

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196 and AM2014/197

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Common issue – Casual and Part-time employment

Submissions of:

Australian Council of Trade Unions (ACTU)

DATE: 19 October 2015

D No.: 144/2015

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Background

1. These proceedings are part of the first four-yearly modern award review process to be conducted by the Fair Work Commission ('the FW Commission') as required by section 156 of the *Fair Work Act 2009* ('the FW Act').
2. On 17 March 2014, the FW Commission issued a Statement declaring the review process would comprise three stages: a jurisdictional issues stage, a common issues stage and an award stage.¹ In that Statement, both casual and part-time employment were declared common issues to be determined in a separate proceedings within the common issues stage. Several conferences were held and the parties invited to raise common issues related to casual and part-time employment and a number of issues were identified. On 11 November 2014, the Australian Council of Trade Unions ('ACTU') submitted its outline of claim.² Various other claims have been submitted by other parties.
3. In Directions issued on 29 June 2015, Vice President Hatcher directed that any party seeking variations to any award in respect of the issues identified in casual and part time employment file a list of awards it seeks to vary and any proposed draft determinations by 17 July 2015. His Honour directed that comprehensive written submissions and any witness statements or documentary material to be relied on be filed by 12 October 2015.³
4. The ACTU filed draft determinations and a list of affected awards on 17 July 2015.⁴ Attached is an updated list of both the draft determinations and affected awards.⁵
5. These submissions and the ACTU's claim is supported by the attached material (see end for a complete list of attachments):
 - a. witness statements,

¹[2014] FWC 1790.

² See the [ACTU's amended claim](#), as amended 13 November 2014.

³ The ACTU sought and was granted an extension to file by 19 October 2015.

⁴ See the [ACTU's Draft Determinations and List of Affected Awards](#), as amended 23 July 2014.

⁵ See attachments 'A001 - Draft Determinations_updated 19.10.2015' and 'A002 - ACTU List of Awards updated 13.10.2015'.

- b. expert report co-authored by Professor Raymond Markey and Dr Joseph McIvor under Professor Markey's supervision ('Expert Report')⁶;
 - c. supplementary expert report co-authored by Professor Markey, Dr McIvor and Dr Martin O'Brien under Professor Markey's direction ('Supplementary Expert Report')⁷; and
 - d. *Lives on Hold*⁸, the final report of the Independent Inquiry into Insecure Work ('Insecure Work Inquiry') in Australia conducted by an independent panel of experts commissioned by the ACTU.
6. The Expert Report includes an analysis of a survey commissioned by the ACTU and conducted by Survey Sampling International ('ACTU Survey') on which the ACTU also relies. The Supplementary Expert Report confirms the ACTU survey is reliable, well designed and robust and the findings are consistent with data from the Australian Bureau of Statistics ('ABS') and the Household, Income and Labour Dynamics in Australia survey ('HILDA').⁹
7. The ACTU also supports the claim and submissions made by the AMWU and AMWU Vehicles Division and relies on the AMWU submissions which contain further analysis of the ACTU Survey and further evidence relevant to the ACTU's claim.

The ACTU's Claim

8. The ACTU's claim is directed at the problem of insecure employment in Australia. We propose a pathway out of casual employment for long-term regular casual employees who desire it and improved minimum hours of work for both casual and part-time workers. We submit the claim is necessary in order to meet the modern awards objective.

⁶ See Expert Report in attachment 'E001'.

⁷ See Supplementary Expert report in attachment E001.

⁸ Independent Inquiry into Insecure Work, *Lives on Hold: unlocking the potential of Australia's workforce, A Report of the Independent Enquiry into Insecure Work in Australia* (2012) 21; See attachment 'R001 Lives On Hold Report'.

⁹ Supplementary Expert Report, p6 and 52.

9. The ACTU contends that, in recent decades, dramatic changes to the composition of the workforce and the way employers engage their workers has undermined the security of employment of a substantial proportion of employees.
10. The ACTU will lead evidence to show that casual employment is, for a significantly large category of workers, being used in a manner that departs from the proper purpose and intention of casual employment and undermines the fairness and relevance of the safety net.
11. Whilst the FW Commission, its predecessors and State-based counterparts have endorsed casual employment as a non-standard form of engagement that is irregular or short-term and non-ongoing, the ACTU will lead evidence to show that the exponential growth in casual employment has been accompanied by the growth of a large number of workers who are in fact engaged as casuals on a long-term and regular basis. A significant number of these workers are permanent workers in all but name in that their work is regular and ongoing and yet they enjoy significantly inferior rights and conditions compared to permanent workers. Furthermore, they experience a range of adverse consequences as a result of being casually employed.
12. The reality of the labour market today is that many employers are choosing not to provide entitlements afforded to permanent employees under modern awards simply by paying a casual loading and adopting the nomenclature of “casual” employee. Our contention is that this practice, where left to operate at large and without any coherent checks and balances, operates in a manner that undermines the safety net.
13. The ACTU will show that a significant proportion of long-term regular casual workers do not currently enjoy a right to convert their employment to a permanent footing under modern awards and many that wish to still remain in casual employment. Hence, the first objective of the ACTU's claim is to provide long-term regular casual employees with a pathway out of casual employment into the security of permanent employment and the benefits that such employment provides.

14. Twenty-seven of the 122 modern awards currently contain a provision for conversion from casual to permanent employment.¹⁰ The ACTU's claim seeks variations relating to conversion to permanent employment in 108 awards. The ACTU's model clause would modify and strengthen existing conversion rights for employees by removing the qualification to some existing conversion rights that permits an employer to veto an employee's request to convert on certain grounds.
15. Evidence will be led to show that there is broad support amongst all main categories of workers – permanent, casual and labour hire - and in all major industries for long-term casuals who wish to convert to have the right to do so.
16. The ACTU will lead evidence to show that conversion is unlikely to be onerous to business and is likely to have a positive effect on productivity, employment and the economy.
17. The ACTU accepts that a proportion of casual workers will wish to remain in casual employment, either because the particular flexibility arrangement that they have with their employer suits their individual circumstances, or because they prefer to receive the casual loading or indeed because they are unaware of the benefits of permanent employment. The ACTU's proposal provides for such workers to remain casually employed if they elect to do so. This effects a compromise between the reality of modern employment arrangements and the traditionally proper uses of casual employment, and provides certainty to employees and employers as to the proper characterisation of their relationship for at least for those employees who choose to convert to permanent employment.
18. The ACTU contends that although some modern awards already have conversion clauses allowing for an employee to elect to convert to permanent employment, the form of these clauses is inadequate in some of those industries (but not all – see for example *Lang* at [28]-[31]). In these industries, the ACTU is seeking a 'deeming' variant of the conversion clause whereby a regular casual employee's employment would be deemed to have converted to permanent employment automatically after 6 months unless the employee opts out. In both the election and deeming variants of the proposed conversion

¹⁰ Additionally, the *Airport Employees Award 2010* has a (weaker) right to request permanent employment.

clause, there is an obligation on the employer to notify the employee of their conversion rights in advance of the employee qualifying for them.

19. The second objective of the ACTU's claim is to ensure that casual and part-time employees have viable minimum hours of engagement. Short shifts contribute to insecurity of employment and a significant number of casual employees are engaged on shifts that are too short to be viable. The ACTU will lead evidence to show the impact on employees of short shifts in terms of the fixed costs of attending work, including travel costs and child care, travel time and overall impact on earnings. The ACTU's proposal would provide for a minimum engagement of 4 hours for both casual and part time permanent workers in affected modern awards. A variation is sought in relation to 65 awards in relation to minimum periods of engagement affecting part-time employees and 60 awards in relation to casual employees.

20. The ACTU's model provisions are outlined in our claim. The ACTU contends these should in principle constitute a general and universal standard for modern awards and that any tailoring of the wording to accommodate the circumstances of particular industries be done without egregious diminishment of the standard sought. The ACTU's Draft Determinations attempt to balance these considerations. The claim is made in relation to most but not all modern awards.

Statutory Framework

21. As mentioned above, this claim is made within the 4-yearly modern awards review process. Section 156 of the FW Act sets out the requirement that the FW Commission conduct a 4-yearly review and what may be done in such a review. The nature and scope of that process was summarised by a Full Bench of the FW Commission in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision [2014] FWCFB 1788 ('Preliminary Jurisdiction Issues Decision') as follows:

[60] On the basis of the foregoing we would make the following general observations about the Review:

1. Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156(2) to make determinations varying modern awards and to make or revoke modern awards in a Review, is expressed in general terms. The scope of the discretion in s.156(2) is limited by other provisions of the FW Act.

In exercising its powers in a Review the Commission is exercising 'modern award powers' (s.134(2)(a)) and this has important implications for the matters which the Commission must take into account and for any determination arising from a Review. In particular, the modern awards objective in s.134 applies to the Review.

2. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).

3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

4. The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'.

5. *In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.*

6. *There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.*

7. *The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.*

8. *Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards. Depending on the terms of a variation arising from the Review, certain other provisions of the FW Act may be relevant. For example, Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the National Employment Standards (NES) and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. The Review will also consider whether any existing term of a modern award is detrimental to an employee in any respect, when compared to the NES (see s.55(4)).*

9. *Division 5 of Part 2-3 (ss.157-161) of the FW Act deals with the exercise of powers outside 4 yearly reviews and annual wage reviews. These provisions are not relevant to the conduct of the Review but the Review process is not of itself a barrier to an application or determination being made under Division 5, provided the Commission is satisfied that the requirements of Division 5 have been met. In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Interested parties will be provided with an opportunity to comment on any such proposed variation.*

10. *Division 6 of Part 2-3 contains specific provisions relevant to the exercise of modern award powers. These provisions apply to the Review. If the Commission were to make a*

modern award or change the coverage of an existing modern award in the Review, then the requirements set out in s.163 must be satisfied.

Determinations varying modern awards arising from the Review will generally operate prospectively and in relation to a particular employee the determination will take effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. A variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.

Section 166 deals with the operative date of variation and determinations which vary modern award minimum wages and it also applies to the Review.

Presumption regarding the modern award objective

22. As the Preliminary Jurisdiction Issues Decision confirms, there is a statutory presumption that, *prima facie*, the modern awards objective was met at the time the modern awards in question were made. This presumption can be displaced through submissions supported by probative evidence to the contrary.

23. The FW Commission is also empowered to inform itself “in such manner as it considers appropriate”.¹¹ In the context of the nature of the four yearly review of modern awards, this could conceivably involve the FW Commission taking a more interventionist approach after a party establishes a *prima facie* case, or at any time, rather than leaving the parties to fully carry the evidentiary burdens that apply in more adversarial *inter partes* litigation. The rules of natural justice would still need to be complied with and any findings the FW Commission intended to make as a result of inquiries made on its own volition put to the parties before determination. As was observed by the recent four yearly review Full Bench in a matter concerning annual leave:

“...The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral

¹¹ FW Act s. 590(1).

functions performed by the Commission in the past. In the Review context, the Commission is not creating an arbitral award in settlement of an inter partes industrial dispute – it is reviewing a regulatory instrument”¹² [emphasis added].

24. The FW Commission could, for example, conduct its own examination of witnesses or undertake its own analysis of relevant datasets (such as HILDA and AWRS).

Modern award objective

25. According to the Preliminary Jurisdiction Issues Decision, the ACTU must show the proposed changes are necessary in order to ensure that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’ taking into account the criteria in s134. Given a significant change (in the sense of a non-trivial change) is proposed, the claim must be supported with a submission addressing the relevant legislative provisions accompanied by probative evidence. The proposed changes must also only be that necessary to achieve the modern award objective. These criteria are addressed below.

The legal conception of casual employment

26. Whilst there is no single “go-to” authoritative legal definition of “casual employment”, as with many concepts that are important to the common law of employment, the courts have adopted the approach of identifying *features* of a casual employment relationship which enable the law to distinguish casual arrangements from permanent ones, in the same way as they have, for example, identified features that distinguish employees from contractors¹³ or reasonable restraints of trade from unreasonable ones¹⁴. There is a long-standing judicial acceptance that casual

¹² [2015] FWCFB 3406 at [156]

¹³ See, for example, *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366.

¹⁴ See, for example, *Wallis Nominees (Computing) Pty Ltd v. Pickett* [2013] VSCA 24

employment is typically characterised by 'informality, uncertainty and irregularity'¹⁵ and that it is typically *ad hoc* or non-ongoing work¹⁶ in contrast to permanent employment, which involves employment on a regular, ongoing basis.¹⁷

27. In the High Court's decision in *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545, Dixon J said: "...unfortunately what is casual employment is ill defined. Indeed it is scarcely too much to say that it seems open to a tribunal of fact to treat most forms of intermittent or irregular work as casual." Similarly, Starke J said in *Doyle* (at page 1):

"The description "casual worker" is not one of precision: it is a colloquial expression, and where, upon all the facts, there is a reasonably debatable question whether the work is casual or regular, the question is one of fact for the commission."

28. In *Reed v Blue Line Cruisers Ltd* (1996) 73 IR 420 at 425 Moore J said:

*"A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual."*¹⁸

¹⁵ See *Reed v Blue Line Cruisers Ltd* (1996) 73 IR 420 at 425 per Moore J: 'It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual,'; See B.Creighton and A.Stewart, *Labour Law* (5th Edition, 2010) p198 at [8.01].

¹⁶ See Dixon J's comments implying that the 'ad hoc' and indefinite nature of an employee's work is indicative of casual employment.

¹⁷ See Creighton and Stewart (2010) p198 at [8.01]. See *Metals Case* at para [95]: "*Casual employment in the Award, and in many other awards, was and still is, in form, an exception to standard full-time and indefinitely continuing employment*".

¹⁸ In *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Department of Justice and Attorney General (Corrective Services NSW)* [2010] NSWIRComm 148 at para [22], Boland J noted that, given Justice Moore was concerned with the question of whether a person was a 'casual employee engaged for a short period' under regulation 30B of the Industrial Relations Regulations (Cth), "his Honour's decision cannot be taken as a definitive statement as to what is a casual employee under Australian domestic law, although his Honour's observations are helpful". We would, however, note that Moore J's *obiter dicta* we extract here was directed to "engagement on a casual basis" at common law, which he went on to equate to the concept of a 'casual employee engaged for a short period' in the relevant regulations: "Regulation 30B reflects a similar concept having regard to how a casual engaged for a short period is identified." In *Williams v. Macmahon* [2010] FCA 1321, Barker J accepted (at [34]) that Moore J's observations were general and pertinent: "I do not consider that these observations by Moore J should be read other than as general observations concerning the concept of casual employment. Certainly, they were not, in

29. The following may be described as indicia of casual employment in the general law¹⁹:
- a. Where the employer can elect to offer employment on a particular day and when offered, the employee can elect to work;²⁰
 - b. Where there is uncertainty about the period over which this employment may be offered;²¹
 - c. Employment that is generally informal, uncertain and irregular;²²
 - d. Most forms of 'intermittent' or 'irregular' work may be treated as casual.²³
 - e. Employment that is conditional on the availability of work.²⁴
 - f. Where the employee is free to inform the employer that he or she is unavailable.²⁵
 - g. Where the hourly rate of pay is intended to cover leave entitlements; award classification; payment only for hours worked; and working varying hours during the course of employment.²⁶
 - h. An absence of firm advance commitment as to the duration of the employee's employment or the days or hours the employee will work.²⁷
30. Various courts and industrial tribunals have noted the inferior legal entitlements and other disadvantages experienced by casual employees. In *Registered Clubs*

my view, intended to be observations about employment on a casual basis under any particularly statutory or regulatory regime. They are a helpful commentary on what the early authorities, such as *Doyle*, have to say on the topic of what casual employment is under the general law today”.

¹⁹ See Boland J's summary in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Department of Justice and Attorney General (Corrective Services NSW) [2010] NSWIRComm 148*

²⁰ *Reed v Blue Line Cruisers Ltd (1996) 73 IR 420* at 425 per Moore J.

²¹ *Ibid.*

²² *Ibid.*

²³ *Doyle* per Dixon J;

²⁴ *Ross v Court Recording Services (NSW) Pty Ltd* (27 August 1999), AIRC, per Ross VP, Duncan DP, and Larkin C. Print R8524.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589; (2001) 115 FCR 78 at [38]; *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175; (2008) 175 IR 455 (at [105]).

Association of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, NSW Branch [2000] NSWIRComm 262, Glynn J said:

"I accept the submission by the RCA that historically loadings are paid to casual employees because of disadvantages inherent in the nature of casual employment such as:

(a) lack of job security- employers utilise casuals as and when they are required;

(b) lack of benefits in relation to sick leave;

(c) lack of benefits in relation to public holidays;

(d) lack of 'award benefits' generally. Specifically as to club employees, examination of the 1999 Award shows a number of provisions that relate only to weekly and part-time employees. Those provisions may not necessarily be monetary in nature but they do provide benefits to weekly and part-time employees not available to casual employees eg subclauses 7.1 to 7.16 (terms of employment, including notice);

*(e) disabilities associated with intermittency inherent in casual work (see for instance, In re Clerks (Sydney Daily Newspapers) Award [1961 AR 529 at 537], In re Shop Employees (State) Award (No.2) [1977 AR 555 at 575] and Decision - Public Holidays (AIRC, Hancock SDP, MacBean SDP and O'Shea C; Print L9178; 20/3/95)."*²⁸

31. State and federal industrial tribunals have also confirmed the uncertainty and insecurity inherent in casual employment. In *Australasian Meat Industry Employees' Union, Newcastle and Northern Branch v Sunnybrand Chickens and another re independent contracting* [2003] NSWIR.Comm 361, Harrison DP stated:

"So far as the so called permanent employees, the undertakings by the Company meet all concerns. So far as the casual employees are concerned,

²⁸ See also the *Secure Employment Test Case*.

the nature of their casual employment is uncertain and surrounded by fluctuation in the availability of work and consequent earnings consistent with the usual nature of casual employment."²⁹

32. Generally, and with some disapproval, the judiciary has noted the emergence of the regular, ongoing casual worker who, unlike 'true' casual employees, works on a similar basis to permanent employees but with inferior rights and entitlements to permanent workers. In *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385 at 399 the Full Bench of the Industrial Relations Commission of New South Wales described two classes of casual employee as follows:

*It is apparent that two classes of employee colloquially described as "casual" can readily be identified in the organisation of industrial relationships. The first class refers to those employees who are truly casual in the sense that there is no continuing relationship between the employer and the employee. The second class is where there is a continuing relationship which amounts to an ongoing or continuing contract of employment; it is this second class of contract which, for the reasons set out earlier by us, is of such a nature as to attract the Commission's jurisdiction under Pt 8 of Ch 3 of the Act [and hence were said to have access to unfair dismissal protection].*³⁰

33. In referring to the above passage, a Full Bench of that Commission made the point that the mere recognition that casual workers are being engaged on a long-term and regular basis should not be taken as judicial acceptance of the merit of that practice, nor was it an endorsement that such 'permanent casuals' would meet the requisite statutory standards of fairness or and reasonableness or fit within the well-established jurisprudence on the 'true' nature of casual employment:

"We do not consider that Ryde Eastwood Leagues Club v Taylor represents an acceptance (as opposed to a recognition) by the Commission of the notion of the "permanent casual" as a form of employment. The question whether an employee is engaged on a casual basis for the purpose of determining jurisdiction (such as in an unfair dismissal matter) does not disturb the well

²⁹ See paragraph [52].

³⁰ at 401-402

established jurisprudence surrounding the true nature of casual employment, nor does it represent a review by the Commission of the casual employment model against statutory standards of fairness or reasonableness. Indeed, decisions such as Ryde Eastwood Leagues Club v Taylor highlight further the changes we have described in the management of casual employment vis a vis permanent employment.

There was no shortage of evidence in this matter, some of which is extracted earlier, to demonstrate the way in which the features of casual employment have, in many instances, changed from short term and unpredictable to long term and regular. The storeperson engaged by Bonds Industries Pty Limited is a clear illustration: the employee has been engaged for over six years, working a 38 hour week on regular morning shifts, yet was labelled and paid as a casual employee. We do not consider such long term casual engagements to be isolated incidents, but rather reflect the increasing trend.”³¹

34. In *Notification under section 130 by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Liquor and Hospitality Division, New South Wales Branch of a dispute with Parramatta Leagues Club Ltd re reduction of hours* [2002] NSWIRComm 208, Sams DP indicated that attempting to maintain a casual contract of employment insisting on fixed hours on specific days is 'illogical and oxymoronic':

" A casual engagement cannot conceptually, or by definition, be for fixed hours or days. Indeed, on one view, it might be argued that each single casual engagement is, of itself, a contract of employment."

35. Several decisions of state industrial tribunals emphasised that the proper nature and purpose of casual employment in industrial instruments is in relation to work of a short-term, irregular and intermittent nature.³² In *Re Social and Community Services Employees (State) Award* (2001) 113 IR 119, a Full Bench of the NSW Industrial Relations Commission (Wright J, President, Grayson DP, McLeay C) said [at par 314]:

³¹ *Secure Employment Test Case* [2006] NSWIRComm 38 at [233]-[244].

³² See *Watchmen, &c. (State) Award* [1965] AR(NSW) 268 at 276-7; *Re Shop Employees Award (No 2)* [1977] AR(NSW) 555 at 579; *Australasian Meat Industry Employees' Union, Newcastle and Northern Branch v Sunnybrand Chickens and another re independent contracting* [2003] NSWIRComm 361.

"We do not envisage that employers will be unreasonably or unnecessarily constrained in their use of casual employees by limiting such employment to work of a short-term irregular nature. We do consider, conversely, that those employees who have in the past been employed in and have an expectation of continuing regular long-term employment are entitled to the range of employment related benefits which accrue to permanent employees. We conclude that a useful application of the words "short term irregular" would be continuous work of not more than 13 weeks' duration and not occurring at predictable, expected and equal intervals. Beyond that, we consider there is a compelling case for permanent employment."

36. The South Australian Industrial Relations Commission said in the *SA Casual Clerks Case* (per Stephens DP):

*"The Commission is of the opinion, and makes a finding to that effect, that the current provisions for casual, part time and full time employment as they are being applied, have led to a significant use of the casual employment provision, notwithstanding that the true nature of the contract may be for regular part time or full time employment. The evidence suggests that true casual employment in this industry (other than labour hire firms) where the employee is engaged on an intermittent or irregular basis, with no expectation of ongoing or continuous employment is the exception rather than the rule. Yet the evidence also suggests that those employees who have regular and systematic employment which is ongoing and continuous in nature, are more likely than not to be paid as casuals and not a permanent part time employees. The existing definitions, properly applied on the basis of the primacy of weekly hire, should not have led to this situation occurring."*³³

37. A series of successful test cases for casual conversion and minimum hours of engagement were run in the 1990s and 2000s. In *Re Metal, Engineering and Associated Industries Award (2000) 110 IR 247 (T4991)* ('Metals Case'), a Full Bench of the

³³ *Re Clerks Award* [2000] SAIRCOMM 41, Stevens DP, 20 July 2000 at page 55. These observations were endorsed by the Full Bench of that Commission on appeal. See *Clerks (SA) Award Casual Provisions Appeal Case* [2001] SAIRComm 7 (7 June 2001), *Clerks (SA) Award Casual Provision Appeal Case* [2002] SAIRComm 39 (5 July 2002).

Australian Industrial Relations Commission ('AIRC'), whilst rejecting an application to limit the circumstances in which casual employees could be engaged, granted an application to including a right of conversion for casual employees to permanent employment and also minimum hours of engagement for casual and part time workers into the *Metal, Engineering and Associated Industries Award (2000)*. The Commission noted that: "... Casual employment in the Award, and in many other awards, was and still is, in form, an exception to standard full-time and indefinitely continuing employment."³⁴ The Commission further noted that:

*"...As a general proposition, it is desirable that use of non-standard forms of employment be justified. To ensure that, it may be necessary to set limits or to impose incidents that discourage uses designed to avoid observance of the conditions that attach to standard forms of employment."*³⁵

38. The AIRC went on to highlight the disjunct between regular, ongoing casual employment and the true nature of casual employment and the potential of the former to undermine the award safety net:

[106] We consider that there is considerable force in the considerations raised by the AMWU in support of some time limit being put on engagement as a casual. We have rejected in Sections 7 and 8 of this decision the contentions that the Award should be read or should now be converted to minimise free access to casual employment. However, those conclusions do not extend to justify a unilateral extension of a casual engagement nominally based on hourly employment over indefinite periods, in some cases for years. The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.

[107] The main point made in the passage quoted from Mr Buchanan's evidence was to the effect that the category of the permanent casual is founded upon an entrenched diminution of workers' rights. That construction was

³⁴ See paragraph [95].

³⁵ See paragraph [103].

supportable from other evidence and constitutes a strongly persuasive consideration. In relation to that emerging phenomenon in Australian patterns of employment, Creighton and Stewart have observed:

“[7.28] ... the term ‘casual’ really embraces two different classes of worker. The first - ‘true’ casuals - work under arrangements characterised by ‘informality, uncertainty and irregularity’. The second category consists of persons who may be treated as casuals for some purposes (notably the application of a relevant award or agreement), yet in fact have quite regular and stable employment. The prevalence of this latter kind of worker helps to explain the remarkable statistic, drawn from AWIRS 95 data, that the average job tenure of a casual is over three years (Wooden 1998a: ...). It is especially important to bear this consideration in mind when looking at figures that appear to show that Australia has an abnormally high incidence of ‘temporary’ employment by international standards. Many casuals do indeed have temporary jobs; but there are a lot of others for whom the application ‘permanent casual’ is far from a contradiction in terms.

[7.29] The phenomenon of casual employment has important implications for regulatory policy, especially in light of the ease with which workers can come to be classified as casuals. In theory, the loading is meant to discourage employers from hiring casuals. However, even if the loading does constitute adequate compensation for the full value of the non-wage benefits foregone, most employers seem happy to pay the additional amount in return for what they perceive as the flexibility of being able to hire and fire at will. For some workers too, the loading may seem an attractive substitute for benefits they are unlikely to access, or whose true value they do not appreciate. For many though, the question of choice is simply irrelevant when the only alternative to accepting casual work is unemployment. In light of these factors, it should hardly be surprising that the number of people in casual employment has increased

dramatically in recent years. According to ABS data, casuals now make up around 27% of the workforce, up from 19% in 1988 ABS (1999b). While it is possible that these figures overstate the incidence of casual employment, the trend is clear. [Creighton and Stewart, Australian Labour Law: An Introduction, 3rd Edition, Federation Press 2000 at paragraphs 7.28-7.29.]"

...

[115] We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals. We have determined in favour of a process requiring election rather than one of setting a maximum limit to engagements. Such process should create room for the individual employee's perception of the best option to operate. It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election."³⁶

39. The AIRC granted the application for an award right of conversion for casual employees working regularly for 6 months or more to convert to permanent employment. The AIRC agreed to insert a provision requiring 3 hours' minimum engagement for part-time workers and 4 hours for casual employees.³⁷ The AIRC stated:

"We accept that a reasonable minimum payment per day is a critical consideration for less advantaged employees faced with a choice between intermittent casual work, or no work and perhaps threatened social welfare benefits."³⁸

40. The *Secure Employment Test Case* [2006] NSWIRComm 38 ('*Secure Employment Test Case*') concerned an application by Unions NSW in the NSW Industrial Relations Commission for a test case standard relating to security of employment, in particular, protecting the job security of employees who regularly and systematically work on a casual basis as well as limitations on labour hire and

³⁶ See paragraphs [106] – [107] and [115].

³⁷ See paragraphs [130] – [132].

³⁸ See paragraph [132].

contracting out and strengthened occupational health and safety obligations in relation to labour hire. The Commission found that:

"227 As earlier stated, the evidence presented in this matter demonstrates that casual employment in New South Wales has experienced significant change in recent years, both in terms of the nature and incidence of casual engagements. It is those changes, and the consequent implications for casual employees, which are at the heart of our decision to grant Unions NSW's application with respect to casual conversion. Our reasons are threefold.

228 Firstly, whilst there are some employees who fit the traditional definition of casual employment, the changing nature of casual employment has resulted in an increasing number of casual employees working regular hours in long term positions. Many of those employees experience significant adverse consequences as a result of having been shifted out of permanent employment.

229 Secondly, the fact that employers are increasingly engaging casual employees to perform work which was previously performed by permanent employees detracts from and undermines the efficacy of the system of industrial awards which regulates a large percentage of permanent and casual employment in New South Wales.

230 Thirdly, whilst employers have benefited in varying degrees from the increases in, and changes to, casual employment, the evidence is ambiguous as to whether the same flexibilities could not be achieved by other forms of engagement. More significantly, evidence called by Employers First as to the perceived difficulties associated with the claimed casual conversion clause did not sustain testing under cross-examination. When the true effect of the clause was understood, most genuinely held objections dissolved. It is important to emphasise that the claim is not directed at true casuals: it only operates where an employee elects to transit to permanent employment.

231 The concept of a "casual" which has emerged through historical employment practice and industrial jurisprudence and which has now long been defined and regulated in awards in this State is essentially one in which: the employee has a short term engagement; shifts are irregular and unpredictable; the employee is not obliged to accept an offer to work a particular shift; the employee's employment technically commences at the beginning of a particular shift and ceases at the end of that shift; the employee is paid a loading as compensation for, amongst other things, annual leave and other benefits "accrued" during each shift worked; and the employee has no expectation of being rostered for another shift.

232 Awards recognise a distinction between casual work and full-time or part-time work, and prescribe levels of remuneration and conditions accordingly. The awards of this State have created and maintained a dichotomy between permanent and non-permanent employment. What the evidence in this matter has revealed is a significant shift towards engaging employees as "casuals" (merely by the label being affixed to the position or by the characterisation of the employment by contract or otherwise) in circumstances where those employees do not, on any reasonable basis, fit the conceptual and legal model so described. This change has occurred without a review by the Commission as to whether the changes are consistent with the existing award model or are appropriate when judged against the requirements of s 10 of the Act and other relevant statutory provisions. The application by Unions NSW represents the first modern opportunity to review the new arrangement. This is significant as it is clear from the evidence that the changed employment patterns which have created something akin to a "permanent casual" (in contrast to the "true casual") significantly altered the work arrangements (often adversely) of a large number of employees.³⁹

³⁹ See paragraphs [227] – [232].

41. The Commission accepted that Unions NSW's 'Secure Employment' clause, including casual conversion, should constitute a general principle and be inserted into the *Storemen and Packers Bond and Free Stores (State) Award* and *Storemen and Packers Wholesale Drug Stores (State) Award* and that other awards could be varied upon application to include the model clause.⁴⁰

42. Several decisions have taken the view that an employee's initial manner of engagement under an award is determinative of casual status even if the employee's subsequent work patterns depart from the definition and purpose of casual employment in the general law. In *CPSU & others v Crown in the Right of the State of Victoria* [2000] FCA 759, a Full Bench of the Federal Court (at paragraph 5) stated:

"...the legal character of their employment, for the purposes of how the Award would operate, was determined by the manner of their initial engagement. It is irrelevant, in our opinion, that the evidence might support a conclusion that, after their initial engagement, their employment had some of the hallmarks of regular employment rather than casual employment. It is unnecessary to consider those authorities which accept that, in appropriate circumstances, employment can properly be characterised as regular casual employment. It is also irrelevant, for present purposes, whether the Award was drafted on the assumption that casual employees would work in a particular way and not in the way that Murrell and Hutchins in fact worked."

43. Despite the fact that *CPSU & Others* was determined on the basis that the relevant award was subservient to the form of engagement prescribed in particular State legislation concerning public sector employment⁴¹, it was endorsed by a Full Bench of the AIRC in 2001 in the *Metals Case* and again in a Full Bench of the FW Commission in 2013 in *Telum v CFMEU*⁴² as consistent with a broader view that the initial characterisation of the form of engagement could be determinative. In the latter case, a Full Bench noted that all of the modern awards contain a similar definition of casual employment and averred that, in its view, the initial manner of engagement is determinative of an employee's employment status under modern awards even if the

⁴⁰ *Secure Employment Test Case* at paragraph [684].

⁴¹ See [3]-[5] thereof.

⁴² *Telum v. CFMEU* [2013] FWCFB 2434 Ata[38]-[58]

nature of the engagement later departs from the common law definition of casual employment. The Full Bench reasoned as follows:

"...Those [modern award] definitions, notwithstanding some variation in wording, have the same core criteria:

(i) That the employee was "engaged" as a casual - that is, the label of "casual" is applied at the time of time of engagement; and

(ii) That the employee is paid as a casual, and specifically, the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.

[39] For example, clause 14.1 of the Manufacturing and Associated Industries and Occupations Award 2010 provides:

14.1 A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of one thirty-eighth of the minimum weekly wage prescribed in clause 24.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate.

[40] That award excludes casual employees from the entitlement to annual leave, personal leave and the other entitlements for which the casual loading compensates.

[41] Clause 14 of the Construction Modern Award relevantly provides:

14.1 A casual employee is one engaged and paid in accordance with the provisions of this clause.

14.2 A casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits.

14.3 An employer, when engaging a person for casual employment, must inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay.

...

14.5 A casual employee must be paid a casual loading of 25% for ordinary hours as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.

[42] Again, this approach to the identification of casual employees was not an innovation in the modern awards. Many, if not most, of the pre-reform awards, and certainly the main pre-reform awards, adopted this approach.

[43] None of the modern awards adopt the general law approach to the identification of casual employees. Indeed, a number of modern awards contain 'casual conversion' provisions (typically where casual conversion was a feature of the key Federal awards and or NAPSAs replaced by the modern award) that allow for an employee who is engaged and paid as a casual, but who works systematic and regular hours for a sufficient period, to seek conversion to permanent full time or part time employment. For example, the Construction Modern Award contains such a provision, clause 14.8, which includes the following:

14.8 Casual conversion to full-time or part-time employment

(a) A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

(b) For the purposes of clause 14.8(a), an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis."

...

(h) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

...

[50] The FW Act defines the expression "long term casual employee" in s.12 to mean

long term casual employee: a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

[51] This very definition suggests that legislature did not intend the expression "casual employee" to call up the general law approach. If the criterion in (b) is satisfied then the employee would likely not be a "casual employee" under the general law approach but the definition presupposes that an employee who satisfies the criterion in (b) can still be a "casual employee" within the meaning of (a).

[52] Moreover, that definition is used in only two places in the FW Act:

(i) in s.65(2)(b) in relation to the right to request flexible working arrangements to long term casual employees (casuals being otherwise excluded); and

(ii) in s.67(2)(a) in relation to parental leave.

[53] In each case, the definition is used to extend those rights to long term casual employees, being rights to which casual employees are otherwise expressly excluded.

[54] Section 23 specifies the meaning of the expression "small business employer" and relevantly provides:

23 Meaning of small business employer

(1) A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.

(2) For the purpose of calculating the number of employees employed by the employer at a particular time:

(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and

(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.

[55] Again, the language presupposes that an employee can still be a casual employee even though he or she is employed on a regular and systematic basis.

[56] The FW Act makes special provision in relation casual employees accessing the unfair dismissal remedy. Relevantly for present purposes, an employee is not protected from unfair dismissal by the FW Act unless her or she has "has completed a period of employment with his or her employer of at least the minimum employment period" (s.382(a)). The minimum employment period is 6 months or 12 months depending upon whether the employer is a

"small business employer" (s.383). The expression "period of employment" is defined in s.384 which relevantly provides:

384 Period of employment

(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; ...

[57] Again, the language of s.383(2)(a) presupposes that an employee employed on a regular and systematic basis with a reasonable expectation of continuing employment on a regular and systematic basis can still be a "casual employee". A conclusion at odds with the general law approach adopted by the Commissioner.

[58] In summary, the FW Act provides for the regulation of terms and conditions of employment of national system employees through an interrelated system of the National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, it is obvious that the legislature intended that those components should interact consistently and harmoniously. We conclude that on the proper construction of the FW Act the reference to "casual employee" in s.123(3)(c) and the rest of the NES - and, indeed, elsewhere in the FW Act - is

a reference to an employee who is a casual employee for the purposes of the Federal industrial instrument that applies to the employee, according to the hierarchy laid down in the FW Act (and, if applicable, the Transitional Act). That is, the legislature intended that a "casual employee" for the purposes of the NES would be consistent with the categorisation of an employee as a "casual employee" under an enterprise agreement made under Part 2-4 of the FW Act (or under an "agreement based transitional instrument" such as a workplace agreement or certified agreement made under the WR Act) that applies to the employee or, if no such agreement applies, then consistent with the categorisation of an employee as a "casual employee" within the modern award that applies to the employee. Subject to any terms to the contrary, a reference to a "casual employee" in an enterprise agreement (or agreement based transitional instrument) will have a meaning consistent with the meaning in the underpinning modern award (or pre-reform award/NAPSA)."⁴³

44. An AIRC Full Bench decision handed down before *Telum v CFMEU* but after the *Metals Case* presented a contrary view to *Telum v CFMEU*. In *Cetin v Ripon Pty Ltd t/as Parkview Hotel* AIRC 30 June 2003, a Full Bench (VP Ross, SDP Duncan and Commissioner Roberts) stated:

"[59] In our view all the facts and circumstances bearing upon the nature of the engagement should be considered in determining the true character of the employment. Consistent with the approach of Moore J in Blue Line Cruises, the informality, uncertainty and irregularity of an engagement supports a conclusion that the employment has the characteristic of being casual. Conversely regular and systematic engagements with a reasonable expectation of continuing employment are usually not characteristic of casual employment.

[60] At the time her employment was terminated Ms Cetin was regularly working four shifts per week on Thursday, Friday, Saturday and Sunday evenings. It was understood between the parties that Ms Cetin was expected to turn up for work every week on those nights. If Ms Cetin was unable to work

⁴³ *Telum v. CFMEU* [2013] FWCFCB 2434 at [38]- [41] and [50] -[58].

on a particular night she was obliged to give notice. Since November 2002 any fluctuation in Ms Cetin's hours was due to fluctuation in the restaurant's closing time on a particular night. Ms Cetin's employment could not reasonably be said to be informal, uncertain or irregular. To the contrary, her employment was regular and systematic, and would have given rise to a reasonable expectation of continuing employment.

*[61] In the matter before us the parties characterised Ms Cetin's employment as casual and her employment was classified as casual under the Award. But in our view it would be wrong in principle to treat the character ascribed by an award to particular employment, and adopted by the parties, as conclusively determining the character of the employment for the purpose of regulation 30B(1)(d). Nor is the fact that Ms Cetin was paid a casual loading in lieu of sick leave, annual leave and public holidays determinative of whether or not she was a casual employee for the purpose of regulation 30B(1)(d). Each of these incidents is a consequence of the characterisation chosen by the parties. Rather than being conclusive, each of these matters are simply factors to be taken into account in determining the true character of the employment. As Lee J observed in *Gurran v Tarbook Pty Ltd* [Unreported, Industrial Relations Court (Western Australia), 424/96, 13 September 1996]:*

"If parties to an employment contract have attempted in the terms of their contract to describe their relationship in a manner that does not accord with the facts, the relationship established by the facts will prevail." (emphasis added) ⁴⁴

45. More recently, in *Williams v MacMahon*⁴⁵, the Federal Court dismissed an appeal by an employer from three decisions by the Federal Magistrates Court, the first of which had characterised an employment relationship as not being a casual one, contrary to the express stipulations in a written contract that the employee was a "casual employee":

"His Honour then turned to the facts and, having noted, at [35], that the description in the Contract of Mr Williams as a 'casual employee' was not

⁴⁴ See paragraphs [59] – [61].

⁴⁵ [2010] FCA 1321.

determinative of the issue, found that there were a number of factors that suggested the description was in fact inappropriately used. In this regard he was expressly influenced by the following findings:

- *At [36], that there was an expectation that Mr Williams would be available, on an ongoing basis, to perform the duties required of him, in accordance with the roster, until such time as the Contract came to an end. This was not a contract where the availability of work was the subject of significant fluctuation from one day, or one week or month, to the next so as to make the work, and hours of work, irregular and uncertain, Rather, there was a stable, organised and certain roster that govern work until the Contract was ended, either for some cause or because the head contract had come to an end;*
- *At [37], that there was mutual expectation of continuity of employment subject only to termination for cause, or termination as a consequence of the head contract ending;*
- *At [38], that this was not a case of an employee working for short periods of time on an irregular basis;*
- *At [39] the fact that Mr Williams was paid a flat hourly rate, that purported to include a loading for various leave entitlements, including annual leave, was more indicative of a casual employment relationship than not;*
- *At 40, that Mr Williams was not regularly contacted and asked to work, rather the work was organised and he knew when and where he was required, and how he was to get there”.*⁴⁶

In the result, the Federal Court dismissed each of the appeals, which left the orders made against the employer intact, including penalties for breach of the requirement to

⁴⁶ at paragraph [17].

pay accrued annual leave on termination and compensation for non-payment of that entitlement with no set-off against the purported casual loading already paid.

46. The issue that *Telum v CFMEU* did not address, and which did not arise for consideration in that case, is whether the state of the law as found to exist in relation to casual employment is satisfactory. That is the issue that falls squarely for consideration in this proceeding. Nor are there any guarantees that a superior court would follow the reasoning in *Telum v CFMEU* if called to rule on the true nature of any particular employment arrangement. If the view expressed in both *Cetin v Ripon Pty Ltd* and *Williams v MacMahon* prevails, it is open for the judiciary to continue assessing the true nature of an employment relationship described as casual and, where it in fact resembles permanent employment, to afford the employee the entitlements attaching to permanent employment. On the other hand, if the view expressed in *Telum v CFMEU* prevails, the judiciary's discretion in this regard is prescribed: the manner of initial engagement is determinative of casual status under an applicable modern award, irrespective of whether the nature of that engagement is subsequently regular and ongoing and, taking an objective view of the totality of circumstances, would constitute permanent employment in the general law.

47. The former outcome would lead to uncertainty for both employer and employee about the nature of the employment relationship and ambiguity about an employee's entitlements. The latter outcome would only heighten the concern, raised by the NSW Commission in the *Secure Employment Test Case*, and the AIRC in the *Metals Case*⁴⁷, that an employer may avoid the entitlements otherwise applicable to a permanent employee under an award simply by describing the employment relationship as 'casual' at its inception and paying a casual loading, given the non-prescriptive nature of the definition of casual employment in awards.

48. State and federal legislatures have made ad-hoc and piecemeal moves to address the lesser rights of long-term regular casual workers compared to permanent employees

⁴⁷ See paragraph [67] confirming that the initial terms of engagement are determinative even if casual employment becomes regular and ongoing, together with the AIRC's concerns discussed above about 'permanent casuals'.

such as access to long service leave for some long-term regular casual workers.⁴⁸ As discussed in *Telum v CFMEU*⁴⁹, the introduction of the FW Act extended some limited rights to long-term regular casual employees such as unfair dismissal, the right to request flexible working arrangements and parental leave.⁵⁰

Conversion clauses Post-Work Choices

49. The process of introducing casual conversion rights for long-term regular casual workers was interrupted by the Work Choices reforms which rendered the conversion provisions introduced by the test cases of the 1990s and 2000s unenforceable, and indeed nullified all such provisions in awards in the newly expanded Federal system, as well as rendering unenforceable some restrictions on the use of casual employment. Section 515, subsection (1) of the *Workplace Relations Act 1996*, as it was after incorporating the WorkChoices amendments⁵¹, set out the matters that were made 'not allowable' award matters:

"(1) For the purposes of subsection 513(1), matters that are not allowable award matters within the meaning of that subsection include, but are not limited to, the following:

...

(b) conversion from casual employment to another type of employment;

(c) the number or proportion of employees that an employer may employ in a particular type of employment;

(d) prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;

... ”

⁴⁸ For example, see *Long Service Leave Act 1992 (Vic)* was amended to extend long service leave to casual employees.

⁴⁹ See paragraphs [50] – [58].

⁵⁰ See s67(2)(a) of the FW Act which does not exclude long-term casual employees with a reasonable expectation of regular and systematic employment with the employer.

⁵¹ The Work Choices amendments were introduced by the *Workplace Relations Amendment (Work Choices) Act 2005*.

50. Hence, casual conversion and some restrictions on the use of casual employment were explicitly non-allowable award matters. Section 525 further stated:

"(1) Immediately after the reform commencement, a term of an award ceases to have effect to the extent that it is about matters that are not allowable award matters, except to the extent (if any) that the term is permitted by Subdivision B to be included in the award.

(2) This section does not affect the operation of preserved award terms."

51. The FW Act removed these prohibitions for modern awards, however they remained in force in respect of the federal awards that the modern award system sought to replace⁵².

52. The AIRC conducted the enormous task of modernising awards, following the commencement of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. The conversion provisions preserved or inserted in modern awards during the award modernisation process and subsequent 2-year review were only done so where there had been an industry standard or in exceptional circumstances.⁵³ Casual conversion was considered by a Full Bench of the AIRC during the award modernisation process in its decision of 19 December 2008 ([2008] AIRCFB 1000). The Full Bench inserted casual conversion provisions into the *Textile, Clothing, Footwear and Allied Industries Award 2010* due to the nature of the industry and the reduction of the casual loading from 33¹/₃ percent to 25 percent. The Bench noted:

"[51] An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances. This provision has its genesis in the Full Bench decision already mentioned in connection with the fixation of the casual loading of 25 per cent in the Metal industry award. 15 The Bench made it clear that it had formulated the casual conversion provision based on the circumstances of the industry covered by the award and that there had been no evidence concerning other industries. Section 515(1)(b) of the WR Act identifies casual conversion provisions as

⁵² See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Schedule 3.

⁵³ Creighton and Stewart (2010) at paragraph [8.12].

matters which cannot be included in awards. Section 525 provides that such terms have no effect. These sections were part of the Work Choices amendments. It appears, however, that casual conversion provisions in NAPSAs were not invalidated. Modern awards can contain a casual conversion provision. In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute an industry standard, but we shall only extend them in exceptional circumstances. The modern awards reflect this approach. We note in particular that we have decided to include a casual conversion provision in the Textile, Clothing, Footwear and Allied Industries Award 2010 (the Textile industry award) against the opposition of employers. We have done so taking into account the nature of the industry and the reduction in the casual loading from 33⅓ per cent to 25 per cent in part of the industry covered by the award."

53. In the 25 September 2009 Statement on award modernisation re Stage 4 modern awards ([2009] AIRCFB 865), the AIRC included a minimum engagement term of 3 hours and declined the LHMU's submission to include a casual conversion clause in the *Hospitality Industry (General) Award 2010* on the basis of industry standards. The AIRC stated:

"[201] We will also include the minimum engagement of three hours for part-time employees. That entitlement appears in all current restaurant instruments other than the SEQ Restaurant Award, which prescribes a two hour minimum, and the SA Delicatessens Award.

[202] Turning now to casual employment, the R&CA draft does not include any minimum period of engagement for casuals, nor a casual conversion clause. The LHMU draft includes both.

[203] There is a two hour minimum engagement in all current restaurant awards, save that a higher number of hours – three or four – is prescribed by SA Restaurant Award, the SA Delicatessens Award, the NSW Restaurant Award and the Queensland non-SEQ Restaurant Award. We have included a minimum engagement of two hours in the exposure draft.

[204] *There is no casual conversion provision in current federal awards covering restaurants, the Queensland non-SEQ Restaurant Award, the SA Restaurant Award, the WA Restaurant Award or the Tasmanian Restaurant Award. There is such a provision in NAPSAs in other States and in the SEQ Restaurant Award. Having regard to the weight of current coverage, we have not included a casual conversion provision in the exposure draft*".⁵⁴

54. *Re CFMEU* [2010] FWAFB 1878 concerned an application by CFMEU in relation to an exposure draft of the *Timber Industry Award 2010* [MA000071] to insert a casual conversion clause applying to the wood and furniture stream. The application was unopposed and granted because it was common in the award-based transitional instruments and the Full Bench of Fair Work Australia ('FWA') saw granting it in this way as consistent with the approach taken in other modern award provisions in relation to casual conversion.

55. A similar approach was taken during the 2-yearly review. In *Re Motor Traders' Association of New South Wales and others* [2012] FWA 9731, ASU applied as part of the 2 year Modern Award review to insert a casual employment clause into the Clerks-Private Sector award and was unsuccessful. SDP Kaufman of FWA followed the AIRC Full Bench decision of 19 December 2008 re the Award Modernisation process [2012] FWA 9731 of only inserting the clause where it was an industry standard in denying the ASU's application to insert a casual conversion clause. SDP Kaufman stated that the award without the clause meets the modern awards objective, the full bench of the AIRC had considered the issue during the Part 10A award modernisation process and the ASU had not demonstrated there were any reasons to depart from that (that is, because it was not shown to be an industry standard).

56. We submit that just as the Full Bench of the NSW Industrial Relations Commission considered the *Secure Employment Test Case* the first modern opportunity to consider whether the use of casual employment fit the conceptual and legal safety net

⁵⁴ See also the Full Bench decision of Fair Work Australia in *Re Aged Care Award 2010* [2010] FWAFB 2026 in which the AIRC described its task (at paragraph [25]) '*...of selecting or devising the most appropriate provisions for modern awards having regard to the provisions in a wide range of award-based transitional instruments*' and stated at paragraph [49], "*It has not been shown that casual conversion provisions generally appear in the relevant award-based transitional instruments and there is no basis to review the decision not to include such a provision in the modern award, even on a transitional basis.*"

framework, this is the first opportunity to review the matter at a Federal level, given that the award modernisation and 2-year review processes were more narrow in scope and the *Metals Case* only concerned one award.

57. In the award modernisation processes, the FW Commission and its predecessors were concerned with consolidating many awards and deferring to industry standards and critical masses of entitlements. In the 2-yearly review, the FW Commission was primarily concerned with assessing that the modern awards were functioning as intended and addressing any problems, primarily in a remedial fashion. Hence, we submit this is the first time since award modernisation that a Federal tribunal has been called on and able to consider these issues in a comprehensive way and the FW Commission should not follow the approach that it did to applications for casual conversion and minimum hours of engagement during the award modernisation process and 2-year view.

58. As confirmed by the Full Bench in the Preliminary Jurisdiction Issues Decision, the 4-yearly review is a broader process than the modern award decision process or the 2-yearly review and, as confirmed in the *Security Services Industry Award 2010 [2015] FWCFB 620* modern award decision, it may to some extent be the first full opportunity to seek significant changes to the terms of modern awards.⁵⁵

59. We submit that if the FW Commission accepts that there is a compelling case for a general right of conversion and for the principle of 4-hour minimum periods of engagement, it should only refrain from extending these rights to a particular modern award if there is compelling evidence preventing it from doing so. The argument for 4-hour minimum engagement periods is industry-independent and set out below.

The nature and extent of casual employment

60. The Expert Report, Supplementary Expert Report and *Lives on Hold* report provide an overview of the nature and extent of casual employment.

61. Throughout most of employment law's development, the proportion of employees engaged on a casual basis was very low. In recent decades, however, there has been an

⁵⁵ See paragraphs [6]-[8].

exponential growth in the use of casual employment. The Australian Bureau of Statistics ('ABS') uses employment without leave entitlements as its definition of casual employment for statistical purposes. On that basis, the proportion of casual employees was 15.8 per cent in 1984, growing to a peak of 27 per cent in 2000-2003 before becoming relatively stable at about 24 per cent from 2005 onwards.⁵⁶ This relative stabilisation is explained partly by the growth of other forms of insecure work such as fixed-term contracts, labour hire and independent contracting, which have given employers other options for minimising costs and shifting risks on to their employees.⁵⁷

62. Both part-time and full-time casual employment has grown from at least the 1980s to the early 2000s, along with permanent part-time employment, with permanent full-time employment dropping from 77.8 per cent in 1988 to 63.4 per cent in 2008 after a low of 61 per cent in 2002.⁵⁸ Nearly 54 per cent of all part-time jobs are casual and approximately 10 per cent of full-time jobs.⁵⁹

63. Australia now has one of the highest rates of non-permanent employees in the OECD – double the OECD average of 12 per cent of employees on what the OECD terms 'temporary contracts'.⁶⁰ Australia's casual employees also have lower protections than apply to temporary contract employees in Europe.⁶¹ Much of Europe restricts precarious employment to a designated start and end point with minimum weekly hours and leave and with other rights accrued on a pro rata basis.⁶² Australia is alone, for example, in the OECD in excluding non-permanent employees from leave rights: Even NZ, Australia's closest analogue, gives casual employees such rights.⁶³

64. The trend towards increased casualisation in Australia is part of a broader trend towards more insecure work in this country. In 2011, the ACTU commissioned an independent inquiry into insecure work by an esteemed panel of experts and chaired by the Honourable Brian Howe AO, former Deputy Prime Minister. The other members of

⁵⁶ Supplementary Expert Report at paragraph 6.

⁵⁷ *Lives on Hold*, p10 and p14.

⁵⁸ Supplementary Expert Report at paragraph 7.

⁵⁹ Expert Report, p12.

⁶⁰ Expert Report, pp12-13

⁶¹ Ibid.

⁶² Expert Report, p13.

⁶³ See Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 66.

the Panel were Justice Paul Munro (former Senior Deputy President of the Australian Industrial Relations Commission and Deputy Chair of the Inquiry), Dr Sara Charlesworth (then Associate Professor at the Centre for Work+Life of the University of South Australia) and Jill Biddington (a former union leader).⁶⁴ The panel were asked to investigate the extent and causes of insecure work, the workers most at risk of insecure work and why, and the impact of insecure work on workers, their families and the community; the Panel was also asked to make recommendations as to what could be done.⁶⁵ The panel considered over 550 public submissions, conducted 25 days of public hearings in 22 towns and cities, and drew widely on published academic research.⁶⁶ The Panel's final report, *Lives on Hold: Unlocking the Potential of Australia's Workforce* was released in 2012 and contains a wealth of material relevant to these proceedings. In the report, the Chair of the inquiry summarised the problem of insecure work as follows:

"Over the past few decades, a new divide has opened in the Australian workforce. No longer between the blue-collar and white-collar worker, it is between those in the "core" of the workforce and those on the "periphery".

Those in the core are likely to be in full-time employment, either permanently within organisations, in management positions, or possessing skills for which there is steady demand and for which they can charge a premium. They are likely to enjoy sick leave, paid holidays and in many cases parental leave above the government's universal scheme.

For them, flexibility means the chance to work in a variety of industries, to work overseas, to earn good money freelancing or in a secure part-time arrangement. Periods of unemployment are likely to be short or voluntary.

Below and around this group are those on the periphery. They are employed on various insecure arrangements, casual, contract or through labour hire companies, on low wages and with far fewer if any benefits.

Many do not know what hours they will work from week to week, and often juggle multiple jobs to attempt to earn what they need.

⁶⁴ See *Lives on Hold* pp2-3.

⁶⁵ See p1 of *Lives on Hold* for the full terms of reference.

⁶⁶ See *Lives on Hold*, p4 and p6.

If their skills are low, or outdated, they are not offered training through work. They shift between periods of unemployment and underemployment that destroy their ability to save money.

Their work is not a “career”; it is a series of unrelated temporary positions that they need to pay rent, bills and food.

For them, flexibility is not knowing when and where they will work, facing the risk of being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work.”⁶⁷

65. The report defined insecure work as:

“...poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation. These challenges are most often associated with non-permanent forms of employment like casual work, fixed-term contracts, independent contracting and labour hire – all of which are growing.”⁶⁸

66. The report noted that *“to an extent the growth of these jobs has taken place ‘under the radar’”* with *“40% of the workforce in non-permanent forms of employment, and.. a quarter of employees with no entitlement to sick leave or paid leave.”⁶⁹*

67. The majority of insecure jobs are casual jobs.⁷⁰ Australia has experienced exponential growth in casualisation in virtually all industries, including manufacturing, which traditionally had little experience of it.⁷¹ The growth has not been driven by employee preferences for casual engagement but by employer preference: the growth is best explained by a combination of employer choices about the structure of employment

⁶⁷ *Lives on Hold* p5.

⁶⁸ *Ibid* p14.

⁶⁹ *Ibid* p17.

⁷⁰ See ABS statistics quoted in *Lives on Hold*, p14 and p15.

⁷¹ See Campbell et al (2008).

and opportunities provided for by gaps in the awards and regulatory system rather than any underlying structural changes or needs.⁷² The growth has been driven by employers taking advantage of casual clauses in awards that allow for employers to be exempted from offering standard rights and benefits in a climate, since the 1970s, of increasing competitive pressures and decreasing labour conditions.⁷³ The Insecure Work Inquiry found that the key driver of the growth in insecure work has been the emergence of a business model that shifts the risks associated with work from the employer to the employee and minimises labour costs at the expense of job quality.⁷⁴

68. In essence, casual employment has grown because it is legal for employers to utilise the perceived financial, operational, legal and administrative advantages attaching to casual employment and there are few regulatory restrictions to employers doing so, including, generally, no limitation on the duration of casual employment. Hence, Australia stands apart from other OECD countries, including New Zealand, both for its lack of regulatory restrictions on casual employment and its attendant high rates of casualisation.⁷⁵

69. The evidence shows the following about the current nature and extent of casual employment:

- a. Most part-time jobs are casual (54%) and 10% of full time jobs.⁷⁶
- b. Most casual employees work part-time hours. Seventy-one percent of casuals are part-time compared to 19 percent of permanent workers⁷⁷ and 85 per cent of all award-reliant casual employees are part-time.⁷⁸
- c. Casualisation is present in all industries and disproportionately represented among award-reliant employees (55 per cent of award-reliant employees are casual) and in low paid industries, being particularly concentrated in Accommodation and Food Services (20 per cent), Retail Trade (19 per cent)

⁷² See Campbell, I. & Brosnan, P. (2005). 'Relative advantages: Casual employment and casualisation in Australia and New Zealand' in *New Zealand Journal of Employment Relations* 30(3), 33–45.

⁷³ Ibid.

⁷⁴ *Lives on Hold*, p10.

⁷⁵ See Campbell et Al (2008).

⁷⁶ See Expert Report, p12.

⁷⁷ Ibid.

⁷⁸ See Supplementary Expert Report p26.

and Health Care and Social Assistance (11 per cent).⁷⁹ The Accommodation and food sector contains the highest density of casual employment with 65.4 per cent of all casual employees.⁸⁰

- d. Females make up the majority of casual employees (54.4 per cent of all casual workers and 64.1 per cent of part-time casual workers).⁸¹ A clear majority (69.4 per cent) of all full-time casuals are male.
- e. 59 per cent of all casual workers are aged between 25 and 64. The 15-19 year-old age group has the highest casual density (70.7% of employees in that group are casual employees) and the 55-59 year-old age group have the lowest density (15.1%).⁸²
- f. Remarkably, the mean employment tenure for casual employees is now 4.1 years, including 4.9 years for full-time casuals and 4.0 years for part-time casuals.⁸³ In manufacturing, the mean employment tenure for casuals is 5.6 years and 7.7 years in wholesale trade.
- g. The mean weekly earnings of casual employees are lower than permanent workers (\$1,181 per week versus \$1,412 per week). Just over one third of part-time casual employees earn less than \$200 per week. Women consistently earn less than men, in casual full-time, casual part-time, permanent part-time and permanent fulltime employment.⁸⁴
- h. Labour hire employees are more likely to be casual (76% of labour hire employees) but make up only approximately 2 percent of the workforce.⁸⁵

Long-term, regular casual employment

70. The fastest rate of growth in casualisation has been amongst long-term rather than short-term casual employees.⁸⁶ The average job tenure for casual employees is now 3

⁷⁹ Ibid at paragraph 8; Expert Report p26.

⁸⁰ See Supplementary Expert Report at paragraph 9.

⁸¹ Ibid at paragraph 10.

⁸² Ibid, figure 2.8.

⁸³ Ibid, Table 5.1, p55.

⁸⁴ Supplementary Expert Report, p26.

⁸⁵ Ibid p14.

years.⁸⁷ 16.7% of male casual employees and 19.7% of female casual employees have worked for their current employer for 5 years or more.⁸⁸ Some 28% of casual workers, or over 600,000 workers, have both worked for their employer for at least 3 years and on a regular basis.⁸⁹ According to the HILDA survey, approximately 73 per cent of casual employees had worked for their current employer for 6 months and 60 per cent of self-identified casual workers have both regularly worked for their current employer for at least six months and on a regular basis.⁹⁰

71. The rise in casual employment has been at the expense of permanent full-time jobs: permanent full-time employment has fallen from 77.8 per cent of employees in 1988 to 61.6 percent in 2013,⁹¹ whilst at the same time both casual full-time and casual part-time employment have risen more significantly than permanent part-time employment.⁹²

The adverse consequences of casual employment

72. The ACTU will lead evidence to show that casual employees experience a range of adverse consequences compared to their permanent counterparts.

73. Whilst much of Europe restricts precarious employment to a designated start and end point with minimum weekly hours and with leave and other rights accrued on a pro rata basis, Australia allows for insecure work to continue indefinitely with no guarantee of future work and reduced rights and entitlements.⁹³ It is perhaps alone in the OECD in excluding non-permanent employees from leave rights: even New Zealand, Australia's closest analogue, gives casual employees such rights.⁹⁴

⁸⁶ See Campbell et al at p175; ABS 2002 cat 6254.0.

⁸⁷ See Supplementary Expert Report, paragraph 14.

⁸⁸ Ibid, p18, Figure 2.10.

⁸⁹ See Expert Report, p14.

⁹⁰ See Supplementary Expert Report p17

⁹¹ Ibid, p8 and Figure 2.3; see also Lives on Hold, 17.

⁹² See Supplementary Expert Report Figure 2.2.

⁹³ See Expert Report, p13.

⁹⁴ See Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 66.

74. The disadvantages of casual employment in Australia include lower earnings compared to permanent workers. According to classical economic assumptions, employees would be prepared to pay a premium for security of employment. However, as the OECD notes, temporary workers receive less than permanent workers even when controlling for job differences:

"Temporary employment is associated with a wage penalty, even after using regression techniques to control for differences in individual job characteristics"

and further notes that:

*"Wage formation theories based on the hypothesis of compensating differentials – the pay attached to a job must compensate for any less advantageous characteristics – would suggest that temporary workers be paid more than workers in permanent jobs, assuming that most workers would prefer a permanent job..[but] theories of dual labour markets predict that workers in the secondary segment of the labour market – including those on temporary jobs – are paid less."*⁹⁵

75. An international study conducted in analysis in 2009 found that:

*"...workers with the same characteristics of temporary workers would have received higher wages if they had worked with a permanent contract in almost all the countries considered and that this discrimination is higher at the bottom of the wage distribution".*⁹⁶

76. The theoretical prediction of lower wages for casual workers, despite casual loadings, is borne out by the evidence in Australia. The overall mean weekly earnings of casual employees in Australia working full-time hours are \$1,181 per week compared to \$1,412 per week for permanent employees.⁹⁷ Median weekly earnings of casual employees overall are \$425, much lower than the \$1052 for permanent employees.⁹⁸

⁹⁵ OECD, *OECD Employment Outlook* (July 2002) pp166 and 141.

⁹⁶ See Comi, S. & Grasseni, M. (2009, September, 24–25). *Temporary jobs wage differential in Europe*. Paper presented at the XXIV National Conference of Labour Economics University of Sassari, p1.

⁹⁷ See Supplementary Expert Report, Figure 3.1 at p27.

⁹⁸ Ibid.

Approximately 70 per cent of casual employees earn less than \$700 per week.⁹⁹ Casual employees' average weekly earnings are less than permanent employees in all relevant categories: female full-time (\$931 versus \$1,224), male full-time (\$1,292 versus \$1,530), female part-time (\$351 versus \$685), male part time (\$373 versus \$707) and in terms of both mean and median earnings.¹⁰⁰

77. Beyond reduced pay, the adverse consequences of casual employment are many and varied, including:

- a. Lower security of employment and higher risk of unemployment; casual employees have double the risk of periods of unemployment compared to permanent employees;¹⁰¹
- b. Lower security of income, hours, overall earnings and reduced predictability and reliability and increased intermittency of pay,¹⁰² including reduced employee-oriented flexibility such as control over hours and days of work and control over quantum of hours (casual employees often receive more or less hours of work than desired).¹⁰³ Fluctuating pay is caused by working time insecurity and income insecurity.¹⁰⁴ Some 25% of employees have variable pay from one pay period to the next.¹⁰⁵ *Rackstraw* will give evidence that in the 3-odd years she worked relatively regular part-time casual hours at McDonalds her days of work varied greatly and her roster was sometimes subject to sudden drops in hours, compromising her ability to meet expenses such as mortgage payments. Her several requests for more hours and more predictable days of work were not acceded to.¹⁰⁶ The variability and lack of predictability can manifest at daily intervals: See for example *Stewart* at [17] at [23], *Todora* at [10], *Gray* at [10].

⁹⁹ See Expert Report, p26.

¹⁰⁰ Supplementary Expert Report figures 3.1 and 3.2 at page 27. Quoted figures are from mean average earnings.

¹⁰¹ Supplementary Expert Report, paragraph 31.

¹⁰² *Ibid*; Expert Report, p28.

¹⁰³ See *Lives on Hold* p17 and Expert Report p29.

¹⁰⁴ *Ibid*.

¹⁰⁵ See ABS data cited in *Lives on Hold*, p17.

¹⁰⁶ See Witness Statement of Linda Rackstraw.

- c. The variability and insecurity of income that attends casual employment makes financial planning for the medium and long-term difficult.¹⁰⁷ See for example *Stewart* at [23], *Dredge* at [28]-[33], *Shakespeare* at [6]-[7], *Morgan* at [13].
- d. Exclusion from leave rights under the National Employment Standards ('NES'), including annual leave¹⁰⁸, personal/carer's leave and compassionate leave¹⁰⁹, and paid public holidays¹¹⁰, as well as notice of termination and redundancy pay¹¹¹. The entitlement to be absent from work during public holidays is weaker for casual employees.¹¹² The lack of access to paid leave might encourage workers to attend to work when they are not sufficiently rested, or sufficiently well: See for example *Kemp* at [12]-[15], *Minervini* at [13], *Campbell* at [12], *Brkic* at [15] & [24]-[25], *Aiton* at [20]-[23], *Fisher* at [15]-[16] & [22]-[24].
- e. Short-term and irregular casual employees are excluded from parental leave¹¹³, the right to request flexible working arrangements¹¹⁴ and unfair dismissal protection.¹¹⁵
- f. Lack of paid jury service leave entitlements¹¹⁶;
- g. Casual loadings have limited capacity to compensate for loss of leave rights, which in many cases includes the loss of the right to take leave as well as the right to be paid whilst on leave: the size of the loading may not be equivalent to the loss forgone and an equivalent permanent comparator may be near non-existent in some occupations, suggesting casual loading is "at best a rather

¹⁰⁷ See Expert Report, p30.

¹⁰⁸ Casual employees are excluded by s86 of the FW Act.

¹⁰⁹ Casual employees are excluded by s95 of the FW Act.

¹¹⁰ See note to s116 of the FW Act.

¹¹¹ See *Telum*; notice of termination and redundancy pay entitlements under the NES are excluded by s123(1)(c) of the Act.

¹¹² An employer may request that an employee work on a public holiday if reasonable (s114(2)) and casual employment is a factor that may be taken into account in determining if reasonable: (s114(4)).

¹¹³ FW Act s67(2).

¹¹⁴ FW Act s65(2)(b).

¹¹⁵ FW Act s384(2)(a) which states that a period of service of a casual employee (for the purpose of qualifying for unfair dismissal) must be regular and systematic with a reasonable expectation of continuing employment with the employer.

¹¹⁶ See FW Act s. 111

tattered fig leaf, which fails to conceal the true nature of relations between employers and employees."¹¹⁷

- h. In practice, lower access to overtime: See for example *Brkic* at [19], *Aiton* at [13], *Fisher* at [17];
- i. As well as the lack of redundancy entitlements, casual workers are more likely to be retrenched than permanent workers and have greater risk of transitioning into periods of unemployment;¹¹⁸
- j. Lower workplace participation. Casual employees tend to be less integrated into the workplace and may be marginalised by management and other permanent employees.¹¹⁹
- k. Casual employment has been linked to feelings of powerlessness and fear and a lack of voice in the workplace and reluctance to speak up about concerns for fear of reprisals and a lower position of power vis-à-vis employers.¹²⁰ Linda Rackstraw will give evidence that the fear of losing shifts and uncertainty of future work made her reluctant to voice or press her concerns. See also *Stewart* at [3] and [24], *Gale* at [27], *Kemp* at [8] and [12], *Brkic* at [10] & [26] & [30], *Morgan* at [12], *Jenks* at [19], *Todora* at [16]. There are also examples of employees who associate their unsuccessful attempts to convert out of casual employment with subsequent unfavourable workplace treatment: See for example *Stewart* at [19], *Gale* at [29]-[33].
- l. Lack of, or lower opportunities for, a career path, training and skill development.¹²¹ Employers invest less and less often in training and development of casual employees (and of the casual employees who receive training, they are significantly more likely than permanent workers to have to pay for it themselves);¹²² this has the potential to lead to a long-term degradation of the skills base in the Australian economy and undermines

¹¹⁷ See Expert Report, pp26-28 and p39.

¹¹⁸ See Expert Report, p28

¹¹⁹ See Expert Report p29.

¹²⁰ See Expert Report p31 and 39.

¹²¹ See Expert Report p29.

¹²² See Supplementary Expert Report, p53.

innovation, organisational commitment and productivity¹²³ The Lives on Hold report notes that, "Insecure work represents a commoditisation of workers that uses people in an instrumental and short-term manner as opposed to investing in their capabilities".¹²⁴ Hence, for many, casual employment is a trap rather than a bridge to more secure employment later, especially in low-paid industries¹²⁵ and especially for intermittent casual workers.¹²⁶ In particular, casual employees are more likely to stay casual or become jobless as they get older and part-time casual employees are much less likely to become permanent than their full-time casual counterparts.¹²⁷ Long-term casual employment can deplete the confidence of those seeking permanent employment elsewhere.¹²⁸

- m. Various adverse health consequences of insecure work and attendant psychological and financial stress on casual workers and their families.¹²⁹ This anxiety has been linked to anxiety about gaining more hours or the need to find secure employment.¹³⁰ Casual employment has been closely linked to intensified stress, anxiety and frustration in the workplace and reduced physical health;¹³¹ *Rackstraw* will give evidence that the uncertainty of her roster caused her great stress and anxiety and made keeping doctor's appointments difficult.¹³² Casual employment is also linked to unwanted sexual advances in the workplace and suicide.¹³³
- n. Lower work/life balance and negative impacts on casual workers' ability to plan their lives. For example, *Rackstraw* relates that the unpredictability of her roster caused her to stop making as many social engagements with family

¹²³ See p7 of *Lives on Hold*; Expert Report pp 15-18 and p40.

¹²⁴ See *Lives on Hold*, p6.

¹²⁵ See Expert Report, p28; Supplementary Expert Report, pp36-37.

¹²⁶ See Supplementary Expert Report, paragraphs 29 and 30.

¹²⁷ *Ibid*, p36.

¹²⁸ *Ibid*, paragraph 32.

¹²⁹ See Expert Report p31.

¹³⁰ *Ibid*.

¹³¹ See Expert Report p31.

¹³² See witness statement of Linda Rackstraw.

¹³³ See *Expert Report* p31.

due to lost and broken plans.¹³⁴ See also *Kemp* at [8] and [25]-[28], *Shakespeare* at [8]-[9], *Todora* at [11]-[15], *Gray* at [18]-[19].

- o. Reduced access to finance due to lenders reluctance to extend credit and loans to casual workers, for example, due to perceived or actual intermittent work and doubts about their ability to make consistent payments.¹³⁵ See also *Lang* at [14], *Minervini* at [8], *Brkic* at [27]-[28], *Aiton* at [26], *Morgan* at [14].
- p. Lower accrued superannuation. 72% of casual workers, which may be working part time or full time hours, are covered by superannuation by their current employer and/or personal contributions, compared with 98% of ongoing workers and 28% of casual workers remain uncovered by superannuation.¹³⁶ Casuals workers may be vulnerable to membership of high fee personal retail superannuation funds and accrue significantly less superannuation overall.¹³⁷ Compared to the superannuation accrued by the 'policy benchmark', a male on average/median earnings, contributing continuously for 40 years, it is estimated that casual full-time males receive 98%, casual full-time females receive 77%, and casual part-time males and females receive 29%. This is further diminished for intermittent casual employees and by the fact that casual employees are less likely to make additional employee contributions.¹³⁸ This poses serious issues and broader social problems concerning casual workers' ability to support themselves in retirement;
- q. Casual employment is being used as a form of indefinite probation. Evidence was heard by the Insecure Work Inquiry of a worker working several extended casual jobs through a labour hire company in the hope of it turning into permanent employment.¹³⁹ The worker said, "Trying to find a job today that is permanent is like trying to get blood out of a stone... I feel now that the

¹³⁴ See witness statement of Linda Rackstraw; The reduction of work hours rather than casual status facilitates work/life balance: see Expert Report, p39.

¹³⁵ See *Expert Report* p30; *Supplementary Expert Report*, p37; *Lives on Hold*, p20.

¹³⁶ Hazel Bateman *Labour Market Uncertainty and the Adequacy of the Superannuation Guarantee* Discussion paper (2006) 5.

¹³⁷ *Ibid.*

¹³⁸ *Ibid* 6-7.

¹³⁹ *Lives on Hold*, p8.

only way to get a traditional permanent full-time job is to go via casual or labour hire types of employment".¹⁴⁰

- r. Various forms of socio-economic disadvantage as more precariously employed workers; and,
- s. Lower rates of unionisation and industrial representation leading to little scope or ability to improve their circumstances through bargaining. Casual workers are more vulnerable, less organised and more likely to depend on award and minimum entitlements. *Rizzo* provides a case study of the difficulty encountered in improving conditions for casual workers even where they are organised.

Gender equity

78. The adverse aspects of casual employment disproportionately affect women for a number of reasons. Firstly, the increased casualisation of employment has disadvantaged women with respect to men by contributing to the gender pay gap. Women are more likely to be casuals and casuals earn less take home pay due to fluctuating hours, intermittency of work, lack of support for training, skill development and career progression and other barriers to workforce participation.¹⁴¹ Most jobs with less than 35 hours in Australia are casual¹⁴² and 43.2% of all women worked less than full time in 2013.¹⁴³ Approximately 55% of all casual employees are women¹⁴⁴ and twenty-seven per cent of all female employees are employed on a casual basis.¹⁴⁵

79. Women are also more likely to be regular long-term casual employees than men. Around 63% of women in casual positions have worked regular shifts with their current employer for longer than six months, as opposed to 54% for men.¹⁴⁶

¹⁴⁰ Ibid. See also the findings in the *Secure Employment Test Case* of casual employment being used as indefinite probationary employment (at paragraph 26).

¹⁴¹ Glenda Strachan, 'Still Working for the Man? Women's Employment Experiences in Australia since 1950' *Australian Journal of Social Issues*, (2010) 45 (1) 124-125.

¹⁴² 54% of all part-time jobs are casual: see Expert Report at p12.

¹⁴³ ABS cat. 4125.0 *Gender Indicators, Australia* (2013) 1.

¹⁴⁴ Expert Report, p 32; *Lives on Hold*, p21.

¹⁴⁵ ABS 2014, cited in Expert Report, p32.

¹⁴⁶ See Expert Report, p32

80. When a higher proportion of men have access to secure employment, it serves to increase pay inequity between the genders.¹⁴⁷ In 2013, the gender pay gap was 17.5%, an increase from 15.5% in 2005. It rose again to 18.8% as at November 2014.¹⁴⁸ Australia was one of only two developed countries where the gender pay gap increased in 2013-2014.¹⁴⁹ Men on average earn \$284.20 more per week¹⁵⁰ and less superannuation over their lifetime¹⁵¹. Among casual employees, women earn a median of \$350 per week compared to \$600 for males. This difference is not wholly explained by the overrepresentation of women amongst part-time casuals but also by lower representation at higher earnings levels.¹⁵²
81. The gender pay gap is a particular problem in the private sector – 20.8% vs 13.1% for the public sector. It varies significantly by industry, with a gap of over 30% in financial and insurance services, health and social assistance and professional, scientific and technical services.¹⁵³
82. Women are more likely than men to be under-employed (8.7 percent of women vs 4.2 percent of men)¹⁵⁴ and to be in employed in poor quality, irregular, insecure or unsociable jobs.¹⁵⁵ Women are also more likely to be unemployed (59% female employment vs 71% male).¹⁵⁶
83. Women's lower workforce participation is partly due to barriers to effective labour market transitions for women in connection with childbirth, leading to a distinct 'motherhood gap' in participation in the workforce.¹⁵⁷ Female preferences for part-time

¹⁴⁷ See *Lives on Hold*, p21

¹⁴⁸ See the calculations accepted in the Fair Work Commission's *Annual Wage Review 2014-2015* [2015] FWCFB 3500 at para [474] – [481].

¹⁴⁹ WGEA Media Release *National gender pay gap rises to 18.2% (2014)* 1; World Economic Forum *Global Gender Gap Report* 2014.

¹⁵⁰ Workplace Gender Equality Agency, *Gender Pay Gap Statistics* (September 2015) .

¹⁵¹ *Lives on Hold*, p43.

¹⁵² Expert Report p34.

¹⁵³ WGEA report May 2014 p3. Workplace Gender and Equity Agency, *What is the Gender Pay Gap?* (May 2015) viewed 26 September 2015 <https://www.wgea.gov.au/addressing-pay-equity/what-gender-pay-gap>

¹⁵⁴ Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 68.

¹⁵⁵ Expert Report, p32; see *Lives on Hold*, p14.

¹⁵⁶ ABS cat 6202.0 (2015), *Labour force, Australia*, Aug 2015, viewed 26 September 2015, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0/>.

¹⁵⁷ Australian Institute for Family Studies, Jennifer Baxter, *Australian mothers' participation in Employment* (September 2013).

hours are strongly linked to caring and family responsibilities. According to the HILDA survey, 37 per cent of permanent part-time and 17 per cent of casual part-time female employees cited "caring for children" as the main reason for working part-time hours (compared to 5 per cent and 2 per cent of male part-time employees respectively).¹⁵⁸

84. Women are more likely to experience insecure work because of the need for flexible work arrangements due to caring responsibilities and the lack of flexible working arrangements and social support for working parents.¹⁵⁹ Whilst an issue for both genders, in reality women still perform more than two thirds of domestic and caring work and far more likely to take extended leave to care for dependants.¹⁶⁰ The lack of flexible work arrangements can prevent women gaining secure employment and force them to accept casual and intermittent work and its adverse consequences.¹⁶¹ The cost and time of childcare arrangements makes short engagements particularly unviable for women.¹⁶²

85. The regulatory facilitation of insecure employment has acted to entrench a male-bread winner or 'one and a half earner' model, where fathers work full-time and mothers work part-time and this exclude women's participation in the workforce¹⁶³ by excluding casuals from basic leave entitlements (annual leave and holiday leave) and by not accommodating the needs of employees, such as women with carer responsibilities who seek reduced hours and working time security.¹⁶⁴ As a result, over a quarter of women employees do not have access to paid leave compared to a fifth of men.¹⁶⁵

86. Whereas many women desire flexibility to accommodate family and caring responsibilities, this desire appears to a large degree driven by a preference for

¹⁵⁸ Expert Report, p33.

¹⁵⁹ Workplace Gender Equality Agency, *Parenting, Work and the Gender Pay Gap* (2013) 3; Expert Report, p34.

¹⁶⁰ *Lives on Hold*, p21; Australian Institute of Health and Welfare, *The Future Supply of Informal Care 2003-2013*, (2003).

¹⁶¹ Expert Report, p33; *Lives on Hold* p21; Australian Institute for Family Studies, Jennifer Baxter, *Australian mothers' participation in Employment* (September 2013) 3; Sarah Charlesworth, 'Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 72.

¹⁶² Sarah Charlesworth, 'Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 75.

¹⁶³ Expert Report, p32; See *Lives on Hold*, p32; Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 72.

¹⁶⁴ Expert Report, p32.

¹⁶⁵ See *Lives on Hold*, p21.

permanent part-time rather than casual employment,¹⁶⁶ but the growth of insecure casual employment has replaced many part-time jobs¹⁶⁷ and may be the only option for these women as an alternative to full-time employment. Women may not have the right to choose permanent-part time employment and be forced to choose irregular casual work. Often, a woman with caring responsibilities is forced to choose between a casual job and unemployment.¹⁶⁸

87. The negotiation of working hours is commonly a fraught process with workers reluctant to refuse shifts even at short notice or inconvenient times for fear of jeopardising future offers.¹⁶⁹

88. Casual employment is also more likely for women than men to be a trap rather than a pathway to more secure employment and *unemployed* women may be more likely to find permanent full-time work.¹⁷⁰ Longer job tenure for women as a casual employee is associated with reduced chances of becoming permanent.¹⁷¹

89. The regulation of casual employment entrenches vertical gender segregation more broadly in the workforce as casual employees are less likely to be senior, high skilled or managerial employees (or have the career opportunities to become so)¹⁷² and entrenches gender segregation between industries as industries that predominately employ casual and insecure workers such as health care and social assistance and retail are female dominated.¹⁷³

90. The lack of permanent work that is less than full time hours represents a failure to meet women's needs, leading to a vicious cycle whereby most managers are men and organisational cultures are often male-oriented and insufficiently unsupportive of practices that assist with managing both paid work and family care leading to the

¹⁶⁶ Expert Report, pp32-33.

¹⁶⁷ See *Lives on Hold*, p20.

¹⁶⁸ See *Lives on Hold*, p43.

¹⁶⁹ Iain Campbell, Gillian Whitehouse and Janeen Baxter, 'Casual Employment, Part-time Employment and the Resilience of the Male-Breadwinner Model in Leah F. Vosko (ed), *Gender and the Contours of Precarious Employment* (Taylor and Francis 2009) 68.

¹⁷⁰ Expert Report, p28.

¹⁷¹ *Supplementary Expert Report*, p36.

¹⁷² See *Lives on Hold*, p21; Sarah Charlesworth, 'Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 66.

¹⁷³ See *Lives on Hold*, p21; Workplace Gender Equality Agency, *Parenting, Work and the Gender Pay Gap* (2013) 4.

perpetuation of exclusions to female workforce participation and managerial representation.¹⁷⁴ Casual employment has also been linked to unwanted sexual advances in the workplace, particularly for women, with female casual employees ten times more likely to be subject to such advances than women employed on a permanent basis.¹⁷⁵

91. There was also little in-depth consideration of equal remuneration in either the modern award or annual wage reviews despite the cost of the gender pay gap to the Australian economy being estimated at \$93 billion per year (equivalent to 8.5% of Gross Domestic Product).¹⁷⁶

92. Providing a right of conversion from casual to part-time work and improved minimum engagement periods for casual and part-time workers will increase gender equality in the workplace and women's workforce participation.

93. Casual and precarious employment linked to lower birth rates as time in casual employment affects the likelihood a woman will have a child by age 35,¹⁷⁷ with flow on effects on productivity.

Minimum hours of engagement

94. The ACTU will lead evidence to show that a minimum of 4 hours' work per engagement is a necessary standard across all industries to ensure security of pay and a viable income, particularly for those working less than full-time hours, for low income earners, for employees with family and carer responsibilities, and particularly for women.

95. Working time insecurity is a key component of insecure employment. As the Insecure Work Inquiry finds:

¹⁷⁴ Sarah Charlesworth, 'Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 75.

¹⁷⁵ See Expert Report, p31.

¹⁷⁶ Workplace Gender and Equity Agency, *Parenting, Work and the Gender Pay Gap* (2014) 1.

¹⁷⁷ Steele^{1,2}, L.C. Giles, M.J. Davies, and V.M. Moore, 'Is precarious employment associated with women remaining childless until age 35 years? Results from an Australian birth cohort study' E.J. in *Human Reproduction*, Vol.29, No.1 (2014) pp. 155–160.

"For many workers, this takes the form of too few or irregular hours of work. There are over 850 000 workers in Australia working part-time hours who would like to work more.¹⁷ Working time insecurity in the form of irregular or fragmented hours is common in industries and sectors such as retail, hospitality and health services, where employers have sought to enhance flexibility and reduce costs by reducing or removing restrictions on working time arrangements: widening the span of ordinary hours, averaging working hours, removing or reducing penalty payments for extended or unsociable hours, and reducing minimum periods of engagement. Lack of predictability of scheduling (on a daily and weekly basis) has further eroded job quality.

These types of insecurities are particularly experienced by casual workers and, in some sectors, increasingly also by part-time employees. ABS data also shows that 37% of all employees working part-time hours have no guaranteed minimum number of hours of work¹⁸ and that many casual workers face insecurity in the form of too few hours, with 29% of all casuals wanting to work more hours than they current work.¹⁹ Casuals also experience significant variability in working hours, with 35% of casual workers in jobs where hours varied weekly.^{20,178}

96. It is common for casual and part-time employees to be required to work short shifts of only 3 hours or less. The ACTU Survey suggests that a significant proportion of employees in all industries had had worked a shift of 3 hours or less in the last 3 months and 37 per cent of workers had done so overall.¹⁷⁹ Short shifts are most prevalent in the 45-64, 65 plus and 21-24 age groups.¹⁸⁰

97. Currently, 78 of the 110 modern awards have minimum period of engagement protections for casual employees and 58 have such protections for casual employees. A four-hour minimum engagement period is not uncommon in modern awards: 24 modern awards contain that standard for casual employees and 15 contain it for part-time employees, plus some modern awards have higher protections.

¹⁷⁸ *Lives on Hold*, p16.

¹⁷⁹ See Supplementary Expert Report, paragraph 18 and Figure 2.10 on p21.

¹⁸⁰ *Ibid.*

98. The ACTU will show that a substantial minimum engagement protection is a necessary general standard for casual and permanent part-time employees as:
- a. Females, part-time employees and casual employees expend a higher percentage of wages on employment-related costs, particularly child-care;¹⁸¹
 - b. A feature of the precariousness of casual work is the absence of minimum engagement protections.
 - c. As discussed above, those working on award minimum wages less than fulltime hours are more likely to be low income earners. Any reduction in the expected length of a daily engagement has a severe impact on an already disadvantaged employee, and most heavily on intermittent casual workers.
 - d. Travel, child care and other costs associated with attending work can significantly deplete earnings and are to an extent fixed daily overheads and represent disproportionately high costs as a proportion of earnings for those working less than a full day: See for example *Kemp* at [16]. Some 12 per cent of employees incur child-care costs, the mean cost of which is \$193.71 per week. These costs are double the proportion of wages for casual and part-time employees (20% vs 10% for permanent full-time employees).¹⁸²
 - e. As well as travel cost, travel *time* is also a fixed outlay and so becomes a proportionately higher loss against per hour earnings the fewer hours a worker works per engagement; See for example *Rackstraw* at [24]. Travel time also becomes problematic where short shifts are broken by long periods of unpaid time: See for example *Quinn* at [36]-[43], *Dredge* at [23];
 - f. The cost and time of childcare arrangements makes short engagements particularly unviable for women¹⁸³ who, as in practice, still share the majority of child care responsibilities, as discussed above;

¹⁸¹ See Supplementary Expert Report, p53.

¹⁸² Supplementary Expert Report, paragraph 61.

¹⁸³ Sarah Charlesworth, 'Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 75

- g. The lack of reliable minimum engagements compounds the disadvantage associated with a lack of working time and income security, including the inability to make reliable plans for additional jobs or non-work related commitments: See for example *Quinn* at [49]-[50], *Rackshaw* at [14]-[17], *Paulsen* at [12], *Jenks* at [14]-[18]. On the other side of the ledger, where there is a lack of minimum engagement protection workers (particularly casual workers) may gain free time when they expected they would be working: See for example *Paulsen* at [10]-[11]. In either case, a change to the number of hours worked which reduces the hours worked on a particular day below a sustainable level can be highly disruptive: See for example *Stewart* at [7]-[10].
- h. The minimum income from a casual engagement determines whether or not people who rely on social security or who have responsibility for the care of children or others will accept a job. This, together with the difficulties in balancing the requirements of the social welfare Newstart program, for example, with an offer of casual work may be too great to make the job worth the extra trouble. The analysis below explores this further.

99. The ACTU had made calculations based on the findings presented in the expert reports¹⁸⁴ which suggest that, for representative workers, a 4-hour daily engagement is necessary to make an engagement viable after the costs of attending work such as child-care, transport, uniform and other expenses are accounted for.

100. The Supplementary Expert Report shows that 80% of employees incur travel costs, 12% incur child care costs and over 50% incur uniform and other costs.¹⁸⁵ As a benchmark, the poverty line for a single person with one dependent child including housing was \$654.95 in the March quarter of 2015¹⁸⁶, which is \$130.99 per work day, assuming a 5-day working week. The Newstart Allowance is currently \$261.70 for a

¹⁸⁴ See attached ACTU Minimum Shift Calculations and Supplementary Expert Report, p62 and Table 5.6.

¹⁸⁵ See Supplementary Expert Report p62 and Table 5.6.

¹⁸⁶ See Melbourne Institute of Applied Economic and Social Research, Poverty Lines: Australia, March Quarter 2015, available at <
<https://melbourneinstitute.com/downloads/publications/Poverty%20Lines/Poverty%20lines%20Australia%20M arch%202015.pdf>>.

single person with no children and \$281.65 for a single person with dependent children,¹⁸⁷ which is \$52.34 and \$56.33 per work day respectively.

101. Our calculations show that a permanent Retail Employee Level 2 paid according to the *General Retail Industry Award 2010*, will not earn more than the equivalent Newstart workday rate until he or she has worked 4 hours, assuming average travel costs and no other costs. With childcare costs incurred as well, the employee's net daily earnings would drop to \$27.80 for a four-hour shift and \$18.85 if uniform and other costs are also included. Even with a casual loading and travel costs only, such a worker would receive a net gain of \$85.98, still well below the poverty line. A permanent Food and Beverage Attendant grade 2, paid according to the *Hospitality Industry (General) Award 2010* would receive less than a Retail Employee Level 2 – \$62.66 for four hours' work after deducting travel costs, and \$14.97 after also deducting travel, child care and other costs (all these figures are before-tax earnings). The table below shows the range of net gain for casual and permanent representative employees considering the varying categories of costs of attending work:

Daily Earnings v Net Gain Given Various Costs of Attending Work

Retail Employee Level 2 (hourly rate: \$19.44 perm, \$24.30 casual)								
<u>Daily earnings - weekday</u>	<u>Net daily gain - permanent</u>				<u>Net daily gain - casual</u>			
	with child care, travel and other	with child care and travel	with travel and other	with travel only	with child care and travel	with child care, travel and other	with travel and other	with travel only
1 hour shift	-39.47	-30.52	-0.73	8.22	-25.66	-34.61	4.13	13.08
2 hour shift	-20.03	-11.08	18.71	27.66	-1.36	-10.31	28.43	37.38
3 hour shift	-0.59	8.36	38.15	47.10	22.94	13.99	52.73	61.68
4 hour shift	18.85	27.80	57.59	66.54	47.24	38.29	77.03	85.98

¹⁸⁷ See Department of Human Services, Payment rates for Newstart Allowance, available at < <http://www.humanservices.gov.au/customer/enablers/centrelink/newstart-allowance/payment-rates-for-newstart-allowance>>.

Food and Beverage Attendant Grade 2 (hourly rate: \$18.47 perm, \$23.09 casual)								
<u>Daily earnings - weekday</u>	<u>Net daily gain - permanent</u>				<u>Net daily gain - casual</u>			
	with child care, travel and other	with child care and travel	with travel and other	with travel only	with child care and travel	with child care, travel and other	with travel and other	with travel only
1 hour shift	-40.44	-31.49	-1.70	7.25	-26.87	-35.82	2.92	11.87
2 hour shift	-21.97	-13.02	16.77	25.72	-3.78	-12.73	26.01	34.96
3 hour shift	-3.50	5.45	35.24	44.19	19.31	10.36	49.10	58.05
4 hour shift	14.97	23.92	53.71	62.66	42.40	33.45	72.19	81.14

102. The classification structure in modern awards are interdependent so all modern awards have equivalent or near to the above representative employees.

Employee preferences

Conversion

103. An ABS survey in 2007 found 52 per cent of casual employees in Australia would prefer permanent work with leave benefits even if, as the survey warned, they would lose additional income from losing casual loadings.¹⁸⁸ In the ACTU Survey, 33 percent of casual employee respondents responded positively to the opportunity to convert to permanent employment and 70 per cent of all workers agreed casual employees should have the right to convert if they wish.¹⁸⁹ 27.5 per cent of long-term casual employees who had been with their employer for at least 6 months indicated they wished to become permanent in their current job.¹⁹⁰ The figure may be higher for long-term casual employees given the ABS's finding above and the fact that the ACTU Survey was overrepresented by part-time casual employee respondents.¹⁹¹

¹⁸⁸ Expert Report, p37; Supplementary Expert Report, Table 4.1 at p45.

¹⁸⁹ Ibid.

¹⁹⁰ See Supplementary Expert Report at paragraph 41.

¹⁹¹ Ibid at paragraph 41.

104. The ACTU Survey also suggests that successful requests to convert to permanent work played an important role in workers successfully securing permanent work, although the survey is limited by a small sample number in this regard.¹⁹²

Minimum hours of engagement

105. According to AWRS, casual and part-time employees express a higher preference for more hours than their counterparts.¹⁹³ 36 per cent of permanent part-time, over 42 per cent of casual employees and 47 per cent of casual part-time employees would prefer longer hours, largely irrespective of job tenure.¹⁹⁴

106. According to the ACTU Survey, an average of 45.6% who worked 3 hours or less responded positively to minimum shifts being longer and an average of 42.7% responded "neutral".¹⁹⁵ Those who worked a minimum shift of between 4 and 7 hours showed less agreement to their shifts being longer.¹⁹⁶ Less than 9% of casual employees who had worked a minimum shift of 3 hours or less in the last 3 months disagreed that minimum shifts should be longer.¹⁹⁷ We submit this suggests that there is a particular preference from a significant portion of those working less than 4 hours for longer shifts and greater satisfaction with minimum hours for those with minimum shifts of 4-7 hours.

Application of the modern awards objective

107. We submit the claim is necessary in order to meet the modern award objective. In conducting the review, the FW Commission is exercising modern award powers, and so the modern awards objective applies to the review. Section 134 of the Act outlines the modern award objective:

¹⁹² See Supplementary Expert Report, p45.

¹⁹³ See Supplementary Expert Report, p57.

¹⁹⁴ See Supplementary Expert Report, p57.

¹⁹⁵ See Supplementary Expert Report, Table 4.3 at p49. These averages were calculated by averaging the responses from the '1 hour', '2 hour' and '3 hour' rows.

¹⁹⁶ Ibid; Ibid paragraph 45.

¹⁹⁷ Ibid, Table 4.3 at p49.

"134 The modern awards objective

What is the modern awards objective?

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
- (a) relative living standards and the needs of the low paid; and*
 - (b) the need to encourage collective bargaining; and*
 - (c) the need to promote social inclusion through increased workforce participation; and*
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - (da) the need to provide additional remuneration for:*
 - (i) employees working overtime; or*
 - (ii) employees working unsocial, irregular or unpredictable hours; or*
 - (iii) employees working on weekends or public holidays; or*
 - (iv) employees working shifts; and*
 - (e) the principle of equal remuneration for work of equal or comparable value; and*
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

*This is the **modern awards objective**.*

When does the modern awards objective apply?

*(2) The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**, which are:*

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

108. The Preliminary Jurisdictional Issues decision explains how the modern awards objective is to be applied. The considerations outlined in s578 of the FW Act, including the objects the Act are relevant.¹⁹⁸ Many of these overlap with the criteria in the modern awards objective. Notably, section 578 requires that the FW Commission take into account "equity, good conscience and the merits of the matter"¹⁹⁹, and "the need to respect and value diversity of the work force by helping to prevent and eliminate discrimination on the basis of... [relevantly] sex... family or carer's responsibilities, [or] pregnancy."²⁰⁰ The object of the FW Act includes "providing workplace relations laws that... take into account Australia's international labour obligations".²⁰¹

109. The Preliminary Jurisdictional Issues decision also affirms that:

[31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' taking into account the particular considerations identified in paragraphs

¹⁹⁸ See Preliminary Jurisdictional Issues Decision at paragraphs [10]-[12].

¹⁹⁹ See s578(a) of the FW Act.

²⁰⁰ Ibid s578(c).

²⁰¹ Ibid section 3(a).

134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.¹⁹ The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process.²⁰ As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

“To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.”²¹

[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[33] There is a degree of tension between some of the s.134(1) considerations. The Commission’s task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

[35] Section 138 of the FW Act is also relevant, it emphasises the importance of the modern awards objective in these terms:

“A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.”

110. These criteria are addressed below.

Relative living standards and the needs of the low paid

111. The claim is necessary in order to address the needs of the low paid, who fall squarely within its scope. The pay of 1.86 million employees (18.8 per cent of all employees) was set on the basis of the award only in May 2014.²⁰² As at May 2014, 21% of all employees in the private sector were paid by award only and 9.5% of all employees in the public sector.²⁰³ In total, an estimated 2.0 million employees are low paid, comprising 22.7 per cent of all employees.²⁰⁴ Most award-reliant employees are casual employees (55 per cent) and casual employees appear disproportionately in low paid industries.²⁰⁵ A sizeable proportion of award-reliant workers are low paid²⁰⁶ (low paid workers are generally defined as those earning less than two-thirds of the median wage).²⁰⁷ Low paid workers are much more likely to be casual and more likely to be amongst the most precarious workers and the most adversely affected by casual employment. Casual employment is itself a cause of lower take home pay and superannuation.

112. Addressing the needs and relative living standards of the low paid includes, amongst other things, addressing the income inequality compared to other workers and financial stress that low paid workers experience.²⁰⁸ The claim will help improve the security of employment, security of income and security of working hours of low paid workers.

113. As discussed above, employees with relatively regular hours may still be subject to intermittent variation in quantum of hours and days and times of work. Converting to permanent employment will allow these employees more security over both of these and more predictable and secure income. As a consequence, such workers, including low paid workers, are also likely to enjoy greater ability to plan their lives and finances, greater access to finance, greater ability to spend time with friends and family, less anxiety and stress, improved mental and physical health and greater work/life balance. They will also gain entitlements to paid leave and redundancy pay.

²⁰² ABS data cited in Annual Wage Review 2014-2015 at paragraph [313].

²⁰³ See ABS 6306.0, Employee Earnings and Hours, Australia, May 2014.

²⁰⁴ Annual Wage Review 2014-2015 at paragraph [313].

²⁰⁵ See Expert Report, p26.

²⁰⁶ See Annual Wage Review 2014-2015 at paragraph [391]-[392].

²⁰⁷ See Annual Wage Review 2014-2015 at paragraph [314] – [316].

²⁰⁸ See Annual Wage Review 2014-2015.

114. A pathway to permanent employment for low paid long-term regular casual workers is also likely to have a positive impact on low paid workers' training and skill development needs. Whilst there is an excess supply of people with low education and low skill levels in Australia, there is a shortage of skilled labour. The main reason people between 25 and 55 cannot get as much work as they want is because of lack of skills²⁰⁹ and higher skills leads to higher wages. Low paid workers who are able to convert to permanent status are more likely to be the beneficiaries of such skills investment by their employer.
115. The improved security for low paid workers is also likely to give them a greater voice in the workplace and reduced fear of reprisal that may otherwise prevent them enforcing other rights such as underpayments or mistreatment. Low paid female casual employees are those most at risk of sexual harassment. Conversion to permanent employment would mean these workers are less likely to be the victim of sexual harassment and more likely to enforce their rights.
116. The minimum hours of engagement aspect of the claim will help ensure low paid workers' earnings per engagement are more viable after the costs of attending work are accounted for. These costs are a higher proportion of wages for low paid workers. It will also help protect low paid workers' future income. Low paid workers are the most vulnerable to reductions in hours. The claim would protect both casual and part-time employees from having their existing shift hours reduced to below 4 hours in future.
117. The claim will also help reduce the instance of poor quality work traps for low paid workers, both in terms of work that provides unviable short shifts or long-term insecurity that inhibits progression to secure and higher quality employment.

The need to encourage collective bargaining

118. Casual workers are less likely to participate in the workplace, less likely to be union members and face significant barriers to collective bargaining. The claim would increase the security, mutual commitment and workforce participation of long-term

²⁰⁹ Michael Keating, 'Increasing Employment Participation in Australia and How to Finance It', in Australian Bulletin of Labour, Vol. 32, No.2 (2006), pp163-182 at 169; see also *Lives on Hold*, p44.

casual employees who convert to permanent employment, leading to greater access to bargaining representatives and an increased capacity to bargain collectively for better outcomes.

The need to promote social inclusion through increased workforce participation

119. The claim will significantly improve the workforce participation and social inclusion of long-term regular casual employees, those working short shifts and particularly women and the low paid.

120. As the President of the Australian Human Rights Commission notes:

"There is no universally accepted definition of social inclusion. The Australian Social Inclusion Board defines social inclusion as having the resources, opportunities and capabilities to:

- *Learn (e.g. participate in education and training);*
- *Work (e.g. participate in employment, unpaid or voluntary work including family and carer responsibilities);*
- *Engage (e.g. connect with people, use local services and participate in local, cultural, civic and recreational activities); and*
- *Have a voice (influence decisions that affect them)."²¹⁰*

121. Greater certainty over hours and days of work through conversion to permanent status will assist the social inclusion of affected employees by helping them better participate in community life, including providing a greater ability for them to plan their lives and make social engagements, connect with friends and family, deal with personal crises, and be heard in the workplace.

122. Casual employees have lower workforce participation than permanent employees. Greater employment security through a right to convert to permanent employment for regular, long-term casual employees would lead to casual employees' greater workforce participation through helping to avoid gaps in employment,

²¹⁰ See Professor Gillian Triggs, President, Australian Human Rights Commission, 'Social Inclusion and Human Rights in Australia', Speech to KPMG, Sydney August 2013, available at <https://www.humanrights.gov.au/news/speeches/social-inclusion-and-human-rights-australia>; see also Australian Social Inclusion Board. *Social inclusion in Australia: How Australia is faring*, available at <http://www.socialinclusion.gov.au/resources/how-australia-is-faring>.

underemployment and intermittent work, and promoting greater organisational commitment in employees.

123. Longer minimum terms of engagement would lead to the greater workforce participation of women and parents with family and carer's responsibilities, and otherwise particularly improve the workforce participation and social inclusion of women by helping to address the gender pay gap and gender inequality by removing some of the barriers to women's participation.
124. Social inclusion is intimately connected to the right to participation and non-discrimination.²¹¹ Hence, the social inclusion of women will be aided by the claim's role in addressing the gender pay gap and horizontal and vertical workforce segregation.

The need to promote flexible modern work practices and the efficient and productive performance of work

125. We submit s134(1)(d) of the FW Act requires the promotion of mutually flexible work practices that meet the flexibility needs of both employers and employees. The evidence shows that, in practice, the 'flexibility' of casual employment is often unilateral and employer-oriented and often falls short of employees' flexibility needs, with control over working hours often largely dictated by employers.²¹² The claim would help redress this imbalance by giving more security of hours and days of work to employees who require it. The claim would add to the flexibility needs of employees needing longer minimum hours of work and by providing short shifts that are long enough to be viable for those working part-time hours.
126. Regarding employer-oriented flexibility, the claim for conversion would not diminish an employer's capacity to engage a worker on a long-term and regular basis but it would ensure an employee has the option of conversion to permanent employment and the security and entitlements that entails. The claim would curtail an employer's capacity to avoid paying such workers redundancy pay and other

²¹¹ Lynch, Philip, 'Homelessness, human rights and social inclusion', *Alternative Law Journal*; 30 (3) June 2005: 116-119.

²¹² See Expert Report p21.

entitlements. We submit, however, that this employer flexibility should not be countenanced.

127. As the expert evidence shows, any reduction in employers' numerical flexibility could invariably be made up for by using functional flexibility which is better for employees and productivity because of the flow on effects on skills training. Functional flexibility is actually improved by imposing limits on numerical flexibility.²¹³ In any event, in both the *Clerks SA Award Casual Provisions Appeal Case* and the *Secure Employment Test Case*, the tribunals were satisfied that any reduction of employer flexibility in the use of casual employees would at best be relatively minimal.²¹⁴

128. The claim is likely to increase the productive performance of work as the expert evidence shows labour productivity is enhanced by the mutual loyalty, organisational commitment and bilateral investment that security of employment has been shown to promote.²¹⁵ Labour productivity is also likely to be enhanced by the increased workplace participation and investment in training that permanent employment facilitates.

The need to provide additional remuneration for employees working overtime; working unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts

129. For a small class of employees, those required to work irregular short shifts of less than 4 hours' duration, the minimum engagement period aspect of the claim would ensure those workers are paid four hours' pay, irrespective of hours worked, providing them with additional remuneration for irregular work.

The principle of equal remuneration for work of equal or comparable value

130. The claim will have a positive impact on gender pay equity by assisting casual employees (predominately female and predominately lower paid) to permanent employment leading to reduced intermittency of pay and ultimately to higher paid

²¹³ See Expert Report, pp16-19; Supplementary Expert Report, p26.

²¹⁴ See *Clerks SA Award Casual Provisions Appeal Case* [2002] SAIRComm 39 (5 July 2002) at paragraph 27 and the *Secure Employment Test Case* at paragraph 245.

²¹⁵ See Expert Report, p15.

employment. Short shift workers receive significantly less net gain in pay than longer shift workers. The claim will help ensure such employee's net gain for equal or comparable work is more equal.

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

131. The claim is likely to be positive for productivity and unlikely to impose any significant costs on business. Higher levels of permanent employment and greater stability and security for employees is likely to improve productivity and innovation, both through better harnessing employees' contribution to organisational performance, and through better access to, and higher investment in, training and human capital and the positive effects of encouraging functional flexibility over numerical flexibility.²¹⁶ Casual employment diminishes organisational commitment and loyalty, contributing to higher turnover costs for business and negatively affecting business performance.²¹⁷ The Australian Human Resources Institute estimated staff turnover costs to Australian businesses at \$20 Billion.²¹⁸
132. In any event, it is our contention that long-term, regular casual workers are being required to work as though they were permanent employees, so conversion to permanent employment means an alignment between their *de facto* manner of engagement and their proper legal entitlements. On that basis, any cost impost on business would merely be the removal of employers' windfall that had been gained at employees' expense. However, we contend there would not in fact be any overall significant cost imposed on business.
133. The claim would not adversely affect the regulatory burden.
134. Increasing women's workforce participation and gender equality will increase productivity because employers will attract and retain better and underutilised talent, necessary for success in competitive markets. Women are more highly educated than men and increasingly so. 20% more women aged 25-34 hold bachelor degrees.²¹⁹

²¹⁶ See Supplementary Expert Report, p51; Expert Report, p17.

²¹⁷ Expert Report 15.

²¹⁸ Ibid 2.

²¹⁹ Workplace Gender Equality Agency *The business case for gender equality (2013)* 2.

Overall, 34% of Australian men and 40% percent of women have a tertiary qualification.²²⁰ Research shows employers retain more skilled and talented employees and reduce turnover costs where they have a proactive diversity climate as people stay with an organisation longer that they perceive is fair.²²¹ Similarly, not only women but also 18% of men and 37% of young fathers had 'seriously considered' leaving an organisation due to a lack of flexibility'.²²²

135. Managerial and executive diversity is also linked with improved organisational performance as team diversity is linked to innovative capacity, including improved understanding and access to markets, including targeting female customers' needs, and increased innovation. Women themselves represent the majority of consumers. Companies with more female employees better understand women's needs and preferences.²²³

136. Hence, organisations with higher gender equity and female participation enjoy a competitive advantage. This advantage is being utilised by Australian firms' international competitors. Nearly one billion more women could participate in the market economy worldwide in the next ten years. The World Economic Forum has found a strong correlation between a country's competitiveness and how it educates and uses its female talent. It states:

*“...empowering women means a more efficient use of a nation's human talent endowment and... reducing gender inequality enhances productivity and economic growth. Over time, therefore, a nation's competitiveness depends, among other things, on whether and how it educates and utilizes its female talent.”*²²⁴

²²⁰ Australian Bureau of Statistics, *Education Differences Between Men and Women* (2012).

²²¹ Workplace Gender Equality Agency, 'The Business Case for Gender Equality' (March 2013) available at https://www.wgea.gov.au/sites/default/files/business_case_for_gender_equality.pdf ; Kaplan, D M, Wiley, J W, & Maertz, C P (2011), 'The role of calculative attachment in the relationship between diversity climate and retention', *Human Resource Management*, 50(2), 271-287.

²²² Workplace Gender Equality Agency, *Engaging Men in Flexible Working Arrangements* (2013) 3.

²²³ Workplace Gender Equality Agency, 'The Business Case for Gender Equality' (March 2013) available at https://www.wgea.gov.au/sites/default/files/business_case_for_gender_equality.pdf.

²²⁴ As quoted in Workplace Gender Equality Agency, 'About Workplace Gender Equality' at <https://www.wgea.gov.au/learn/about-workplace-gender-equality>.

137. Reducing women's time in casual employment and better accommodating parents with carer needs could also improve birth rates with an attendant boost in productivity in the long term.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

138. The claim will help simplify and harmonise modern awards by creating a universal standard of conversion clauses and minimum engagement provisions extending across the vast majority of modern awards. Both conversion clauses and minimum periods of engagement are common in modern awards but highly varied. Minimum periods of engagement vary greatly in terms of quantum of entitlement between casual and part-time employees. The claim will help harmonise these.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

139. The increasing participation of women in the labour force would have a significant impact on economic growth. The OECD notes that a 50% decrease in the gender gap in labour force participation rates is estimated to lead to an increase in the annual growth rate (GDP per capita) of 0.3 percentage points on average.²²⁵ The competitiveness of firms and the national economy is also likely to be improved through increased workplace diversity and its effect on innovation.

140. Providing employees with greater certainty as to the hours of work (and reduced intermittency) via conversion to permanency and improved minimum hours of engagement is likely to contribute to employment growth by reducing underemployment.²²⁶

Only the extent necessary to achieve the modern award objective

141. We contend the claim only calls for changes to modern awards to the extent necessary to achieve the modern award objective.

²²⁵ See OECD, *In it Together: Why Less Inequality Benefits All* (2015), p210; OECD (2012), *Closing the Gender Gap: Act Now*, OECD Publishing, Paris, http://dx.doi.org/10.1787/empl_outlook-2008-en.

²²⁶ Supplementary Expert Report, p51.

Fair and relevant safety net

142. We submit it is unfair that the safety net has allowed and facilitated the development of significant class of casual employees who are working on a long-term and regular basis as though they were permanent employees but who do not enjoy the security and conditions of permanent employment; who, further, experience a range of adverse consequences compared to their permanent counterparts, including lower earnings, exclusion from paid leave and other entitlements, insecure working hours and working time, intermittent work, greater likelihood of unemployment or underemployment, fluctuating pay, lower work/life balance and ability to plan their lives, less superannuation, less access to training, development and career path, financial and psychological stress, lower health options. Hence, casual employment is often acts more as a trap in low quality work than a pathway to better employment.
143. Fairness demands that these employees at least be afforded the option of equal conditions and security compared to permanent workers. The status quo is especially unfair given evidence that the emergence of this class is driven of disadvantaged workers is due to employer opportunism rather than employee preferences or indeed motivated by any genuine underlying workplace requirements that can't be met in less egregious ways. Fairness demands that these employees be given a more genuine choice as to the nature of their engagement.²²⁷
144. Article 1 of the International Labour Organization ('ILO') treaty, *Employment Policy Convention, 1964 (No.122)*, ratified by Australia, requires that member states "promote full, productive and freely chosen employment". The evidence shows that a significant portion of casual employees did not choose to be casual and would prefer permanent work. In 2014, the ILO Committee observed with concern that "A remarkable 25 per cent of all employees work on a causal basis" and noted the ACTU's concern that "Article 1 of the Convention requires the Government to take positive steps to address the issue of precarious work."²²⁸ The ILO Committee further noted:

²²⁷ The 'choice' whether to be employed on a casual or permanent basis is often not a genuine one for employees: see Expert Report, p38.

²²⁸ See ILO Observation (CEACR) - adopted 2014, published 104th ILC session (2015)

*"Keeping in mind the concerns raised by the ACTU, the Committee requests the Government to specify how, pursuant to Article 2 of the Convention, it keeps under review the measures and policies adopted according to the results achieved in pursuit of the objectives of full, productive and freely chosen employment, specified in Article 1."*²²⁹

145. Fairness also demands that the disproportionate impact of casual employment on women with respect to men be addressed through conversion rights and greater minimum hours of engagement as women are more likely to be casual employees, more likely than men to be long-term casual employees and more likely to work part-time hours (on a permanent or casual basis) and more likely to need greater security of hours and employee-oriented flexibility due to being more likely to carry family or carer responsibilities. Further, casual employment and work-time insecurity poses significant barriers to women's workforce participation and contributes to the gender pay gap and broader gender inequality.

146. The casualisation of the Australian workforce has grown to one of the highest levels in the world with some of the least protections by international standards. The FW Commission must act to protect the relevance and integrity of the safety net in the face of this exponential growth in both casual employment and long-term, regular casual employment. As the Full Bench of the NSW Industrial Relations Commission affirmed in the *Secure Employment Test Case*:

*"In our view, there have been significant changes in the circumstances in which casual employees are engaged, such that the regulation of casual employment by industrial awards is becoming less relevant to the actual experience of casual employment."*²³⁰

147. The NSW Industrial Relations Commission had the following comments to make about the fairness and equity issues raised by long-term casual employment:

Employment Policy Convention, 1964 (No. 122) - Australia (Ratification: 1969), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3183415.

²²⁹ Ibid.

²³⁰ Ibid at paragraph [3].

*"In our view, principles of fairness and equity demand that some protection be afforded to long term casual employees to minimise those adverse consequences where the employees concerned have, in essence, been forced by a shift in employer practices and policies to that form of engagement, and when the evidence demonstrates that the economic cost to employers of converting casual employees to permanent, if they so elect, is modest. There is a pressing need, in our view, for a safety net to be instituted for those employees for whom long term casual employment is not only disadvantageous, but an impediment to their ability to obtain and remain in paid work. Working mothers make up a significant component of that group. In those circumstances, we consider that there are strong social and industrial bases for granting Unions NSW's application with respect to casual conversion."*²³¹

148. As the ACTU will show, the exponential growth in casual employment that the NSW IR Commission noted with concern in the *Secure Employment Test Case* and sought to remedy in that State is the common experience throughout Australia and across industries. The proposed changes would complete a process begun in the State and Federal secure employment test cases but interrupted by the Work Choices changes and then largely postponed by award modernisation. The ACTU calls on the FW Commission to complete this process.

Attachments

149. The following materials are attached:

Expert Witness Statements and other Reports

- E001 Statement of Professor Raymond Markey;
- E002 Statement of Dr Joseph McIvor;
- E003 Statement of Dr Martin O'Brien;
- R001 Lives on Hold Report;

²³¹ *Secure Employment Test Case* at paragraph [240].

Lay Witness Statements

- W001A Witness Statement_Linda Rackstraw;
- W001B Linda Rackstraw_payslips 01; **Not published**
- W001C Linda Rackstraw_payslips 02; **Not published**
- W001D McDonalds_Australia_Enterprise_Agreement_2013;
- W002A HSU Scott Quinn witness statement;
- W002B HSU Scott Quinn Annexure A;
- W002C HSU Scott Quinn Annexure B;
- W002D HSU Scott Quinn Annexure C; **Not published**
- W003A ANMF Statement of Jan Paulsen;
- W003B Re Paulsen_Sunsh Coast Day Surgery EA 2012-15;
- W004A ANMF Statement of Vicky Stewart;
- W004B ANMF Statement of Vicky Stewart - Attachments VS 1 to VS 5;
- W005A HACSU Witness Statement of Limasene Potoi;
- W006A NTEU Witness Statement of Linda Gale;
- W007A ASU Statement of Jacquie Dredge;
- W008A ASU Statement of John Perry;
- W009A ASU Statement of Natalie Lang;
- W010A ASU Statement of Tracy Kemp;
- W011A ASU Statement of Michael Rizzo;
- W011B Rizzo Attachment 1;
- W011C Rizzo Attachment 2;
- W011D Rizzo Attachment 3;
- W011E Rizzo Attachment 4;
- W011F Rizzo Attachment 5;
- W011G Rizzo Attachment 6;
- W011H Rizzo Attachment 7;
- W011I Rizzo Attachment 8;
- W011J Rizzo Attachment 9;
- W012A SDA Statement of Kyra Campbell;
- W013A SDA Statement of Madeline Minervini;

- W014A SDA Statement of Dianne Shakespeare;
- W015A UV Statement of Morgan Stan;
- W016A UV Statement of Narelle Jenks;
- W017A UV Statement of Jack Torado
- W018A UV Statement of Kylie Gray;
- W019A CFMEU Statement of Colin Aiton;
- W020A CFMEU Statement of Michael Fisher;
- W021 CFMEU Statement of Marian Brkic;

Other attachments

- A001 - Draft Determinations_updated 19.10.2015;
- A002 - ACTU List of Awards updated 19.10.2015; and
- A003 - ACTU Minimum shift calculations.

Additional lay witness statement of Matthew Francis

ACTU