Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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REPLY SUBMISSION
JOB SECURITY
MODERN AWARDS REVIEW 2023-24
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MODERN AWARDS REVIEW 2023-24 – JOB SECURITY

BNSW AND ABI REPLY SUBMISSION

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INTRODUCTION

1. On 5 February 2024, the Commission received 20 submissions from a combination of employee and employer associations (collectively, **the interested parties**) in response to the job security discussion paper.[1]

2. The interested parties were directed to file any submissions in reply by Wednesday 21 February 2024.

3. We do not propose to reply to each individual submission filed by the interested parties. Instead, we identify and reply to a series of specific issues arising from those submissions.

4. The specific issues are as follows:

   (a) **Issue 1:** the intention of the Federal Parliament in relation to promoting job security;

   (b) **Issue 2:** the construction of the objects clause;

   (c) **Issue 3:** the construction of the modern awards objective;

   (d) **Issue 4:** the observations of the Expert Panel;

   (e) **Issue 5:** casual and part-time employment;

   (f) **Issue 6:** consultation about major workplace change;

   (g) **Issue 7:** consultation about changes to regular rosters and hours of work;

   (h) **Issue 8:** individual flexibility arrangements; and

   (i) **Issue 9:** dispute resolution.

5. Each issue will be responded to in turn.

[1] Discussion Paper – Job Security: Modern Awards Review 2023-24 (Fair Work Commission, 18 December 2023) (**Discussion Paper**).

ISSUE 1: THE INTENTION OF PARLIAMENT

6. Given the emphasis upon improving the job security of casual employees across submissions filed by the unions, we set out the intention of parliament in relation to that subject by reference to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**), *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Closing Loopholes (No. 1) Bill**) and *Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2024* passed (**Closing Loopholes Act (No. 2)**) (collectively **the Legislation Amendments**).

7. Improving job security has been at the forefront of the Albanese Federal Government's policy agenda since 2022. This policy objective is expressly conveyed in Revised Explanatory Memoranda that accompanies the Legislation Amendments. Putting aside the introduction of *"promote job security"* in s 3 of the *Fair Work Act 2009* (Cth) (**the FW Act**),[2] two types of engagement were identified as the intended beneficiary of the 'job security' reforms:

   (a) employees subject to fixed term contracts; and

   (b) casual employees.

8. The relevant extracts from the extrinsic material are set out below.

SJBP Act

9. An express purpose of the *SJBP Act* was to *"boost job security"*.[3]

10. Beyond amendment to the objects of the FW Act, the main reform directed to 'boosting' job security was centred upon fixed term contracts. The Explanatory Memorandum noted, in that respect, that fixed term contracts can exacerbate job insecurity for employees when *"they are used for the same role over an extended period, or where employees are subject to rolling contract renewals for jobs that would otherwise be ongoing"*. Hence, provisions were introduced to remove the circumstances of a seemingly permanent probation period.[4]

Closing Loopholes

11. An express purpose of the *Closing Loopholes (No. 1) Bill* was, again, to 'improve job security'. The main reform, in this respect, concerned reforms to casual employment.

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[2] Addressed in BNSW/ABI Job Security Submission filed 5 February 2024.

[3] *Revised Explanatory Memorandum - Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [2].

[4] *Explanatory Memorandum - Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [558]-[559].

12. The *Closing Loopholes (No. 1) Bill* proposed to replace the existing definition of *"casual employee"* with a fair and objective definition and by introducing a new employee choice pathway for eligible employees to change to permanent employment if they wish to do so.

13. The Revised Explanatory Memorandum noted:

> *"The amendments made by this Part of the Bill would provide casual workers with a greater ability to make a choice about their employment status, by providing a pathway to move to permanent employment if they wish. Under the amendments, an employee would have the opportunity to move from casual employment where they are in fact working like a permanent employee. The choice to change status would rest with the employee; no employee would be forced to change employment status. Rather, the amendments would strengthen the pathway to permanent work for employees who choose it."*[5]

14. The reforms relating to casual employment ultimately passed as part of the *Closing Loopholes (No. 2) Bill.* Notably the amendments to casual employment were not radical in nature – as evident by the decision to crystalise two fundamental aspects of the casual engagement as follows:

    (a) *"the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work"*; and

    (a) *"the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment."*[6]

15. The remaining amendments to casual employment primarily concerned the introduction of paid family and domestic violence leave and the *"employee choice"* pathway to permanent employment (set to replace the current casual conversion process).

Observations

16. The above context is highlighted to emphasise the manner in which the Federal Government has sought to *"improve"* job security via legislative reform.

17. To the extent the union submissions refer to further alterations to the operation of leave entitlements and loading – it is noted that the Federal Parliament had the opportunity

[5] Revised Explanatory Memorandum - Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, 9.

[6] *Closing Loopholes (No. 2) Act,* Part 1.

to introduce such proposals and did not while extensively changing various features of casual employment but not these.

ISSUE 2: THE CONSTRUCTION OF THE OBJECTS CLAUSE

18. Across submissions filed by the unions, there is a concerning pattern of isolating or reducing the objective in s 3(a) of the FW Act to *“promote job security”.* The unions submissions effectively elevate the objects clause from the purpose of an objects clause to an imperative provision in its own right, requiring something to be done independent of the rest of the Act.

19. Whilst consideration must necessarily be directed to the new text, the words *“promote job security”* should not be severed from their proper context. To do so risks an undue elevation of the text and its importance in the context of s 3.

The overarching purpose

20. Section 3 provides that *“[t]he object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians”* (**the overarching purpose**). Being an objects clause for a piece of legislation, the overarching purpose is necessarily crafted at a high level of generality, noting the breadth of the subject-matter the FW Act addresses.[7]

21. With that caveat noted, returning to the text of s 3, the purpose of the *Fair Work Act* is to provide *“a balance framework for cooperative and productive workplace relations”* that promotes two outcomes:

    (a) *“national economic prosperity”*; and

    (b) *“social inclusion for all Australians”.*[8]

The means by which the overarching purpose is achieved

22. Paragraphs (a) to (g) identify eight factors by which the overarching purpose is achieved throughout the FW Act. Obviously, not every provision of the FW Act will address each factor.

23. Paragraph (a) states that the overarching purpose may be achieved by providing workplace relations law that:

    (a) *“are fair to working Australians”*;

    (b) *“promote job security and gender equality”*;

    (c) *“are flexible for businesses”*;

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[7] See generally, *Unions NSW v New South Wales* (2019) 264 CLR 595; [2019] HCA 1 at [172]

[8] The reference to *“economic prosperity”* was previously address in submissions filed on 5 February 2024 at [65].

(d) *"promote productivity and economic growth for Australia's future economic prosperity"*; and

(e) *"take into account Australia's international labour obligations".*

There is no suggestion that any of the items listed in paragraph (a) warrant greater primacy over the other. Rather, those are the factors identified as relevant to meeting the overarching purpose.

24. In context, the provision of workplace relations law that addresses the criteria listed above (i.e. 'the means' to achieve the overarching purpose) is considered relevant to the following:

(a) the creation of *"a balanced framework for cooperative and productive workplace relations"*; and

(b) the promotion of *"national economic prosperity and social inclusion for all Australians".*

"Social inclusion for all Australians"

25. The term *"social inclusion"* is repeated in s 134(1)(c) and 284(1)(b). Notwithstanding that repetition, the Commission applied the principles of statutory construction to the specific text of s 134 to determine the scope of paragraph (c).

26. In the *Annual Wage Review 2009–10*, the Full Bench observed:

> *"social inclusion encompasses both the obtaining of employment and the pay and conditions attaching to the job concerned … we must be careful not to inhibit the growth of entry level jobs for vulnerable groups such as the young and low skilled workers. We accept that while incentives to work full-time are significant, where part-time work is concerned the position is less clear and the incentives may be less."*[9]

27. In the *Penalty Rates Decision*, the Full Bench observed:

> *"Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'.* ***The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively 'through increased workforce participation', that is obtaining employment is the focus of s.134(1)(c)****.*

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[9] *Annual Wage Review 2009–10* [2010] FWAFB 4000 at [275]-[276].

However, we also accept that the level of penalty rates in a modern award may impact upon an employee's remuneration and hence their capacity to engage in community life and the extent of their social participation. The broader notion of promoting social inclusion is a matter that can be appropriately taken into account in our consideration of the legislative requirement to 'provide a fair and relevant minimum safety net of terms and conditions' and to take into account 'the needs of the low paid' (s.134(1)(a)). Further, one of the objects of the FW Act is to promote 'social inclusion for all Australians by' (among other things) 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through … modern awards and national minimum wage orders' (s.3(b))"[10]

28. The extract from the *Penalty Rates Decision* highlights that the surrounding text in s 134(1)(c) dictated a narrower application of the term *"social inclusion"*. Further, whilst paragraph (a) may be described as aligning to a *broader* concept of *"social inclusion"* – the Full Bench did not rely on s 3 to broaden the impact of either s 134(1)(a) or (c).

29. Plainly, the observation that both paragraphs 134(1)(a) and (c) are consistent with the promotion of social inclusion referred to in s 3 of the FW Act does not alter the application of statutory principles of construction to s 134. The text continues to be the beginning and end of the process.

[10] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [179]-[180] (emphasis added).

ISSUE 3: CONSTRUCTION OF THE MODERN AWARD OBJECTIVE

30. Similarly, in the context of s 134(1)(aa), there is no basis to elevate *"improve access to secure work"* above all other paragraphs in s 134(1). It is well established that no factor listed in s 134(1) has more work to do or primacy than any other; it is simply one matter to have regard to in formulating the safety net for employees and employers.[11]

[11] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [115].

ISSUE 4: OBSERVATIONS BY THE EXPERT PANEL

31. The issue of *"job security"* was considered by the Expert Panel in *Annual Wage Review 2022-23 Decision*.[12] Numerous interested parties relied upon the observations made in submissions advanced in response to the Discussion Paper.

32. Whilst noting the remarks of the Expert Panel were provided in the context of an annual wage review, for the reasons that follow, we respectfully express some hesitation in the immediate application of the observations made by the Expert Panel.

Definition of "job security"

Observations by the Expert Panel

33. The Expert Panel distinguished between two constructions of *"job security".* It observed:

    (a) As to the meaning to be applied in *"the award context"*:

        (i) *"job security is a concept which is usually regarded as relevant to award terms which promote regularity and predictability in hours of work and income and restrict the capacity of employers to terminate employment at will"*;[13] and

        (ii) *"[t]he award provisions which are likely to be most pertinent in this respect are those which concern the type of employment (full-time, part-time, casual or other), rostering arrangements, minimum hours of work per day and per week, the payment of weekly or monthly rather than hourly wages, notice of termination of employment and redundancy pay (noting that a number of these matters are dealt with in the NES)"*.[14]

        (Hereinafter, **the narrow definition**).

    (b) Turning beyond *"the immediate award context"*, the following meaning was provided:

        (i) *"job security has a broader dimension and may be understood as referable to the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis"*;[15] and

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[12] [2023] FWCFB 3500 (2 June 2023) (**AWR Decision 2022-23**).
[13] *AWR Decision 2022-23* at [28].
[14] *AWR Decision 2022-23* at [28].
[15] *AWR Decision 2022-23* at [29].

(ii) *"[i]n exercising the Commission's modern award powers, consequential effects of this nature arise for consideration under ss 134(1)(f) and 284(1)(a), and have always been taken into account on this basis in past Review decisions".* [16]

(Hereinafter, **the broad definition**).

34. The Expert Panel describe the broad definition as the *"broader dimension of job security"* and observed it was *"highly relevant in our consideration under ss 134(1)(f) and 284(1)(a)"*.[17] No further elaboration or reasoning is provided.

Observations by BNSW/ABI

35. These are brand new provisions of the statute. It is not uncommon for the Commission to make observations of the new provisions and for there to be a period of time for the Commission to ultimately settle on a view having had the full benefit of argument that often develops and evolves in the early period of new provisions.

36. The term *"job security"* in s 3(a) of the FW Act attracts two separate definitions. Especially given that the term only appears in s 3(a).

37. The term *"job security"* appears in a specific context within the overarching purpose of the FW Act: it is not an object in and of itself. In that respect, we repeat our submissions at [18] to [29] above.

38. The inclusion of *"promote job security"* in s 3(a) does not alter either:

(a) the construction of s 134(1)(aa); or

(b) the historical construction of s 134(1)(f).

39. Section 134(1)(f) is extracted below:

> *"the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden".*

40. In the *Penalty Rates Decision*, the Full Bench observed that paragraph (f) is expressed in *"very broad terms"* and it requires the Commission (or an Expert Panel) that is exercising modern award powers *"to take into account the likely impact of any exercise of modern award powers 'on business, including' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'".*[18]

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[16] *AWR Decision 2022-23* at [29].
[17] *AWR Decision 2022-23* at [30].
[18] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [218].

41. Thus, the text of the provision dictates the metes and bounds of what the Commission is to consider. Critically, the paragraph is concerned with the impact of award powers *"on business"*.[19] The construction of s 134(1)(f) does not require the Commission to establish a link to the new text in s 3(a) of the FW Act.

42. Further submissions are developed in relation to s 134 below.

Distinction between "secure work" and "job security"

Observations by the Expert Panel

43. The Expert Panel do not recognise any reason to consider the expression *'secure work'* (in s 134(1)(aa)) as *"substantially different"* to *'job security'* (in s 3(a)). However, the Expert Panel observed:

> *"…we consider that it is significant that s 134(1)(aa) refers to 'the need to improve access' to secure work rather than the general promotion of job security. The language of s 134(1)(aa) suggests that* ***it is more tightly focused on the capacity of employees to enter into work which may be characterised as secure. This appears to reflect the REM's reference to the importance of employees being able to have a 'choice' to enter into secure employment.*** *As such, the consideration in s 134(1)(aa) would appear to direct attention primarily to those award terms which affect the capacity of employees to make that choice."*[20]

44. The Expert Panel also observed that the outcome of the annual wage review *"will only affect the capacity of employees to have access to secure work across the economy* ***to the extent that it promotes or diminishes the capacity of employers to offer permanent employment****"*.[21]

45. Finally, the Expert Panel said:

> *"**Tightening monetary policy and a slowing economy are likely to be the main factors bearing upon job security in the most general sense** in the coming year. It is unlikely that any uniform percentage increase to the NMW and modern award minimum wages, at least within a reasonable range, will negatively impact the capacity of individual employers to employ, or continue to employ, workers on a permanent rather than casual basis."*[22]

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[19] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [1669].
[20] *AWR Decision 2022-23* at [30] (emphasis added).
[21] *AWR Decision 2022-23* at [142] (emphasis added).
[22] *AWR Decision 2022-23* at [147] (emphasis added).

Observations by BNSW/ABI

46. The surrounding context in which *"secure work"* arises is highly relevant to its construction.[23] For that reason, as previously submitted, we submit that sections 3(a) and 134(1)(aa) should not be readily treated as substantially similar in their meaning; such an approach goes against the principles of statutory construction.

47. The Expert Panel suggest that the reference to *"secure work"* in s 134(1)(aa) reflects *"the REM's reference to the importance of employees being able to have a 'choice' to enter into secure employment"*. We make the following observations:

    (a) the new employee choice provisions represent an amendment to the National Employment Standards (**NES**) in Part 2-2 of the FW Act;

    (b) by reference to *"together with the National Employment Standards"* in s 134(1), reference to the new employee choice provisions is factored into the exercise under s 134;

    (c) no part of the REM suggests that the commentary relating to the amendments to Part 2-2 of the FW Act is intended to inform the construction of s 134(1)(aa); and

    (d) as set out above under Issue 1, the REM expressly provides that the basis for inserting a new definition of casual employment together with a new *"pathway"* was to *"boost"* job security (reflecting the new text in s 3(a)).

48. We accept that the terms and conditions in modern awards, together with the NES, can impact the following:

    (a) the characterisation of a particular type of employment as *"secure work"*; and

    (b) the *"accessibility"* to secure work.

49. However, paragraph (aa) directs attention to a specific objective: *"the need to **improve access to**… across the economy"* (emphasis added) (**the accessibility objective**). The provision does not introduce a generalised consideration of either the creation of *"secure work"* or the promotion of *"job security".*

50. Equally, we do not consider the text in paragraph (aa) supports a narrow construction of the accessibility objective from the lens of an employee's perspective. Section 134 provides a series of considerations that need to be weighed in the balance in arriving at the fair and relevant minimum safety net for employers *and* employees.[24]

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[23] See *AWR Decision 2022-23* at [30].
[24] See *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001.

51. As previously submitted, the focus in paragraph (aa) is upon creating the opportunity to access the secure work – more so than the secure nature of the work itself. Noting that the reference to *"improve"* necessarily presupposes that access to secure work already exists. Improving that opportunity is not a one-sided consideration.

ISSUE 5: CASUAL AND PART-TIME EMPLOYMENT

Casual Employment

52. The Australian Council of Trade Unions (**ACTU**) submissions in relation to job security, which are endorsed by other Union parties (collectively, **the Union movement**), place importance on this review process "*improv[ing] the safety net entitlements of casual workers to better meet the amended modern awards objective".*[25]

53. The ACTU specifically highlight developing options to:

    (a) increase the casual loading;

    (b) provide for additional or improved forms of paid leave; and

    (c) adjust other conditions relevant to job security including restoring greater predictability and security to permanent work, particularly part time work which in some industries has become closer to casual work in form and is almost indistinguishable in practice. [26]

54. In effect, the Union movement are seeking to remove the hallmark features of casual employment and replace these with conditions which are more akin to those of permanent employment.

55. Simply increasing the benefits of casual employment and making it *more permanent-like* in character is unlikely to *improve access to secure work* across the economy, nor is it going to aide in distinguishing between permanent and casual work. Rather, it would only seem to further blur the lines.

56. What is likely to occur is that the prevalence and use of casual employment is likely to decrease, as the restrictions imposed would disincentive employers use of casual employment, a scenario expressly desired by the Australian Nursing and Midwifery Federation (**ANMF**).[27]

57. Introducing restrictions or rules which fetter the engagement of casual employees, and promote permanent employment may seek to improve job security, however, it would simply be a short-sighted approach.

58. When employers and employees need flexibility to adapt to changes and respond to consumer demands, or employees require flexibility to manage their personal

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[25] See Recommendation 3, page 4 of ACTU Submission into *Modern Awards Review 2023-2024* in response to the Job Security Discussion Paper.
[26] See paragraph 18 of ACTU Submission
[27] See paragraph 113 of ANMF Submission *Modern Awards Review 2023-2024* ANMF response to Discussion Paper - Job Security, February 2024.

circumstances, the inability to adapt and be agile is likely to have the effect of increasing job insecurity.

59. Understanding the bigger picture as to why casual employment is valuable (and as such a clear distinction between the two is needed) is important in this regard.

60. The FWC has previously considered these issues in the previous 4-yearly modern award review process, as part of the review into casual and part time conditions, which we turn to below.[28]

Commentary by the Fair Work Commission: Casual Employment

61. At the outset the Casual Employment Decision examines the history and nature of casual employment.[29] Whilst not extracted, that is highlighted as apt summary of the relevant background to the coverage of casual employment in awards.

Employers and casual employment

62. In the *Casual Employment Decision*, the FWC made the observations as to why employers use, or seek out, casual employment. By way of summary these include:

    (a) to service a client demand which is highly intermittent and/or irregular, or face other external operational constraints which impose intermittency and/or irregularity, and for that reason seek to have a high degree of flexibility in the supply of their labour so they can closely match it to client demand or the external constraints which they face;[30]

    (b) seasonal factors affecting the operation of a business may mean that the business requires a regular supply of labour, perhaps on a full-time basis, but for only particular parts of the year; [31]

    (c) within a business which has largely stable operations and engages a predominantly permanent workforce, there may be to undertake discrete work functions which are only performed intermittently, or might be performed regularly but only for a small number of hours;[32] and

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[28] See *4 Yearly Review of Modern Awards - Casual Employment and Part-Time Employment* (2017) 269 IR 125; [2017] FWCFB 3541 (**Casual Employment Decision**)

[29] See *Casual Employment Decision* at [15]-[85]

[30] *Casual Employment Decision* at [352(1)].

[31] *Casual Employment Decision* at [352(2)].

[32] *Casual Employment Decision* at [352(3)]. Example cited: *"the day care centre business described in the evidence of Mr Mondo used casual employees both intermittently to cover for unscheduled leave taken by permanent employees, and regularly to cover for the lunchbreaks of permanent employees for a period of 1–4 hours each day. Mr Blanchard described a road transport company which employed juniors on a casual basis regularly to wash trucks on Saturday mornings."*

(d) temporary surges in demand might require a business to use a casual workforce to supplement its permanent workforce.

63. The Full Bench also emphasised that the above list (and examples referred to in the decision) were not exhaustive – there are a variety of ways that business may use casual employees to meet their operations needs.[33] The Full Bench also observed that some businesses engage casual employees *"merely because they (apparently) prefer the casual employment model to permanent employment"*.[34] Two examples were provided:

(a) *"First, the Westend Pallets business described in the evidence of Mr Aiton and Mr Fisher used a casual workforce to perform long term, full-time, wholly regular Monday-Friday work where clearly the business could have engaged, at least substantially, a full-time permanent workforce";* and

(b) *"Second, Mr Francis' evidence showed him performing long term, regular, full-time work at the Blackwater Mine Site owned by BMA, in circumstances where he was employed to do the same job by a succession of labour hire companies, some of which employed him casually and other of which employed him permanently".*[35]

64. In both examples the Full Bench held that the casual employment model was *"not a business necessity".*[36]

Employees and casual employment

65. The Full Bench also made observations about why employees engage in casual employment. In that respect, the Commission drew upon responses to an ACTU survey. Whilst acknowledging the data is *"not quantitatively reliable"*, the Commission considered the data provided *"a sound qualitative guide to the range of reasons as to why persons become engaged in casual employment"*.[37]

66. The two most common reasons provided by employees:

(a) *"It was the only work available, I had no choice"; and*

(b) *"I freely choose to work casual because it is more flexible/convenient for me".*[38]

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[33] *Casual Employment Decision* at [353].
[34] *Casual Employment Decision* at [353].
[35] *Casual Employment Decision* at [353].
[36] *Casual Employment Decision* at [353].
[37] *Casual Employment Decision* at [354].
[38] *Casual Employment Decision* at [354].

67. The Full Bench described the two responses as *"plainly diametrically opposite reasons for engaging in casual employment".* [39] It was also observed that a *"small proportion identified the higher income produced by being paid with a casual loading as a relevant reason".*[40]

68. The following additional observations were made by the Full Bench and shed insight onto the employee perspective:

(a) *"the career trajectory of casual employees may vary greatly. It is clear that many young persons engage in casual employment in order to earn income while studying for a career in an entirely different field of endeavour. In that sense, it is not intended by the employee (or, presumably, the employer) that the casual employment should lead to a longer- term career in the same field"*;[41]

(b) *"a casual position may constitute an entry opportunity to a longer term career with the same employer or in the same industry"*; [42]

(c) *"casual employment may be engaged in on a long-term basis during the prime working age of 25–64 years without there being any real prospects of career progression or even a conversion to permanent status".*[43]

69. As to the latter example, the Full Bench observed one or two scenarios may arise:

(a) *"This **may be by choice**; for example, long-term part-time casual work may suit a performer who has unpredictable creative commitments. Such work may also suit a parent who has the primary responsibility for raising children if the hours of work are fairly stable"*;[44] or

(b) *"In other cases it **may not be by choice**, but may represent the only work which is available to the employee in the labour market over a period of time. In this case, the employee may be said to be "locked into" casual employment and insecure work".*[45]

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[39] *Casual Employment Decision* at [354].
[40] *Casual Employment Decision* at [356].
[41] *Casual Employment Decision* at [356].
[42] *Casual Employment Decision* at [356]. The following examples were cited: "*Mr Blanchard, whose evidence we have earlier referred to, said that his business had provided permanent employment to juniors engaged to wash trucks on Saturday mornings who had expressed an interest in working in the road transport industry as a career. Similarly, Ms Meilak, who ran an automotive repair business, said that her business employed school students casually during after-school hours as a way of giving them experience in the automotive industry and as the first step in a potential career path in the industry".*
[43] *Casual Employment Decision* at [356].
[44] *Casual Employment Decision* at [356].
[45] *Casual Employment Decision* at [356].

70. Ultimately, the Full Bench found that *"persons may accept casual employment for different reasons, including principally that it is the only form of employment available to them at the relevant time, or that it suits their personal and economic circumstances".*[46] That finding was accompanied by the following consideration:

> *"In the former case, the employee may be said to acquiesce in the employer's designation of the employment as casual, with the payment of a casual loading in lieu of the principal NES entitlements, in order to obtain much-needed employment. In the latter case, there is likely to be a greater degree of mutuality in the employee's acceptance of an offer of casual employment. In either case however, the lack of any guarantee of future work that is a usual feature of casual employment means that the future characteristics of the casual employment will not be predictable at the point of engagement. Whether the employment will ultimately turn out to be short or long term, the numbers of hours that will be worked, and their degree of regularity, will usually not be known, or at least will not be guaranteed. In that sense, employees accepting casual employment will usually not be doing so on a fully informed basis."*[47]

Casual employment across the economy

71. The Commission also made the following observations about the use of casual employment broadly across the economy (informed by the expert evidence in the proceedings):

    (a) *"the proportion of casual workers increased rapidly in the period from about 1984 to 2003, peaking at about 27%, and since then has stabilised at around 24%"*;[48]

    (b) *"the growth in casual employment did not however come at the expense of the share of the population engaged in permanent employment, which has remained stable"*; [49]

    (c) *"[t]he rise in the labour force participation rate and growth in casual employment have been associated with higher female labour force participation"*; [50]

    (d) *"whilst it is undoubtedly the case that that many casuals are engaged by their employers on an intermittent and irregular basis, many others are not"*;[51]

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[46] *Casual Employment Decision* at [364].
[47] *Casual Employment Decision* at [364].
[48] *Casual Employment Decision* at [347].
[49] *Casual Employment Decision* at [348].
[50] *Casual Employment Decision* at [348].
[51] *Casual Employment Decision* at [351].

(e) *"casual employees may be engaged over long periods of time, whether their employment is regular or irregular".* [52]

72. The Commission also describe the expert evidence as to the effects on conversion from casual to permanent employment *"to be of little assistance, being theoretical and speculative in nature"* on that point.[53]

BNSW/ABI Observations: Casual Employment

73. Disincentivising the use of casual employment by increasing its cost and changing its nature to require more stability and predictability is unlikely to improve access to secure work.

74. Rather, it is only likely to dimmish access, as the more onerous access to secure work is made, the more the provisions of s134(1) of the FW Act are undermined. This is likely to create conflict as work has not been made secure because employers will look to avoid the onerous requirements by reducing job opportunities.

75. Overall, the focus should not be on increasing the safety net to ensure work is as secure as possible, but rather ensuring an appropriate minimum standard that takes into account all the modern award objectives in s 134(1), and not just a singular lens of "*improving access to secure work"* at the expense of other objectives.

76. If the Commission formed the view it was appropriate to the review the calculus of the casual loading it is free to do so – and has always been free to do so – with the qualification that there is a statutory level set for the causal loading at 25%, which in our view should still be the guiding threshold.

Part-time Employment

77. The Union parties (in particular the ASU, UWU and SDA) broadly support new or enhanced protections around part time employment that:

    (a) guarantee reasonably predictable hours of work;

    (b) written agreements outlining regular pattern of work or guaranteed hours;

    (c) compensation for working outside the regular patterns; and

    (d) ability to request or review working hours to increase guaranteed hours.

78. We accept that some strictures on part-time engagements are relevant for setting the minimum safety net, however, a balance must be struck that does not compromise (or

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[52] *Casual Employment Decision* at [351].

[53] *Casual Employment Decision* at [371]. Further limitations in evidence were addressed at [385].

neglect) the operation of such clauses in a flexible and practical manner (consistent with s 134(1)(d), (f) and (h)) as the safety net is for both the employer and employee.

79. In light of the attention that part-time employment received in responses filed by the Union movement, we set out some of the commentary by the Commission in relation to part-time employment (in particular some of the history surrounding the current formulation of the part-time provisions in modern awards).

Commentary by the Fair Work Commission: Part-time Employment

80. The *Casual Employment Decision* also addresses the history and nature of part-time employment in an award context.

81. By way of overview, some aspects of that history are identified given their relevance to the current formulation of the part-time provisions in modern awards:

(a) The origins of part-time employment in awards is tied to enabling *"women with family responsibility to be employed".*[54] Gender restrictions on access to part-time employment were eventually removed.[55]

(b) The introduction of part-time into award initially caused concern as a potential vehicle for reducing the hours of existing fulltime employees.[56] In response, the Commission introduced a limited provision to allow for a reduction of hours by agreement (on a short-term basis).[57]

(c) A significant expansion of award part-time employment provisions occurred as a result of the *1995 Personal Carer's Leave Test Case - Stage 2.*[58]In that decision, the AIRC Full Bench held:

> *"It is apparent from the evidence that part-time employees are an integral part of the labour force. Part-time employment is one of the ways in which families reconcile their work and family commitments. The evidence shows an employee preference for part-time work, particularly among women."*[59]

[54] *Casual Employment Decision* at [87]-[88].
[55] *Casual Employment Decision* at [91].
[56] *Casual Employment Decision* at [89], citing *Re Vehicle Industry – Repair, Services & Retail – Award 1980* (1983) 5 IR 100.
[57] *Casual Employment Decision* at [90].
[58] (1995) 62 IR 48.
[59] *Casual Employment Decision* at [92], quoting *1995 Personal Carer's Leave Test Case - Stage 2* (1995) 62 IR 48 at 72.

(d) The AIRC also observed that the adequacy and relevance of existing provisions should be reviewed against the characteristics of the particular industry or enterprise covered by the award.[60]

(e) Two matters were identified as essential to the development of *"fair and equitable"* part-time work provisions:

(i) *"ensure that part-time employees were provided with pro-rata entitlements to the benefits available to full-time employees, including equitable access to training and career path opportunities"*;[61] and

(ii) *"**part-time work needs to be clearly distinguished from casual employment**. While the provision of pro rata benefits is one means of providing such a distinction other measures are also needed. In particular part-time work provisions should specify the minimum number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked".*[62]

(f) The AIRC also observed:

> *"Regularity in relation to hours worked is an important feature of part-time employment. In the absence of such regularity reduced hours of work may not be conducive to reconciling work and family responsibilities. For example, if hours of work are subject to change at short notice it can create problems for organising child care as these arrangements generally require stable hours and predictable timing..."*

(g) The part-time employment provision established for the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* became a model clause adopted in many awards.[63]

(h) In the *Award Modernisation Decision*,[64] the following features were identified as characteristics of *"regular part-time employment"*:

(i) an employee who works less than full-time hours of 38 per week

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[60] *1995 Personal Carer's Leave Test Case - Stage 2* (1995) 62 IR 48 at 72, cited in *Casual Employment Decision* at [93].

[61] *Casual Employment Decision* at [93].

[62] *Casual Employment Decision* at [93], quoting *1995 Personal Carer's Leave Test Case - Stage 2* (1995) 62 IR 48.

[63] As a result of the *Award Simplification Decision* (1992) 75 IR 272; Print P7500. See *Casual Employment Decision* at [94].

[64] [2009] AIRCFB 826.

(ii) has reasonably predictable hours of work;

(iii) receives, on a pro rata basis, equivalent pay and conditions to those of fulltime employees who do the same kind of work;

(iv) requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible; and

(v) all time worked in excess of mutually arranged hours is overtime.[65]

(i) In many modern awards this means that part-time employees, unlike full-time employees, may not have their rostered hours changed by the employer on the provision of a specified period of notice, but must consent in writing to any change. The basis for that decision was considered as part of the award modernisation process.[66] The Full Bench observed:

> *"…the typically distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – reflect the original rationale for part-time employment to which we have earlier referred. Part-time employment has been treated as peculiarly suitable for those with major family or other personal commitments in their lives, and award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours."* [67]

82. The Full Bench in the *Casual Employment Decision* also emphasises the importance of considering the part-time provisions within the context of the relevant sector/industry. For example, in relation to the part-time provisions in the Hospitality Award and Clubs Award, the Full Bench held they did not meet the modern awards objective. The provisions were described as being *"a dead letter"* because they did not provide *"a workable model for the regulation of part-time employment"* in the relevant sectors.[68]

83. The Full Bench observed:

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[65] *Casual Employment Decision* at [94], citing *Award Modernisation Decision* [2009] AIRCFB 826 at [136].

[66] *Casual Employment Decision* at [95]-[97].

[67] *Casual Employment Decision* at [97].

[68] *Casual Employment Decision* at [524] (emphasis added, footnotes omitted).

"It is clear that greater flexibility in the rostering of hours is necessary for the part-time provisions in these 2 awards to become relevant. In stating this conclusion, we do not intend to depart from the general principle stated by the AIRC Full Bench in the Award Modernisation Decision of 4 September 2009 that, as a matter of concept and principle, ***parttime employment must carry with it a "degree of regularity and certainty of employment" and that it "should be akin to full-time employment in all respects except that the average weekly ordinary hours are fewer than 38". However that degree of regularity and certainty in working hours for part-time employees needs to bear a proper relationship to the patterns of work in the industry sector in question.*** *While there are many sectors with predictable patterns of hours which make the conventional model of part-time employment entirely workable, that is clearly not the case in the hospitality and clubs sectors."*[69]

84. As to the construction of part-time provisions, in that context, the Full Bench made the following observations:

(a) *"a more flexible part-time provision can lead to a very large increase in the proportion of parttime employees (and a corresponding drop in the proportion of casuals)"*;[70]

(b) *"[t]he degree of flexibility afforded to employers to alter working hours on notice cannot be to such a degree that part-time employees can be rostered to work during hours which they are simply unavailable to work because they need to attend to their other major commitments"*; [71]

(c) *"an unrestricted right for the employee to change his or her availability hours may have the result of compromising the employer's capacity to provide the guaranteed hours"* [72]

(d) "*We consider that the better course is, firstly, to require that any alteration to availability be the result of a genuine and ongoing change in the employee's personal circumstances and, secondly, to provide that if the change to the employee's availability cannot reasonably be accommodated by the employer within the guaranteed hours then, the guaranteed hours will no longer apply and*

[69] *Casual Employment Decision* at [525].
[70] See *Casual Employment Decision* at [526].
[71] See *Casual Employment Decision* at [527].
[72] See *Casual Employment Decision* at [532].

the employer and the employee will need to reach a new agreement in writing concerning guaranteed hours".[73]

BNSW/ABI Observations: Part-time employment

85. We agree there is an ability for the current arrangements that apply to part-time employees to be reviewed. However, it is imperative that an appropriate balance is struck to provide a fair and relevant minimum safety for both employees and employers.

[73] See *Casual Employment Decision* at [532].

ISSUE 6: CONSULTATION ABOUT MAJOR WORKPLACE CHANGE

86. The ACTU say the current model clause is inconsistent with the requirements of s134(1)(aa) and should be varied to:

(a) Include a reduction in job security as a significant effect for the purpose of consultation, irrespective of the change which threatens this is a *major change*.

(b) Remove the requirement for a major change to trigger an obligation to consult.

(c) Require employer to specify options for suitable alternative employment, such as facilitating employees obtaining new employment with incoming contractors.

(d) Requiring consultation to be activated once an employer is *seriously considering change*, rather than once a *definite decision* has been made.

(e) Providing for industry- level consultation about job security issues (rather than only at the enterprise level).

Recognise Reduction in Job Security as a Significant Effects

87. We oppose the ACTU's proposal.

88. These provisions have operated in the industrial landscape for decades and have been the subject of extensive consideration. They have stood the test of time, and they are understood, workable, and fair. It appears that the ACTU are actually looking for a solution that doesn't have a problem.

89. The format of the current model major change consultation clause is based on the standard clauses developed by the AIRC during the *Termination Change Redundancy* Cases (**TCR 1** and **TCR 2**, together, the **TCR Cases**) during the 1980's[74].

90. The matters which constitute a *significant effect* were considered during the TCR Cases. In TCR 2, the AIRC noted:

> *"We are not prepared to include the expression contented for in our award but we are prepared to indicate that where an award already makes provision for alteration of any matters,* ***such as changing shift work rosters, the existing award provision should prevail and that alteration should not be included in the definition of significant effect****"*[75]

91. The ACTU's proposal will significantly increase the matters which are subject to consultation. Further, there is a broad level of subjectivity involved in assessing matters

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[74] *1984 Termination, Change and Redundancy Case* (C Nos 3690, 3735 of 1981; 127 of 1983) (**TCR 1**), and 505/84 MD Print F7262 [incorporating Mis 505/84 MD Print F7262 [1984] AIRC 133; (14 December 1984) (**TCR 2**).

[75] See TCR 2 page 15, points g - j

which may impact negatively on job security. The effect of this is likely to be increased disputation and protracted consultation on matters which in turn impacts productivity and the effective and efficient operation of business.

92. The modern awards objective in s 134(1) needs to considered on a holistic basis. Simply expanding consultation to address the new s 134(1)(aa) at the expense of other objectives is inconsistent with the objectives of the FW Act to provide a fair, relevant and enforceable set of minimum terms and conditions.

93.

Removing requirement for consultation only in relation to major change

94. We also oppose the ACTU's proposal to expand consultation to *any change,* not just major change.

95. The issue of what constitutes major change was extensively considered in the creation of the model clause during the TCR Cases.

96. In developing the model clause, the AIRC had particular regard to consistency with the National Labour Advisory Council Guidelines (**NLAC Guidelines**), and the International Labour Organisation (**ILO**) standards of consultation in other comparable countries[76].

97. The AIRC noted the following:

> *"The ACTU made it clear that the purpose of the consultations was not to tell an employer what he must or must not decide with respect to the introduction of change. The main object of the clause is to ensure that notification and consultation procedures are followed by employers in respect of major changes.*
>
> *The ACTU claimed that the opportunity to discuss matters such as job requirements, training, job security, working hours, monitoring the change and so on, would minimize the potential for conflict which exists when changes are introduced with significant benefits for industrial relations.*
>
> *No party to the proceedings was opposed to the principle of consultation which is at the heart of the ACTU claims but the CAI, in particular, strongly supported the voluntary approach to consultation, as enunciated in the NLAC Guidelines.* ***It did so on the ground that that approach permits management to take the necessary responsibility for the decisions it makes whilst allowing the***

[76] See page 15 of TCR 1

> ***appropriate flexibility as to timing, content and implementation of change.”[77]***

98. The ACTU’s proposal seeks to significant expand the matters subject of consultation. Similar to the issues identified above from paragraphs [88], the effect of this will likely be that employers will be required to consult with employees on a wide range of matters, increasing the regulatory and administrative burden around making necessary operational changes, many of which are already addressed within Award clauses.

99. The AIRC’s comments that the purpose of consultation is a balance between making the employer responsible for its decisions, but allowance appropriate flexibility as to the timing, content and implementation of the change is important. Expanding consultation to cover any change which *might* impact job security would disrupt this balance, increasing regulatory burden on employers as the timing, content and implementation of changes (particularly those which currently would not meet the definition of major change) would now need to be more detailed and considered, and greater given to the timing. This also has the potential to increase disputes as to what matters might be considered necessary to consult. This is not consistent with the modern award objectives in relation to the effective and efficient performance of work.

100. We also do not agree that the concept of *major change* is ambiguous. Rather, this wording sets an appropriate boundary around when consultation is required that takes into account the needs of both employers to make and implement changes in an efficient and effective manner, and the employee to be fully informed as to the exact implications of matters which directly affect their ongoing employment.

101. The AIRC had regard to this in creating the model term, highlighting the NLAC Guidelines:

> The NLAC Guidelines stress the desirability of consultation during which an exchange of views could take place. They state that:
>
> *"Employees and their representatives should be informed as soon as a firm decision has been taken about the proposed introduction of a technological change, consistent with the employer's need to protect the interests of his business. Consultation with the union officials and/or other recognized employees' representatives on the consequences of the proposed change should then take place".[78]*

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[77] See page 15 of TCR 1 (emphasis added).

[78] See page 15 of TCR 1

102. It is relevant that the catalyst of the TCR cases was also about enabling *improvements with respect to job security*[79], in response to a time where there was a large number of retrenchments and high unemployment due to a variety of reasons, such as economic downturn, the rationalization of enterprises, mergers and takeovers, and the introduction of new technology, and significant disputation about termination of employment[80].

103. By expanding consultation to be about any matter, this seeks to diminish the importance of consultation about matters which have the serious implication of the loss of employment. If such a change is made, then it is likely strict requirements about how the message is conveyed to employees in situations where the loss if employment is a real potential. This is likely to further increase administrative burden on employers and also risk losing the potency of the message needing to be conveyed.

Requiring employers to specify or facilitate alternative employment options

104. We oppose the ACTU's proposal.

105. The ACTU's proposal should not be a consideration in relation to the model clause. this is a very select consideration that is only likely to have relevant in a limited number of awards, particularly for industries which are contracting in nature.

Removing the requirement to only consult once a definitive decision is made

106. We oppose the ACTU's proposal.

107. The ACTU say requiring consultation to commence only once the employer has made a definite decision limits the ability for the decision to be swayed by an employee, and expanding this will allow for a *real opportunity to influence decision making*[81].

108. The issue of when consultation should occur was considered by the AIRC in developing the model clause during the TCR cases.

109. The genesis of the wording around the phrase definite decision appears to have been taken from the NLAC guidelines (referenced in TCR 1 at page 14-15):

> *"The NLAC Guidelines stress the desirability of consultation during which an exchange of views could take place. They state that:*

[79] See page 1 of TCR 1
[80] See page 3 of TCR 1
[8181] See paragraph 42 of ACTU submission

"Employees and their representatives should be informed as soon as a firm decision has been taken about the proposed introduction of a technological change, consistent with the employer's need to protect the interests of his business. Consultation with the union officials and/or other recognized employees' representatives on the consequences of the proposed change should then take place".

and further that:

"The aim of employers should be to provide employees and their organizations with information on the nature of the technological changes proposed; the likely date of implementation of the change; how they expect the change to be implemented; the expected effects on employees; proposals for retraining and redeployment if they are likely to arise; the possibility of retrenchment and any other matters likely to significantly affect employees".

As to consultation, those same Guidelines state:

"The arrangements for consultation may vary with regard to the type and extent of the change being made, or the needs of particular situations, but the employer should always seek to afford the appropriate trade union officials and/or other recognized employees' representatives an opportunity to express their views on the employment effects associated with a technological change.

These consultations might include proposals for the possible transfer of employees, training and retraining arrangements, methods and conditions of restructuring jobs. It will also be necessary to discuss the best method of informing employees of the results of the discussions."

We are aware that procedures for notification, consultation and provision of information have generally been settled by negotiation and agreement and we are of the view that, generally speaking, they are not matters which lend themselves to effective legislation or award prescription.

> ***However, at this stage, we are prepared to include in an award a requirement that consultation take place with employees and their representatives as soon as a firm decision has been taken about major changes in production, program, organization, structure or technology which are likely to have significant effects on employees."***[82]

110. The AIRC went on further at page 25 (in relation to consultation about redundancy) saying:

> *Nevertheless, we believe that it is of fundamental importance to involve employees and their representatives in the problems of redundancy as soon as a firm decision has been taken that retrenchments may be necessary. and we are prepared to make an award provision to that effect.*
>
> ***We have taken the expression "as soon as a firm decision has been taken" from the NLAC Guidelines and we are not prepared to go any further, particularly having regard to the fact that our decision will apply to redundancy, whatever may be the cause.***
>
> *However, we would indicate that we are not opposed to the concept of a timetable for discussions and the provision of suitable material. Indeed, we feel that sufficient time must be allowed and sufficient material provided if discussions are to be satisfactory. Nevertheless, we are not prepared to award general and detailed provisions such as those set out in the union claim.*
>
> ***We agree with, and are prepared to adopt the conclusions of the NLAC Guidelines, that "the arrangements may vary with regard to the type and extent of the change, or the needs of particular situations", particularly as our decision extends beyond redundancy caused by technological change.***[83]

111. The comments were further reinforced in the TCR2 decision, which relevantly said:

> ***"We also believe that the obligation to notify employees and their union or unions should only apply when an employer has made a definite***

[82] Emphasis added.
[83] Emphasis added.

> ***decision to make major changes.*** *Such a provision is more appropriate than the expression we used in our draft order "where an employer proposes to make major changes".*[84]

112. As the AIRC notes, the nature of procedures for consultation and notification were traditionally matters which did not lend themselves to effective legislation or award prescription[85].

113. The first difficulty with expanding when consultation occurs is identifying when this must occurs, as it arguably involves consideration of a state of mind, rather than an objective point in time. An employer may have a strong internal view on a matter of change but requires time to consider its own options before it is able to more widely discuss this issue with any level of certainty and precision with affected employees.

114. Second, bringing forward the time at which consultation is triggered may impact the business interests of an employer, as the notification of a considered change may impact their competitive advantage in the wider market. This appears to be a consideration the AIRC took into account in the TCR cases[86].

115. Third, any such change may also need to give consideration to the exclusion on employers releasing commercially confident information as part of consultation.

116. By initiating the requirement once a definite decision is made, this also allows the consultation process to proceed more effectively with employees, and with a level of certainty around what needs to be discussed, and how this might affect employees.

117. Put simply, being required to consult on changes, the impacts of which have not yet been fully explored, has the potential to create a situation where the employee may not be fully informed so as to be able to respond to the situation. This cannot be said to providing fairness to employees, if the information available is not able to be considered with a level of certainty that the proposed change is going to be implemented.

118. The concept of consultation broadly is to inform employees of what is going to happen, and how it will affect them. The significance of the potential outcome (being termination) warrants a higher level of detail in and consideration of information, so that the employee can respond appropriately.

119. The notion of *"definite decision"* has stood the test of time. It is an appropriate threshold because the employer will know what it is talking about with employees. It must be

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[84] See page 15, points g-j of TCR 2 (emphasis added).
[85] See page 16 of TCR 1
[86] See page 14 of TCR 1

understood with factual ease. Absent that clarity – the result is an ethereal concept dealing with the state of an individual's consciousness. As currently drafted, the threshold can legally be determined to have happened and does not require a substantial exercise of judgment.

120. The clauses as drafted have worked well. There is nothing in what they say to suggest that their elaborations will have any meaningful impact on the security of the job within the context of a business making a definite decision to introduce major change that are not already captured by explicitly or implicitly by what is already in the clause.

121. While expanding consultation to commence earlier than when a definite decision is made may have the effect of providing for more meaningful discussions with employees and providing them a chance to *influence decision making,* its arguable this is also likely to restrict the efficiency of consultation, particularly in situations where business need to make important change.

Industry level Consultation

122. Broadly the ACTU's proposal seeks to add a further layer of regulatory obligation on employers to engage with other employers in the aim of improving job security across the industry covered by a modern award.

123. While such a proposal may be meritorious and have some industrial history (for example, the NSW Industrial Committees), we have concern at the practical implementation of the proposal. It is entirely outside the ambit of an award instrument. If that is to be contemplated, it should be contemplated at a political level or on a voluntary basis. It is not a proper matter for an award to deal with.

124.

ISSUE 7: CONSULTATION ABOUT CHANGES TO REGULAR ROSTERS AND HOURS OF WORK

125. The ACTU say that varying the existing model hours of work consultation clause to cover consultation with employees who have *irregular, sporadic or unpredictable* hours of work would enhance the job security and make the clause consistent with the new modern awards objective.

126. We oppose the ACTU's proposal. It is unclear how this means employees can access more secure work. It seems to make them more informed about work and what they can earn, but it doesn't change the fact the work is still the same.

127. The model hours of work consultation clause was introduced by the FWC In 2013 in response to legislative changes emanating from the *Fair Work Amendment Bill 2013* (**FWAB**) that inserted a requirement for all modern awards to include a term requiring employers to consult about changes to regular hours of work (section 145A of the FW Act)[87].

128. The form and content of the model clause was extensively considered by the Full bench of the FWC, including about the requirement to consult with employees who have *irregular, sporadic or unpredictable working hours.* This was to ensure consistency with the (then) new provisions of the Act introduced by the FWAB.

129. Section 145A (1) of the FW Act states:

> *"(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:*
>
> *(a) requires the employer to consult employees about a change to their* ***regular roster or ordinary hours of work*****"** (emphasis added)

130. The term *regular roster* is not defined by the Act. However, guidance can be sought from the Revised Explanatory Memorandum (**REM**) to the FWAA, which says:

> *[44] "Regular roster" in new paragraph 145A(1)(a) is not defined.* ***It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours.*** *Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements*

[87] Paragraph 1 of [2013] FWCFB 10165

will trigger the consultation requirement in accordance with the terms of the modern award.[88]

131. In response to employer proposals, the Full Bench determined to include a reference to the explanation in the REM above (as underlined), noting:

> *"[103] It was submitted that such an exclusion would clarify the scope of operation of the relevant term and was consistent with the modern awards objective.*
>
> *[104] We note that a provision in the form sought is consistent with the observation in the Revised Explanatory Memorandum to what became the 2013 Amendment Act (set out at paragraph [37] above):*
>
> > *"It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employer has irregular, sporadic or unpredictable working hours."*
>
> *[105]* ***We are satisfied that the change proposed is incidental to the relevant term and 'essential for the purposes of making [the relevant term] operate in a practical way', within the meaning of s.142(1)(b) of the FW Act, and consistent with the modern award objective. The exclusion will assist in reducing regulatory burden and making the relevant term simpler and easier to understand (see s.134(1)(f) and (g))."*** (Emphasis added)

132. We consider the Full Bench got the balance right, and even with the inclusion of (aa) the balance is still right.

[88] See paragraph 44 of the Revised Explanatory Memorandum to the *Fair Work Amendments Bill 2013* (emphasis added).

ISSUE 8: INDIVIDUAL FLEXIBILITY ARRANGEMENTS

133. We disagree with the ACTU's proposition that IFA's are inconstant with section 134(1)(aa).

134. The current formulation has gone through extensive processes of review to ensure that it is highly protective of the employee. It is almost so onerous that it is possibly already at a point that it is less workable than it should be.

135. The data already shows they are difficult to use.

136. Having an effective way to have an employer and employee make an accommodation as to working arrangements is most likely to result in the most secure form of work because it is mutually acceptable to both parties.

137. The ACTU's primary motivation appears to create a circumstance where they are unusable and they are not used. They seem to have a philosophical antipathy to an individual employee and an individual employer reaching an accommodation contrary to the black and white law. That antipathy more often than not is couched in the assumption that all employers are untrustworthy and coercive in nature.

ISSUE 9: DISPUTE RESOLUTION.

138. The ACTU's submission identifies four areas where the model dispute resolution clause is inconsistent with, or should be varied to meet the new modern award objective in s 134 (1) (aa).

139. Of particular note are the recommendations that the standard clause be varied to specify the powers the FWC may choose to exercise in resolving a dispute, and that the model term be varied to remove the restriction on disputes only being raised in relation to matters under the Award or the NES.

Specifying the Powers of the FWC to resolve disputes

140. We do not agree that the ACTU's amendments are necessary. These are statutory powers already provided to the Commission by the FW Act. Duplication would appear to be unnecessary.

141. In our view, the proposal is at odds with the objective of the FW Act to *"provide a balanced framework for <u>cooperative and productive</u> workplace relations… by … providing accessible and effective procedures to resolve grievances".*[89]

Expanding the scope of disputes

142. We oppose the ACTU's proposal to expand the scope of matters which are the subject of dispute outside of the National Employment Standards and modern awards.

143. We cannot see any obvious causal link between the ACTU's proposition and secure work.

144. The awards already contain vast numbers of rules creating various forms of security of work, categories of employment, when ordinary hours, shift work, changing rosters, etc. Those rules are mandatory unless expressed otherwise. There just doesn't seem to be any warrant to take the steps their proposing. The legislature did not see it fit to do so, which it could have done, and to the extent that is something to be pursued it is appropriate to pursue through bargaining. It wouldn't, in our view, constitute a minimum standard, but something much higher than that which is prohibited by s 138 of the FW Act.

[89] See Section 3 of the FW Act

145. There are other dispute resolution provisions throughout the FW where employees can raise disputes about the workplace that fall outside the scope of the NES or modern awards, such as anti-bullying[90], sexual harassment[91], adverse action[92] and many more.

146. In our view, there needs to be a limit as to the scope of what matters are subject of a dispute, so as to ensure the orderly and effective resolution of matters, and avoid impacts on the performance of work which in turn impact productivity for businesses.

147. Again, in our view, the proposal is at odds with the objective of the FW Act to *"provide a balanced framework for **cooperative and productive** workplace relations… by … providing accessible and effective procedures to resolve grievances".*[93]

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[90] See Chapter 6, Part 6-4B, Division 2 of the Fair Work Act 2009 (Cth).
[91] See Chapter 3, Part 3-5A of the Fair Work Act 2009 (Cth).
[92] See Chapter 3, Part 3-1 of the Fair Work Act 2009 (Cth).
[93] See Section 3 of the FW Act (emphasis added).