying to those mine workers were objectively considered, it could not be said that they were "casual" work arrangements.

The Rossato case is currently on appeal to the High Court.

The union is running a class action case on behalf of members who are, or have been, Workpac casual employees.

Commissioned research

The union commissioned the McKell Institute to research the economic impact of casualisation with its much lower rates of pay on three major coal mining regions. The report "Wage-cutting Strategies in the Mining Industry: the cost to workers and communities" by Dr Stephen Whelan is available online.[5] It found that in these regions alone – which are not the entirety of the coal industry let alone the Australian mining industry – the loss to workers and communities was up to $825 million per year.

Sponsored research

[2] Williams v MacMahon Mining Services Pty Ltd [2010] FCA 1321 (30 November 2010)

[3] WorkPac Pty Ltd v Skene [2018] FCAFC 131 (16 August 2018)

[4] WorkPac Pty Ltd v Rossato [2020] FCAFC 84 (20 May 2020)

[5] https://mckellinstitute.org.au/research/reports/wage-cutting-strategies-in-the-mining-industry/

The union financially supported the work of Professor David Peetz seeking to examine in much greater detail the proportion and characteristics of casual employment across Australian industry. The research was summarised by Professor Peetz in The Conversation on 11 December 2020 and the original research can be obtained there.[6]

The research on "leave-deprived" workers shows that a high proportion are either not paid casual loading or don't know whether they are paid such a loading. Further, a majority have been employed for more than a year and expect to be with the same employer in another year. Around half work regular hours and are not on standby. What they primarily lack is both paid leave and job security.

Public campaigns

The union has run many public campaigns to protect casual miners. See:
https://me.cfmeu.org.au/news/new-campaign-pushes-mps-protect-rights-casual-miners

The campaign has been set back on the legislative front as a result of the recent federal legislation of 18 March 2021 that sold out the interest of casual mineworkers:
https://me.cfmeu.org.au/news/ir-bill-blow-casual-mineworkers

The fact sheet from that recent campaign is attached to this submission.

A substantial number of videos – including the famous "naked miner" TV advert are available on the union's Youtube channel at:
https://www.youtube.com/user/CFMEUMINING/search?query=casual

These are useful in both describing the problem, and in presenting first-hand worker experiences of it.

The union will continue campaigning against the exploitative misuse of so-called casual employment in the mining industry.

The union would welcome the opportunity to address the Committee directly on these important issues.

Yours sincerely,

Tony Maher
General President

[6] https://bit.ly/3wjYY5p

PROTECT CASUAL MINERS

HANDS OFF OUR BENEFITS

Member fact sheet

WHAT IS THE CAMPAIGN ABOUT?

This campaign is about ending the 'permanent casual' rort in mining.

Mining companies have replaced thousands of permanent Australian jobs with casual labour hire, doing the same work, on the same rosters as permanents but for much less pay.

Our Union has been fighting this unfair work model in the courts for years.

In a big win, the Federal Court has made a common sense ruling that casuals working regular, full-time hours on advance rosters are not really casuals at all. If their work arrangements are the same as a permanent worker, the court ruled they can claim permanent benefits like paid leave.

But employers are pushing the Morrison Government to overturn the ruling, by introducing a new law that says any worker is casual as long as their boss calls them one. This would allow big mining and labour hire companies to keep ripping casual workers off.

The Protect Casual Miners campaign is about making sure our politicians understand how casualisation is hurting mineworkers; and urging them to represent mineworkers' interests in Canberra by ending this rort.

FIND OUT MORE AND TAKE ACTION

SCAN ME

WHAT HAS THE FEDERAL COURT SAID?

In response to a case brought by our Union, the Federal Court has twice ruled the mining industry's permanent casual work model unlawful. The court ruled the work was not genuinely 'casual' and therefore should attract entitlements such as paid annual leave.

- **Workpac v Skene** Paul Skene was a CFMEU member and casual labour hire coal miner employed by WorkPac. Paul argued that his work arrangement did not fit the legal definition of a 'casual' and was therefore owed annual leave entitlements. In 2018, the Federal Court agreed, paving the way for other casual labour hire coal miners to also claim unpaid entitlements.
- **WorkPac v Rossato** Instead of appealing it to the High Court, WorkPac initiated a new case in the Federal Court, in the hope of undermining the Skene decision's definition of casual as intermittent and irregular and reduce their potential financial liability for backpay claims. In May 2020 the full court rejected their arguments and found that like Paul Skene, Robert Rossato was also not a genuine casual and was also eligible for paid leave entitlements.

Employers claim they will face billions of dollars in backpay claims as a result of these decisions, which is a gross exaggeration. The 'permanent casual' model is common in coal mining and some other industries with widespread use of labour hire, but is unlikely to affect small business as claimed by employers.

WorkPac is appealing the Rossato decision to the High Court. The Morrison Government is backing WorkPac and employers in the High Court to prevent affected workers from being compensated. They call it 'double-dipping' even though casual miners earn much less than permanents, not more.

WHAT SHOULD THE FEDERAL GOVERNMENT DO?

Employers are pushing Industrial Relations Minister Christian Porter to introduce a new definition of casual to the Fair Work Act that would mean a worker is casual if their boss wants to call them a casual, regardless of how long the employee has been doing the same job. This would legalise the 'permanent casual' rort and allow it to continue. If retrospective, it would prevent workers unlawfully engaged as casuals from claiming unpaid entitlements.

We are urging the Morrison Government to

- adopt a definition of casual in line with Skene and Rossato Federal Court judge and plain common sense – irregular, in and without firm advance commitment
- not stand in the way of workers who ha unlawfully exploited as casuals from cl compensation, in line with the Federal decisions.

WHAT ABOUT A 'RIGHT TO REQUEST' PERMANENCY?

A right for mineworkers to request conversio casual to permanent is not enough. For a sta employers can still say no. And this conversi usually involves a pay cut for workers who a already paid far less than permanents. Perm pay and entitlements must be the starting po mining jobs with full-time, regular hours and advance roster. **Permanency gives workers t security to organise and stand up for their conditions, rights and safety.**

WILL THE UNION'S CLASS ACTION AGAINST WORKPAC BE AFFECTED?

The Union's class action against WorkPac and any other current or future claims for compensation for casuals are under threat. If the Federal Government bows to employer pressure and adopts a retrospective definition of casual, meaning that any worker is a casual if their boss designates them as casual, then the backpay claims may lose their legal basis.

The Federal Court has ruled that the 'permanent casual' model is unlawful. The Morrison Government should not be endorsing illegal employment practices. Workers who have been unlawfully exploited as permanent casuals deserve the right to be compensated.

Authorised by T.Maher, CFMEU Mining and Energy Sydney