Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Reply Submission & Response to Issues Paper

AM2014/196 & AM2014/197
Casual Employment &
Part-Time Employment

9 August 2016

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/196 & AM2014/197

CASUAL EMPLOYMENT & PART-TIME EMPLOYMENT

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1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in opposition to the variations sought by the Australian Council of Trade Unions (**ACTU**) and its affiliates, in accordance with the Fair Work Commission's (**Commission**) directions of 9 March 2016 and a subsequent extension of time granted to Ai Group.

2. The ACTU and certain union affiliates are seeking sweeping changes to award provisions that apply to casual and part-time employees in 111 of 122 awards as part of the 4 yearly review of modern awards (**Review**).

3. Whilst the variations sought have a common subject matter – that is, the regulation of casual and part-time employment – the specific terms of the changes sought to each award differ. Further, their impact would also vary significantly from award to award, industry to industry.

4. The Commission has nonetheless decided that the claims will be heard by one Full Bench "to ensure that the range of issues are dealt with efficiently and to minimise the risk of inconsistent decisions"[1]. The Commission has made it clear that the referral of the claims to the Full Bench "simply relates to the process adopted for the hearing and determination of the claims"[2] and "it does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards"[3].

5. There is currently a great deal of diversity amongst the casual employment and part-time employment provisions of modern awards. This diversity is necessary and appropriate. Ai Group opposes the development of model provisions for casual and part-time employment that has the effect of overriding this diversity.

6. We commence our response to the claims before the Commission by considering the need to maintain a flexible labour market, the role that casual

[1] *4 Yearly Review of Modern Awards* [2014] FWC 8583 at [19].
[2] *4 Yearly Review of Modern Awards* [2014] FWC 8583 at [15].
[3] *4 Yearly Review of Modern Awards* [2014] FWC 8583 at [15].

and part-time employees play in facilitating such flexibility, and data that establishes recent trends in casual and part-time employment. We then proceed to deal with the various elements of the claims by examining the arguments presented, the evidence called, the relevant history that precedes the issues to be ventilated, the potential impact of the claims if they were granted and the underlying rhetoric that appears to have motivated the case mounted by the ACTU and its affiliates. Finally, we deal with the questions posed by the Commission it its Issues Paper of 11 April 2016 (**Issues Paper**).

2. THE STATUTORY FRAMEWORK

7. The unions' claims are pursued in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**Act or FW Act**).

8. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

9. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

10. Section 136(1) of the Act is also relevant. It deals with what a modern award can include. Relevantly, s.139(1) provides a list of matters about which a modern award can include terms.

11. Section 139(1) reflects s.576J of the *Workplace Relations Act 1996*[4] (**WR Act**), which established the matters about which a modern award was permitted to include terms when the awards were made pursuant to the Part 10A Award Modernisation Process. Section 576J was inserted by the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*. The Explanatory Memorandum to the Bill[5] identified the list of matters in the former s.576J as allowable modern award matters. The Explanatory Memorandum also said that each allowable award matter would have its ordinary workplace relations meaning. The phrase 'allowable award matter'

[4] See the Explanatory Memorandum to the *Fair Work Bill 2008* at paragraph 529

[5] See paragraph 42.

and the principle that each allowable matter would have its ordinary workplace relations meaning derives from s.89A of the WR Act.

12. A Full Bench of the Australian Industrial Relations Commission (**AIRC**) in the *Award Simplification Decision*[6] considered s.89A. The Full Bench referred to a decision made by another Full Bench regarding the *Commonwealth Bank of Australia Officers Award.*[7] The Full Bench in that earlier case held that (emphasis added):

> The list of allowable award matters is comprised of concepts of particular kinds of award benefits and conditions of employment. The construction of Section 89A(2) demands that each concept be given a meaning consistent with the use of the concepts in industrial relations practice in Australia. In its context, section 89A is not a provision for which there is a need for either a restrictive or a generous construction. The terms in it are to be given their ordinary meaning in regard to industrial relations usage. Most of the allowable award matters listed are industrial concepts formulated around entitlements and conditions of employment ubiquitously the subject of award provisions in State and Federal industrial jurisdictions. Even within the standard award concepts, the formulation of an award provision covering employment entitlements and conditions has long allowed room for craft and drafting skills. Conceivably, some conditions of employment could be formulated in sufficiently various ways to bring the conditions within one, another, or more than one of the allowable award matters. The categories of allowable award matters are not mutually exclusive. However it is generally the case that established award provisions are of a sufficiently standard content and form to be identifiable as coming within one or occasionally, more of the allowable award categories, or as not coming within the category at all.

13. The Full Bench in the *Award Simplification Decision* made the following additional points (emphasis added):

> … In the first place, s.89A(2) does not contain a grant of power at all, but a limitation on power. Secondly, even if the principle applied, it cannot be used to broaden the scope of the power itself, but only to provide the means to carry it into effect. Each head of power in s.51 of the Constitution describes a category of laws which are within the competence of the Commonwealth Parliament to enact. By contrast, s.89A specifies particular subjects for award regulation. An example illustrates the distinction. The decision in Burton v. Honan [cited above] was concerned with the scope of the power to make laws with respect to trade and commerce with other countries contained in s.51(i) of the Constitution. Specifically, the Court had to consider whether a provision for forfeiture and seizure of goods was a law with respect to trade and commerce. An inquiry of this kind is not analogous to an inquiry as to the breadth of a specified subject (such as annual leave) for the purpose of the exercise of the Commission's arbitral power. Thirdly, the WR Act itself, in s.89A(6),

[6] Print P7500.

[7] (1997) 74 IR 446.

establishes the limits of the category. That subsection makes it clear that the matters specified in s.89A(2) are not to be expanded, but that an award provision which is incidental to one of the matters is permitted, provided it is also necessary for the effective operation of the award. The State of New South Wales, supported by the LTU and the ACTU, submitted that the implied incidental power is not restricted to that which is "necessary or essential" for the effective operation of the express power. It cited authorities (to which we have already referred) concerning the construction of various grants of power in s.51 of the Constitution in support of that proposition. It went on to submit that, even if s.89A(6) is more restrictive than the implied incidental power, the implied incidental power is still available. We do not accept these submissions. We have already pointed out the difference in character between a constitutional grant of power and the specification of allowable award matters. In addition, it is impossible to construe s.89A(6) by resort to an implied power which is inconsistent with the clear words of that subsection. In enacting s.89A(6), the legislature has given direct guidance on the extent to which the Commission may make provisions extending beyond the subject matters specified in s.89A(2). We see no reason to depart from the language of the statute, as explained in the CBAOA Case [cited above], and limited by s.89A(6).

14. These decisions are of relevance to the construction of s.139(1) as the list of allowable award matters at s.89A was in similar terms to that now found in the Act.

15. Consideration was given to the interpretation of s.139(1) during the two year review of modern awards by a Full Bench that was dealing with numerous claims regarding apprenticeship and traineeship provisions. The decisions above were cited by that Full Bench, after which it stated that the terms of s.139(1) should be given their ordinary meaning.[8] We concur.

16. Section 142 also provides a basis upon which a modern award term may be included in a modern award. Specifically, s.142(1) provides for the inclusion of incidental terms:

142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award; and

(b) essential for the purpose of making a particular term operate in a practical way.

[8] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [95].

17. This provision was also considered by a Full Bench during the review of apprenticeship and traineeship provisions in 2012, in which it observed the narrow basis upon which it allows for the inclusion of an award term: (emphasis added)

> [101] We should, however, say something about s.142(1), which allows terms to be included in an award that are incidental to a term that is permitted or required to be in an award and which is essential to make the particular term operate in a practical way. The terms of this section are to be contrasted with s.89A(6) of the WR Act. That section provided that the AIRC "may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award". We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word "essential" suggests that the term needs to be "absolutely indispensable or necessary" for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).[9]

[9] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [101]

3. THE COMMISSION'S GENERAL APPROACH TO THE 4 YEARLY REVIEW

18. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission's *Preliminary Jurisdictional Issues Decision*[10] provides the framework within which the Review is to proceed.

19. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> [23] 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. We agree with ABI's submission that 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.[11]

20. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review 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.[12]

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[10] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[11] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[12] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

21. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> [25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission 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.[13]

22. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net".

[13] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

23. Section 138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms (emphasis added):

> [36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. 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. 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.[14]

24. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.

25. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

[14] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

26. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench: (underlining added)

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[15]

27. The unions' claims conflict with the principles in the *Preliminary Jurisdictional Issues Decision* and accordingly the claims should be rejected.

[15] Re *Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

4. CASUAL AND PART-TIME EMPLOYMENT ARE AWARD-SPECIFIC ISSUES

28. There is currently a great deal of diversity amongst the casual employment and part-time employment provisions of modern awards.

29. The diversity in the length of minimum engagement periods (if any) for casual and part-time employees and whether casual conversion is included in the award, is highlighted by the table in **Attachment 4A**.

30. Such diversity is necessary and appropriate because:

- There are significant differences in the needs and characteristics of industries and occupations covered by modern awards;
- There are significant differences in the current incidence of casual and part-time employment amongst the industries and occupations covered by modern awards;
- There are significant differences in the current casual and part-time employment provisions of modern industry and occupational awards;
- There are significant differences in the casual and part-time employment provisions of the pre-modern industry and occupational awards upon which the modern awards were based;
- Any attempt to standardise provisions would create significant 'winners' and 'losers'. Many industries would lose critical existing flexibility, resulting in higher costs, reduced productivity, reduced competitiveness and reduced customer service levels.

31. For the above reasons, in a submission of 11 November 2014 Ai Group expressed opposition to the issues of casual employment and part-time employment being dealt with as common issues. In response to Ai Group's submission and similar submissions by other parties, in a Statement of 1 December 2014, Justice Ross said (emphasis added):

> [14] Various employer organisations including ACCI and Ai Group have foreshadowed their strong opposition to the ACTU's claims. A number of submissions, particularly by employer parties, also opposed these claims being dealt with as a 'common issue', largely on the basis that the Commission should have regard to the circumstances in the particular industry or sector covered by an award and not adopt a 'one size fits all approach'. These submissions are more appropriately directed at the *merit* of the claims advanced rather than the *process* adopted for the hearing and determination of the claims.
>
> [15] The ACTU claims are properly characterised as 'common issues' and will be referred to a 'stand alone' Full Bench (the Casual and Part-time Employment Full Bench). The characterisation of a claim as a common issue simply relates to the process adopted for hearing and determining the claim, it does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards. Interested parties who oppose the ACTU's claims on the basis of the particular circumstances pertaining to the modern award in which they have an interest will have an opportunity to make such submissions to the Casual and Part-time Employment Full Bench.
>
> [16] In addition to the ACTU claims a number of employer parties have foreshadowed claims in relation to the various aspects of casual and part-time employment. For example, Ai Group are seeking changes to the casual and part-time employment provisions in some 25 particular awards for reasons relating to the industries concerned. The employer claims tend to relate to awards of specific interest to the relevant organisation and do not seek a common standard across all or most awards. On that basis it is contended that such claims do not have the character of a 'common issue'. I agree. But that still leaves the question of the most appropriate way of dealing with these claims. ACCI advances the following submission in respect of this matter:
>
> > "Some ACCI members may seek to address concerns relating to part-time and casual provisions within particular awards and it seems such applications would likely only address particular industry or occupational considerations. The form and incidence of casual and part-time employment and matters such as rostering arrangements and working patterns vary among industries and occupations and ACCI maintains these circumstances favour individual treatment. The award stage may still provide the most efficient way of dealing with such claims but if they are left as a part of the common issues proceedings, they may warrant discrete treatment."
>
> [17] The FW Act gives the Commission considerable latitude in relation to the process by which the Review is to be conducted. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review (see ss.616(1), (2) and (3) of the FW Act). Section 582 provides that the President may give directions about the conduct of a Review and

the general provisions relating to the performance of the Commission's functions apply to the Review (see particularly ss.577 and 578).

[18] Subsection 156(5) of the FW Act provides that in a Review each modern award must be 'reviewed in its own right', however, this does not prevent the Commission reviewing two or more modern awards at the same time. In *National Retail Association v Fair Work Commission* the Full Court of the Federal Court considered the meaning of the expression '[t]he review must be such that each modern award is reviewed in its own right', in Item 6 (2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* . The Full Court held that the review of a particular modern award may be conducted through a number of different hearings in which different aspects of the award are determined. The Full Court rejected the proposition that Item 6 (2A) required that the review of each modern award is to be confined to a single holistic assessment of all of its terms and said:

> "... The purpose of the requirement to review a modern award "in its own right" is to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations. It is not directed to the manner in which intra-award considerations are to be dealt with.
>
> That the review of each modern award must focus on the particular terms and the particular operation of the particular award does not suggest that the review of that award was intended to be confined to a single holistic assessment of all of its terms. The conclusion that a modern award fails to comply with the modern awards objective may be based upon a single offending provision. There is no reason in principle why the FWC could not come to that conclusion without reviewing the entire award. Nor can we discern any reason why the review of a modern award was intended to be confined to a single holistic exercise. ...
>
> ... It should not be assumed that, in requiring the FWC to conduct the very substantial task of reviewing all modern awards, Parliament intended to impose practical constraints upon the manner in which that task was to be performed, unless such constraints served a useful purpose. No such purpose is apparent to support the constraint for which the NRA contends. Further, the very wide procedural discretion conferred on the FWC, to which we referred at [18], suggests that Parliament intended to confer upon the FWC a great deal of flexibility in the way the transitional review was to be conducted."

[19] To ensure that the range of issues relating to casual and part-time employment are dealt with efficiently and to minimise the risk of inconsistent decisions it is appropriate that all matters pertaining to casual and part-time employment be dealt with by one Full Bench, the Casual and Part-time Employment Full Bench. This means that the ACTU and employer claims referred to in the submissions filed and matters which arise during the award stage, will be referred to the Casual and Part-time Employment Full Bench. The referral of these claims to that Full Bench simply relates to the process adopted for the hearing and determination of these claims. In this context it is relevant to note the following observation by the Full Bench in the *Preliminary Jurisdictional Issues* decision pertaining to the Review:

> "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."

[20] The presiding Member of the Casual and Part-time Employment Full Bench (Vice President Hatcher) will list these matters for mention and programming in due course.[16]

32. Consistent with the above Statement, we submit that the Full Bench should proceed on the assumption that the proposals of employer and union parties to vary casual and part-time employment provisions in particular awards have been included in the current Full Bench proceedings merely to ensure that the matters are dealt with efficiently and to minimise the risk of inconsistent decisions. Of course, decisions of the Commission are not inconsistent just because they result in very different outcomes from one award to another.

33. Ai Group opposes the development of any model clauses relating to casual and part-time employment. The concept of model clauses is inconsistent with the imperative that casual and part-time employment be dealt with on an award by award basis. If any model clauses are developed, there would be a significant risk that inadequate weight and attention will be given to the needs of employers and employees in particular industries and to the unique characteristics of those industries.

[16] *4 Yearly Review of Modern Awards* [2014] FWC 8583.

5. TRENDS IN CASUAL AND PART-TIME EMPLOYMENT

34. The Australian Bureau of Statistics (**ABS**) data on 'forms of employment' (November 2013) show that within the total paid workforce (see Table 5.1):

- The proportion who are permanent employees (employees with paid leave entitlements, regardless of the number of hours they work) has been drifting up slowly over many years. 63.3% of the paid workforce were permanent employees in November 2013, up from 59.6% in 2004 and 60.8% in 1998.

- The proportion who are working on a casual basis (employees with no entitlement to paid leave, regardless of the number of hours they work) has been reasonably stable since 1998 at 19% to 20% of all workers. Indeed, it may have fallen a touch, with an average of 19.3% of workers in casual employment from 2008-2013, versus an average of 20.3% for the period from 1998 to 2007 (albeit with incomplete annual data in these earlier years). The proportion of employees with no leave entitlements peaked at 20.9% in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0% in 2012.

Table 5.1: Forms of employment in Australia, 1998 to 2013

% of all employed, status in main job	Employees		Non-employee workers			
	With paid leave	Without paid leave	Owner-managers of unincorporated businesses		Owner-managers of incorporated businesses	
			With employees	*Without employees*	*With employees*	*Without employees*
Aug 1998	60.8	20.1	3.5	9.3	4.0	2.2
Nov 2001	60.6	19.9	3.7	8.7	4.6	2.4
Nov 2004	59.6	20.6	3.1	9.6	4.5	2.6
Nov 2006	60.8	20.4	3.0	9.1	4.3	2.3
Nov 2007	60.9	20.9	2.9	8.9	4.1	2.4
			Independent contractors		Business operators	
Nov 2008	61.8	19.1	9.1		10.0	
Nov 2009	61.4	19.8	9.6		9.1	
Nov 2010	61.6	19.3	9.8		9.2	
Nov 2011	62.2	19.3	9.0		9.2	
Nov 2012	63.4	19.0	8.5		9.0	
Nov 2013	63.3	19.4	8.5		8.8	

Source: ABS, Forms of Employment, to Nov 2013

35. Across the major industry groups, there are concentrations of employees, casual workers, contractors and self-employed business operators (see Table 5.2) that clearly reflect the typical operational requirements of each industry.

36. Permanent employment (with paid leave entitlements) accounts for very high proportions of employment in mining (88%), utilities (84%), finance and insurance (84%) and public administration (89%). These industries tend to be extremely capital-intensive and concentrated into a small number of very large corporations.

37. Casual employment (without paid leave entitlements) is the dominant form of employment in accommodation and food services, with 58% of workers (440,000 people) in the hospitality industry in this form of employment. For women in this industry, 61% are in casual employment (265,000 women). Of these female casuals, 85% (227,000 women) work part-time. This single group – part-time women in hospitality work – account for 18% of all female casual workers and 10% of all casual workers in the Australian workforce. Other industries that have relatively high proportions (and numeric

concentrations) of casual workers include retail trade (36%), arts and recreational services (33%) and administrative services (22%).

Table 5.2: Forms of employment, major industries (2013 & 2014)

Industry (ANZSIC groups)	All employees (May 2014)			Forms of employment (Nov 2013)			
	People	Part-time	Female	Paid leave	No paid leave	Independent contractors	Business operators
	'000	%	%	%	%	%	%
Agriculture	321.4	27.4	28.4	24.3	21.7	7.6	46.3
Mining	264.6	3.5	15.5	87.8	9.3	2.5	0.4
Manufacturing	921.5	14.1	26.7	72.3	14.6	4.4	8.7
Utilities	144.2	9.0	21.3	84.2	11.8	2.7	1.3
Construction	1,029.2	15.5	11.4	48.1	12.7	29.7	9.5
Wholesale trade	385.6	17.1	32.4	73.8	10.5	3.1	12.6
Retail trade	1,228.9	49.1	55.9	53.5	35.9	2.0	8.6
Accomm. & food services	765.2	58.9	54.2	31.6	57.7	1.1	9.6
Transport & post	590.0	19.6	21.9	62.9	18.8	12.9	5.4
IT & telecomms	195.6	21.8	40.5	75.0	12.5	9.2	3.4
Financial & insurance	404.0	17.5	50.3	84.4	5.1	4.8	5.8
Real estate services	229.5	24.3	48.1	62.0	13.9	7.9	16.3
Professional services	937.6	20.6	43.2	61.9	8.7	17.0	12.5
Administrative services	397.1	41.4	52.1	45.4	22.1	21.8	10.6
Public admin. & safety	730.2	17.1	46.5	88.8	9.1	1.4	0.8
Education	902.5	38.1	70.6	75.5	17.2	4.2	3.2
Healthcare & social services	1,392.9	43.9	78.2	73.8	16.9	4.4	4.9
Arts & recreation services	183.5	48.2	46.6	45.9	32.7	14.0	7.4
Personal and other services	506.6	29.7	42.9	58.3	12.1	11.7	17.9
All industries	**11,529.9**	**30.4**	**45.7**	**63.3**	**19.4**	**8.5**	**8.8**

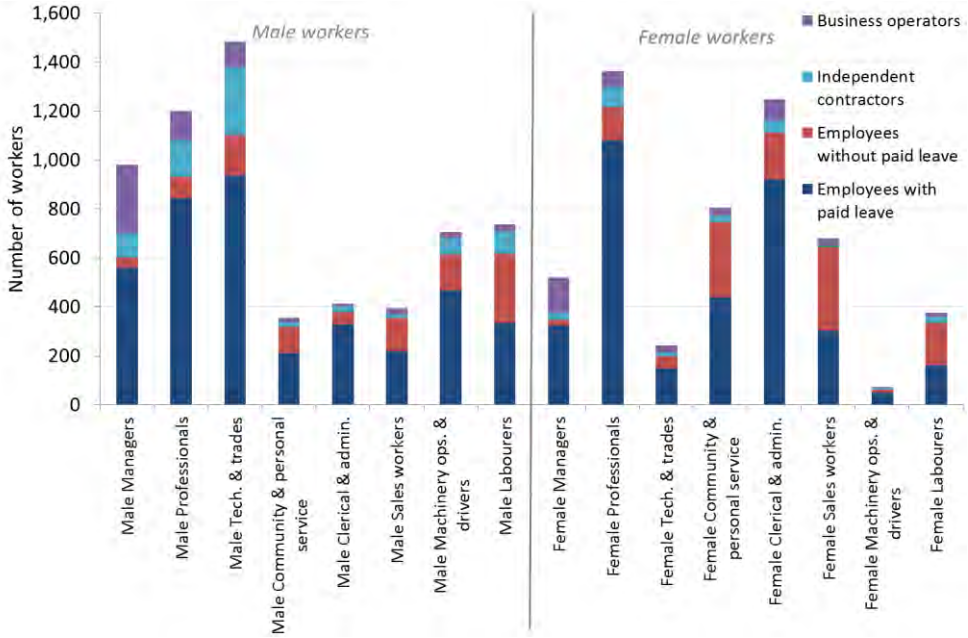
Source: ABS, Forms of Employment, to Nov 2013

38. The occupational profile of people working in various forms of employment largely reflects their industry distribution (Chart 5.1):

- A higher proportion of casual workers are employed in sales occupations (44% of this occupation and 50% of women in this occupation), labouring (41% of this occupation and 46% of women in this occupation) and community and personal service occupations (35% of this occupation and 38% of women in this occupation).

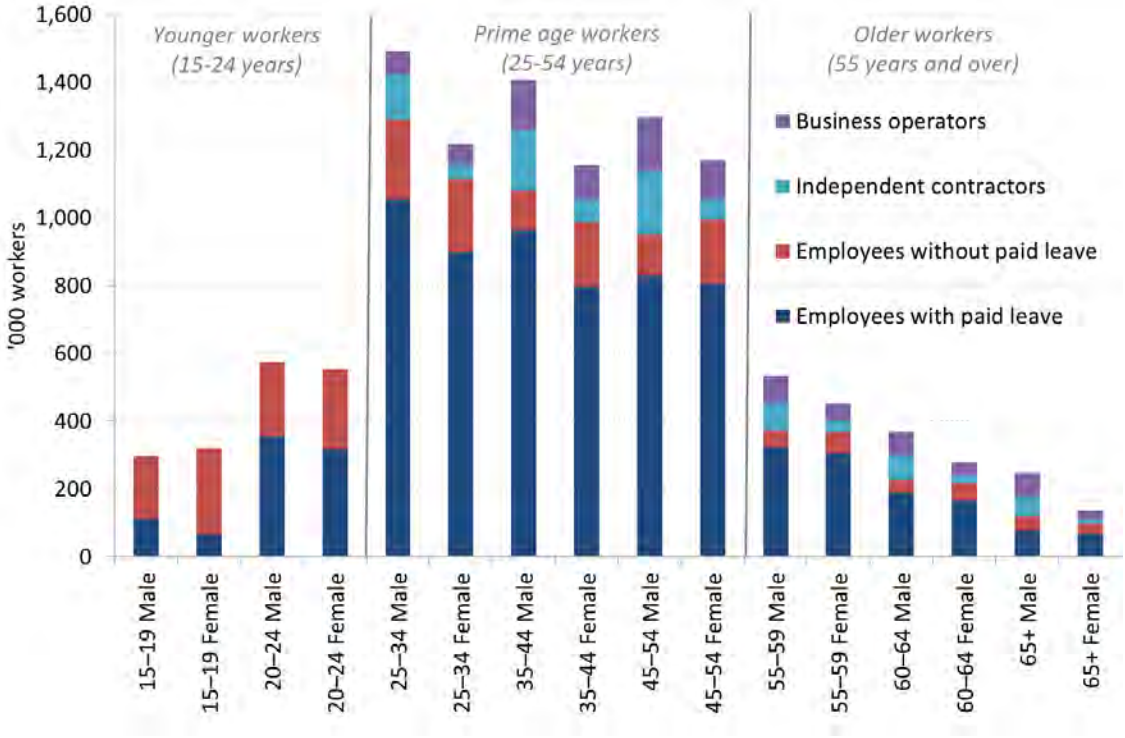
- A higher proportion of independent contractors are employed in technicians or trades (17%), labouring (10%), machinery operators/drivers (10%) and professional occupations (9%).

Chart 5.1: Forms of employment, major occupation groups (2013)



Source: ABS, Forms of Employment, to Nov 2013

Chart 5.2: Forms of employment: age and gender distribution (2013)



Source: ABS, Forms of Employment, to Nov 2013

39. The figures in the abovementioned ABS 'forms of employment' report are consistent with the figures in the new ABS publication called 'characteristics of employment, Australia' (Cat. No. 6333.0) bearing in mind that the first report focusses on casuals as a percentage of the workforce and the second on casuals as a percentage of the number of employees. Employees of course do not include independent contractors and business owners.

40. The following recent article by Professor Mark Wooden was published on 23 March 2016 in *The Conversation*. It considers the level of casual employment in Australia, using various data sources, and concludes that Ai Group's claim that the level of casual employment in Australia has not increased in the past 18 years is correct.

> **FactCheck: has the level of casual employment in Australia stayed steady for the past 18 years?**
>
> March 23, 2016 2.33pm AEDT
>
> While many different views will be expressed about the benefits of increasing or reducing flexibility to engage casuals, one indisputable fact is that the level of casual employment has not increased in Australia for the past 18 years. ABS statistics show that it remains at 20% of the workforce, the same level as it was in 1998. – **Australian Industry Group (Ai Group), media release, March 13, 2016**
>
> Changing work patterns are back in the headlines, with unions calling on the Fair Work Commission to consider new rules to convert casual employees into permanent staff after six months of working for the same employer.
>
> The Australian Industry Group (Ai Group), which represents employers, has argued against the move, saying that the level of casual employment has not increased in Australia for the past 18 years.
>
> Is that right?
>
> **Checking Forms of Employment data**
>
> When asked for a source to support the assertion, a spokesperson the Ai Group referred The Conversation to a document the group produced using a mix of data from the Australian Bureau of Statistics (ABS). The document, titled Casual employment in Australia: numbers and trends, said that:
>
> In August 1998, the ABS identified 1,681,700 people as casual employees, or 20.1% of the workforce.
>
> In November 2015, the ABS identified 2,396,500 people as casual employees, or 20.1% of the workforce.

The ABS, however, does not calculate a specific "casualisation" rate. Rather, the casual employment share has to be inferred from data on the proportion of employees (excluding business owner managers) who don't get paid annual leave and sick leave entitlements. This is a commonly used proxy measure of casual employment.

In its submission to the Fair Work Commission, the Ai Group refers to the ABS Forms of Employment Survey. That survey, a supplement to the monthly Labour Force Survey, was held every few years between 1998 and 2013.

It showed that in 1998, the share of all employed persons who were employees without paid leave entitlements was 20.1%.

ABS' release number 6105.0, Australian Labour Market Statistics, also looks at the proportion of employed people who are employees without paid leave entitlements. The October 2004 release for that data set has the figure at about 19.8% for 1998.

The most recent Forms of Employment data available, from November 2013, estimated that 19.4% of all employed people were employees without paid leave entitlements.

And what happened to the casual employment rate between 1998, when the Forms of Employment survey began, and 2013 when it ended? The short answer is not much; it hovered at around 19% or 20% throughout this period.

In other words, the ABS' Forms of Employment survey data support Ai Group's assertion that the rate of casual employment has remained stable in recent years.

Checking more recent data

The ABS stopped doing the Forms of Employment survey in 2013, but it has long collected data on the presence of paid leave entitlements in the August month of the Labour Force Survey.

These numbers are now published in spreadsheets that are part of the regular detailed quarterly release of of Labour Force Survey data.

According to the most recent estimates, for November 2015, there are 2,396,500 employees without paid entitlements. Given a total pool of 11,919,100, that implies a casual employment share of 20.1%.

The Household, Income and Labour Dynamics in Australia (HILDA) Survey, which commenced in 2001, also asks its respondents about whether they receive paid sick leave and paid annual leave. But in addition, HILDA respondents are asked whether they would describe their employment arrangements in their main job as casual.

On both measures, the HILDA Survey data show a rise in the share of casual employment in total employment between 2010 and 2014 – however, it is still no higher in 2014 than it was in 2001.

Indeed, the casual employment shares are both about half a percentage point lower in 2014 than in 2001.

Casual work is more pervasive than in the past

But surely casual employment is much more pervasive now than in the past?

This is true, but all of the growth occurred prior to the late 1990s.

Unfortunately, the earliest data we have only goes back to 1984, (which labour market academics Peter Dawkins and Keith Norris wrote about in their paper Casual employment in Australia, published by the Australian Bulletin of Labour in 1990).

But the data we do have show that between 1984 and 1998, the casual employment share grew by a whopping 70%; since that time it has fluctuated at around the 20% mark.

Verdict

The Ai Group is correct. Its assertion that the level of casual employment has not increased in Australia for the past 18 years is supported by ABS data. **– Mark Wooden**

Review

This is a fair analysis. The overall trend is that the share of casual employment in Australia has remained relatively stable since the late 1990s. **– Sue Richardson**

41. The recent Productivity Commission (**PC**) final report into Australia's Workplace Relations Framework describes the unions' views on non-standard forms of work as 'overly negative' and characterises casual work as a "now critical part of the labour market".[17]

42. The final report notes that the:

..increase in employment share of non–standard forms of employment has abated, and to some extent even reversed. For example, the share of female employees without leave entitlements — the most commonly used description of a casual worker — scarcely grew between 1992 and 2000, and has since dropped significantly (figure 2.8). While male casual rates grew strongly from 1992 to 2000, they have since stabilised. The share of casuals working part-time has also stabilised.[18]

[17] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, pp.108-109.

[18] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, p.109.

43. Relevantly the PC acknowledges that there:

> ..is little evidence that casualisation or other non-traditional forms of employment have been increasing in importance over the last decade, except among the young. On average, job security has been increasing.[19]

[19] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, p.137.

6. THE IMPORTANCE OF FLEXIBILITY IN THE LABOUR MARKET

44. Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to further improve Australian living standards. Employers need more flexibility to employ casual and part-time employees, not less.

45. In recent years, the emphasis on improving Australia's productivity performance has lifted as productivity outcomes across a wide range of industries have trended down and, particularly in the face of demographic factors, the relative importance of improved productivity as a source of growth has risen.

46. The Australian economy is facing a number of important challenges. The global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked or are embarking on their processes of industrialisation. This is profoundly disruptive and is throwing down major competitive challenges to Australian companies.

47. The pace of technological development is similarly creating far-reaching challenges. It is essential that award provisions enable Australian employers to remain agile and in a position to readily adapt to technological changes. This includes ensuing that employers have a high degree of flexibility to engage casual and part-time employees.

48. Demographic developments present other challenges. Australia is set on a course of demographic change that is seeing a steady increase in the proportion of older people. The ageing of our population will put a premium on workplace flexibility. A fall in the proportion of the population in the workforce will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential. Many people prefer casual and part-time work, and are not available or willing to work on a full-time basis.

49. There are a number of other major economic challenges which Australia is experiencing at this time:

1. The strength and extent of the mining investment boom and the now-reversing surge in commodity prices that were such dominant forces over the past decade have changed our economy much more significantly than is often credited. The associated lift in the value of our currency substantially weakened significant parts of the domestic economy. It reduced industry's capacity to invest and innovate and it meant that segments of industry were simply unable to compete. As a result we have lost or are losing some industries (e.g. automotive assembly). Others industries are much weaker. For some supply chains there are now lost capabilities; some of these are irreversible.

2. While there are some areas of recovery as the mining investment boom is fading and as commodity prices and the exchange rate have fallen, non-mining sources of growth remain thin on the ground and fragile.

3. Australian industry has quite of bit of recovery to do and many industry sectors remain cash strapped.

4. In addition to lost capabilities, our cost structures have also shifted. While wages growth has been relatively low in the past couple of years, for most of the past decade our wages were growing faster than those in other countries and our pace of productivity growth has been slower. This has left Australian businesses with high, and indeed rising unit labour costs reinforcing an uncompetitive cost position. Increased productivity is the key to restoring competitiveness.

5. Domestic energy costs have also risen substantially over recent years. What was once a source of comparative advantage has now been negated.

50. The reality is that Australia needs modern awards that are truly modern, and consistent with the needs of 21st century workplaces. Many of the trends that will reshape the workplace of the future are already apparent.

51. The 'sharing economy' is a new way of organising production, consumption and the use of assets, enabled by cheap computing and ubiquitous communications. "Digital disrupters" like Uber, Airbnb and Airtasker create huge efficiencies and new possibilities, but major competitive risks for established businesses and the employees who they employ. In this new environment, flexibility is the key. The last thing that is needed is the imposition of more restrictions on casual and part-time employment which would make it much harder for established businesses to compete. Established businesses are often at a distinct disadvantage in competing against these new platforms for the organisation of work because transfer of business laws, the general protections, and bargaining laws impose major barriers to the restructuring of existing businesses.

52. Automation and artificial intelligence is moving well beyond the factory floor to shake up an ever wider set of activities, including many personal and professional services. Some kinds of jobs will disappear, but many more will transform as workers shift focus to managing machines and programs to augment and increase their total productivity. Modern awards need to support constant evolution in the nature of jobs, and enable businesses to continue to employ workers.

53. In this environment of rapid workplace changes and major competitive threats, the imposition of restrictions on the engagement of casuals and part-time employees would be 'lead in the saddlebags' of established businesses, and would destroy jobs.

54. The World Economic Forum's (**WEF**) Global Competitiveness Index and other data sources indicate that Australia's global competitiveness has slipped in recent years, falling to 22nd in 2014-15 before rising slightly to 21st in 2015-16, from an all-time national best ranking of 15th place in 2009-10. These

numbers are the statistical expression of the commonly heard comment from business leaders that "Australia has become a very expensive country in which to make things or to do business" (see Table 6.3).

Table 6.3: WEF Global Competitiveness Indexes: Australia's ranking

Year	Overall competitiveness	Flexibility of wages
2007	19	87
2008	18	90
2009	15	75
2010	16	110
2011	20	116
2012	20	123
2013	21	135
2014	**22**	**132**
2015	**21**	**117**

Source: WEF Global Competitiveness Reports

55. In its latest assessment of the Australian economy, the OECD noted that "with the end of the mining boom, Australia must look toward non-resource sectors for future growth". In order to achieve this, economic policy must seek "rebalancing to sustain growth" and that it must "enable the economy to diversify towards more sectors of high-value added activity". The OECD recommends that in response, Australian economic policy should focus on:

> further improving the operating environment for the private sector, most importantly in infrastructure, taxation, labour skills and innovation. Improving educational and labour market opportunities for minority groups would not only reduce social exclusion but also boost growth potential.[20]

56. Far from improving labour market opportunities, the unions' claims in these proceedings would destroy opportunities.

57. The Australian Treasury's latest Intergenerational Report (March 2015) highlights the urgency of implementing policy that fosters business flexibility and sustainability. The Report calls for a:

> policy agenda [that] will support productivity growth by helping to position Australian businesses to be flexible, competitive and robust in the face of dynamic global conditions.

[20] OECD (Dec 2014), *2014 OECD economic survey of Australia: rebalancing to sustain growth,* and OECD (February 2015), *Economic Policy Reforms 2015: Going for Growth* (pp. 141-144).

58. Australian productivity growth rates have been trending lower, in a similar pattern to real GDP growth and other key indicators. At a national level, Australian multifactor productivity has flatlined at best since the turn of this century. And compared to our global competitors, Australia has performed especially poorly, with national multifactor productivity falling by an average of 1.2% p.a. from 2007 to 2011 and by 1.3% in 2012 and 2013, compared with global estimates of an improvement of 0.6% p.a. from 2007 to 2011, 0.2% in 2012 and -0.1% in 2013.[21]

59. These global and domestic factors mean that Australian businesses need to lift their competitiveness and, in particular, they need to raise productivity.

60. Maintaining or imposing barriers to competitiveness and productivity adversely impact employers and employees. Employees are of course amongst those worst affected when their employers decide to close plants, relocate, downsize or offshore because the operating environment in Australia imposes too many inflexibilities and other hurdles. It is of the utmost importance that businesses retain the ability to utilise the most efficient organisational structures and methods of organising work. To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour which they need.

61. As highlighted earlier, the PC its final report on Australia's Workplace Relations Framework stated that casual work is "a now critical part of the labour market"[22] and described the perspective of the ACTU and others on non-standard work, including casual work, as "an overly negative one".[23]

62. Modern awards need to enable businesses to rapidly respond to changes in markets, the economy, technology and demographics. The need to promote

[21] Productivity Commission estimates calculated from the Conference Board Total Economy Database, in PC 2014.

[22] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, p.109.

[23] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, p.108.

agility, not rigidity. The unions' claims conflict with the community's interests and should be rejected.

7. THE IMPORTANCE OF CASUAL AND PART-TIME EMPLOYMENT TO INCREASED WORKFORCE PARTICIPATION AND GENDER EQUALITY

63. It is very widely recognised that Australia's participation rate must increase if Australia is to avoid falling living standards as the population ages over the years ahead.

64. Indeed, the modern awards objective emphasises this need by requiring that the Commission consider the need for "increased workforce participation"[24] whenever dealing with a proposal to vary an award.

65. It is important that casual and part-time employment remains accessible to persons seeking to enter into, or remain within, the labour market. Parents (in particular women), older workers, carers, workers with a disability, students and others often view casual and part-time work as desirable or essential as these forms of employment enable a level of flexibility not available to full-time workers.

66. In the 21st century, casual and part-time employment should not be seen as a secondary or less desirable form of employment. It is not appropriate for awards to discourage or block access to casual or part-time employment as to do so would have a substantial adverse impact on workforce participation. Clearly many employees prefer casual or part-time work and have no desire to work full-time. Also, many employers need the flexibility that casual and part-time employment arrangements offer.

67. The unions' claims, if granted by the Commission, would limit the opportunities for employers' to make casual and part-time employment available, thereby imposing unnecessary barriers to employment and workforce participation.

[24] Section 134(1)(c) of the FW Act.

Intergenerational Report

68. The 2015 Intergenerational Report released by the Australian Treasury reveals that the proportion of the population participating in the workforce is expected to decline over the next 40 years.[25] Increasing workforce participation is critical to Australia's productivity performance and to address skills and labour shortages.

69. The Government emphasises, within the 2015 Intergenerational Report, that the:

> declining participation rate is projected to detract slightly from real GDP growth per person over this period. Encouraging and valuing greater workforce participation, in particular amongst older age groups, presents an opportunity to further lift GDP growth per person.[26]

70. The report goes on to say that "continued efforts to encourage higher participation across the community would have widespread benefits for Australia's economy and society".[27]

71. Increasing the workforce participation of, firstly, the older population group, secondly, prospective parents and parents (particularly women), and, thirdly, workers with a disability, will become essential to maintain and lift the Australian economy as the Australian population continues to age.

72. The report states that:

- The number of Australians aged 65 and over is projected to more than double by 2054-55, with 1 in 1,000 people projected to be aged over 100. In 1975, this was 1 in 10,000.'[28]

[25] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, page ix.

[26] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.2.

[27] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 3.2.3.

[28] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

- "Australians will live longer and continue to have one of the longest life expectancies in the world. In 2054-55, life expectancy at birth is projected to be 95.1 years for men and 96.6 years for women, compared with 91.5 and 93.6 years today."[29]

- "The average annual rate of growth in the population is projected to be 1.3 per cent, compared with 1.4 per cent over the past 40 years."[30]

- "By 2054-55, the participation rate for people aged over 15 years is projected to fall to 62.4 per cent, compared to 64.6 per cent in 2014-15."[31]

- 'The number of people aged 15 to 64 for every person aged 65 and over has fallen from 7.3 people in 1975 to an estimated 4.5 people today. By 2054-55, this is projected to nearly halve again to 2.7 people.'[32]

- "The average number of hours worked is projected to fall slightly over the next 40 years. Population ageing is expected to be the main driver of the decline in average hours worked. Historically, those in older age groups have worked for fewer hours per week, on average, than those in younger age groups. This is expected to continue."[33]

73. In respect of female participation, the report states:

- "Female employment is projected to continue to increase, following on from strong growth over the past 40 years. In 1974-75, only 46 per cent of women aged 15 to 64 had a job. Today around 66 per cent of women aged 15 to 64 are employed. By 2054-55, this is projected to increase to

[29] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

[30] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

[31] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

[32] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.

[33] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.4

around 70 per cent."[34]

- "Australia's female participation rate is around 4 percentage points lower than that in New Zealand and Canada. If Australia's female participation rate reached that of Canada, the Grattan Institute estimate that Australia's GDP would be a permanent $25 billion higher."[35]

- "Over the past three decades, the average number of hours worked per week has decreased, due partly to an increase in the number of people working part-time, reflecting the increase in female and older workers, who particularly benefit from a flexible workplace environment."[36]

74. The Intergenerational Report notes that:

> Policy settings that seek to remove barriers to participation of females and older age groups in Australia and encourage them to work, if they wish to do so, can drive gains in GDP and income growth. These policy settings include availability of childcare, flexible working arrangements, and removal of discrimination. Policies seeking to remove barriers or support participation for other groups where this has been challenging, for example, young unemployed people and people with disability, would also be expected to generate gains in GDP and income growth.[37]

75. The unions' claims run counter to the policy settings that are so necessary given the demographic challenges facing the community.

Productivity Commission Report on Australia's Workplace Relations Framework

76. The final report of the PC Review into Australia's Workplace Relations Framework identifies some of the positive trends that have contributed to Australia's increased workforce participation rate over time (emphasis added):

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[34] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts

[35] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3

[36] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.4

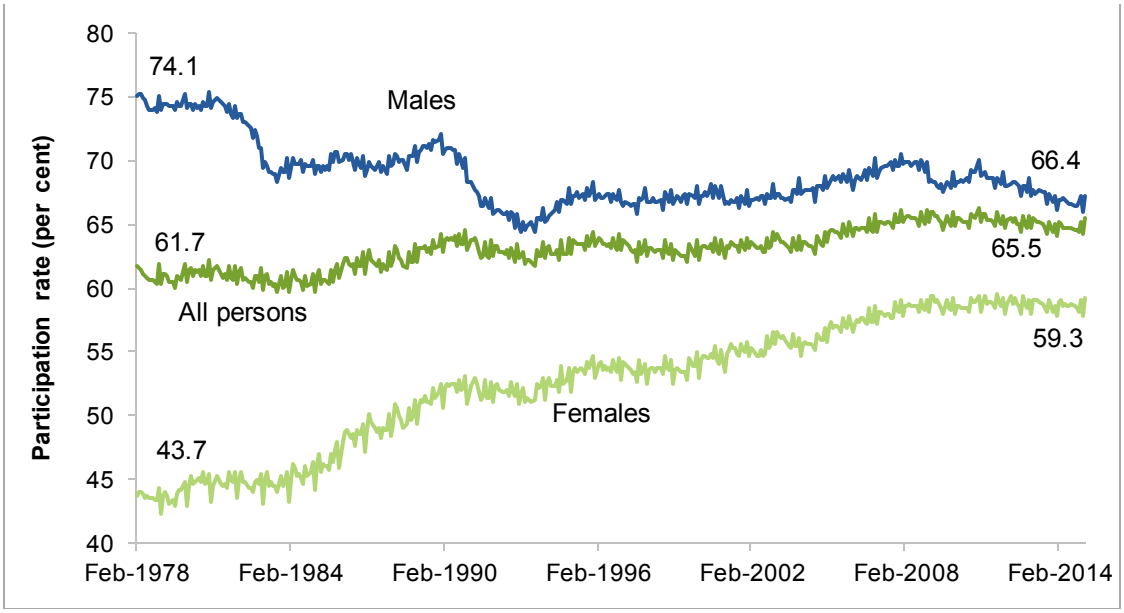
[37] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3

"2.2 Who works? Participation and the composition of the labour force

The composition of Australia's labour force has changed substantially over the past 40 years. Women who work are now the norm, rather than the exception (figure 2.1), more mature age Australians are participating in the labour force, and skilled migrants are forming an increasing share of Australia's migrant intake. These shifts have all contributed to an increased participation rate over time.

Figure 2.1 Female participation rates up, male rates down

February 1978 to February 2015



Source: ABS 2015, *Labour Force, Australia*, Cat. No. 6202.0, released 12 March.

More women are in the workforce

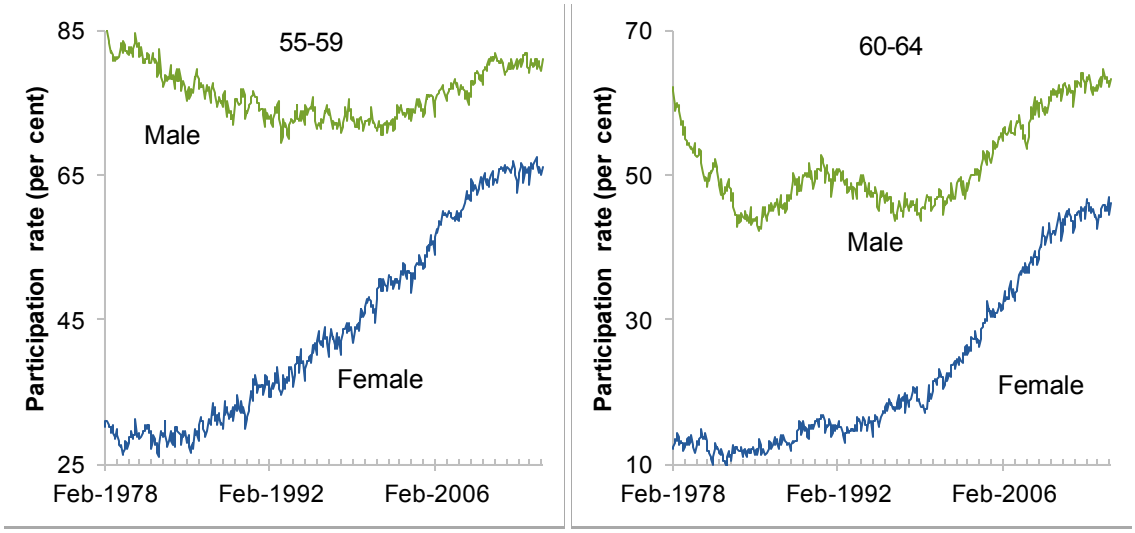
Female participation rates have increased over the last 40 years, both in Australia and other advanced economies. In Australia, they have risen from just under 45 per cent to almost 60 per cent. A number of factors have contributed to this increase, including several social and economic developments. Educational attainment has increased substantially among females since 1960, while fertility rates have declined over the same period. Moreover, increasing access to childcare has facilitated entry into the workforce. Such changes have been partly reflected in regulatory developments. For example, the equal pay cases in the late 1960s and 1970s established the principle of equal pay for work of equal value, overturning the 'Harvester Man' view of the minimum wage.

More mature age people are working

Mature age workers (those aged 55–64 years) have been growing as a share of both the population and labour force. While female mature age workers have traditionally had lower rates of workforce participation, this has increased markedly over the last three decades. Moreover, the decline in male participation rates among mature age workers has reversed in the last 15 years (figure 2.2).

Figure 2.2 Mature age workforce participation has been increasing

February 1978 to February 2015, 55-64 year olds



Source: ABS 2015, *Labour Force, Australia, Detailed*, Cat. No. 6291.0.55.001, released 12 March.

> The trend of rising participation rates of older workers is likely to continue for some time — partly offsetting the decline in participation rates resulting from the shift in the age structure of the labour force (PC 2013a).
>
> The increase in mature age workforce participation is attributable to a range of factors, such as increased life expectancy and improved health in the years before retirement. Additionally, mature age workers have had increasing access to flexible work practices, such as part-time and casual work, while the growth of employment in the services industries has allowed for work in less physically strenuous roles."[38]

77. As identified by the PC, part-time and casual work is particularly important for mature aged workers. The increased flexibility in these areas over time has had a major positive impact on the increased participation of mature aged workers and on Australia's overall participation rate.

[38] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, pp.99-100.

78. In its final report the PC identified the risks and adverse consequences associated with imposing more restrictions on the engagement of casuals (emphasis added):

> Moreover, enhancing the conditions of certain forms of work (relative to others) may lead employers to choose to use one form over another, with consequences for certain types of workers. For example, moving to give casual workers a legal right to become permanent employees may be attractive to casuals looking for permanency and prepared to give up the loading, but where it dampens the employer's motivation to hiring casuals and instead leads to an increased use of labour hire staff, it will likely disadvantage the workers with few skills and experience that welcome casual work and the associated loading (particularly when the alternative is unemployment).[39]

79. It is vital that existing flexibility is maintained, and that the unions' ill-conceived claims to limit flexibility be rejected.

Barriers to Mature Age Employment: Final Report of the Consultative Forum on Mature Age Participation

80. In August 2012, the Consultative Forum on Mature Age Participation released its final report.

81. The Forum was chaired by Mr Everald Compton AM. The Members of the Forum included the Age Discrimination Commissioner, the Chief Executives of Ai Group and the BCA, a representative of ACCI, the Secretary of the ACTU, the Chief Executives of National Seniors Australia and the Council of the Ageing, and Government representatives.

82. The forum identified 14 key barriers facing mature age Australians in the workplace or looking for a job. One of the key barriers was: 'Flexibility of Employment Arrangements', with 'increasing access to part-time working arrangements' identified as a key way to overcome this barrier. Another of the 14 barriers was: 'Care-giving Responsibilities" which of course can be assisted through flexible work arrangements.

[39] Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, p.806.

83. The final report relevantly states (emphasis added):

> **Care-giving responsibilities** are a significant barrier to mature age employment, with 28% of respondents being carers for an average 33.5 hours per week, and 14% caring for someone with a long-term illness or disability. These responsibilities prevent over one-third of care-givers from working and just under one-third from working more hours; caring disproportionately affects the workforce participation of females, people aged 45-54, and carers of the long-term ill and people with a disability. An enabler to increase employment participation and hours worked is suitable external care, which help almost half of respondents whose caring responsibilities affect workforce participation to find work or work more hours.
>
> Another means of improving the workforce participation of carers is more **flexible employment arrangements.** Flexible work patterns would help 61% of non-employed carers and half of employed carers, whose caring prevents their workforce participation, from working or working more. Flexible work arrangements are also a significant enabler of workforce participation of the ill
> and injured. Flexible work patterns have been used by one-quarter of those who have been ill, and would help 59% of non-employed currently ill people to be able to work. Flexible work would most likely help younger workers re-enter the workforce. A reduction in hours as they approach retirement would also help current workers work more years, although for an average of less than one more year.[40]

84. The final report includes the following projection on the cost of failing to increase the flexibility of workplace arrangements:

> The flexibility of workplace arrangements for care-givers and the ill barrier results in a loss of almost 450 000 potential employees by 2031, translating to just under 12.5 million hours foregone.

85. Far from contributing to the greater flexibility needed to boost the workforce participation of mature age workers, the unions' claims in these proceedings, if granted, would substantially decrease existing flexibility with a major adverse impact on workforce participation.

86. The impacts of the unions' claims would become progressively worse over the years ahead as the population ages.

Productivity Commission Report on Childcare

87. The availability of part-time and casual work is a major contributor to the participation of maternal participation in the workforce.

[40] Consultative Forum on Mature Age Participation, Final Report, August 2012, pp.17-18.

88. In the final report of the PC inquiry into Childcare and Early Childhood Education,[41] the PC identified the importance of flexible work arrangements, particularly the importance of being able to work fewer hours than full-time employees.

89. The report relevantly states (emphasis added):

> **6.1 Why are we interested in the workforce participation of parents?**
>
> There are a range of benefits from increasing the workforce participation of mothers — whether in terms of their joining the workforce or increasing the hours of work of those already in the workforce. Many participants and others have commented on these benefits (box 6.1).
>
> Private benefits (benefits to the mother and her family) include or arise from:
>
> - the mother's receipt of wages, on-the-job training, opportunities for career progression, superannuation and other work-related benefits
> - increased satisfaction for the mother in engaging with others in the community beyond the family.
>
> Community-wide benefits from increased maternal workforce participation, which incorporate the private benefits above, may include or arise from:
>
> - a boost in measured economic output
> - increased productivity of the workforce by ensuring the continued workforce attachment of educated and skilled working parents
> - reduced risk of long-term unemployment and reliance on the welfare system
> - increased return on public expenditure on higher education of women (including the repayment of HECS-HELP loans)
> - increased tax revenues and reduced government expenditures (such as on the Newstart Allowance, Parenting Payment and Age Pension) improved level of social engagement.
>
> Some studies have estimated the gross value to the economy from improving the workforce participation of women — that is, not including factors such as the value of unpaid activities (such as childcare) undertaken by women prior to entering the workforce. PriceWaterhouseCoopers (sub. DR648, 2014, pp. 4, 19, 29) estimated that the employment of an extra 0.3 per cent of the female partnered working age population would increase gross domestic product (GDP) in net present value terms by $3.7 billion. The Grattan Institute (sub. 445, p. 4) estimated that GDP would be $25 billion higher in a decade if Australian women did as much paid work as women in Canada — implying an extra 6 per cent of women in the workforce. The Organisation of Economic Co-operation and Development (OECD 2012a) estimated that increasing the workforce participation of women (so as to reduce the gap with men by 75 per cent) could increase Australia's projected average annual growth in

[41] Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014.

GDP per capita between 2011 and 2030 from 2.0 per cent to 2.4 per cent. The Commission considers that the workforce impacts from changing Early Childhood Education and Care (ECEC) funding are likely to have complex effects on GDP. These effects are discussed in chapter 16.[42]

90. The report goes on to state (emphasis added):[43]

Flexible work and other family-friendly arrangements

In contrast to the negative drivers of maternal workforce participation discussed above, is the availability of flexible work and other family-friendly arrangements, which is a key positive workforce participation driver (as noted, for example, by the ACTU, trans., pp. 109, 113–14, Melbourne, 18 August 2014). It can be viewed as a complement to accessible and affordable childcare:

Flexible and caring friendly working arrangements are not a substitute of accessible and affordable good quality childcare, rather they work together to enhance the abilities of mothers and fathers to undertake paid employment whilst having children. (Women and Work Research Group, sub. DR800, p. 7)

These arrangements cover:

- changing the hours of work (for example, working part time or changing start or finish times)
- changing patterns of work (for example, working split shifts, or job sharing)
- changing the place of work (for example, working from home)
- using leave arrangements including paid parental leave
- adopting specific occupational health and safety measures (for example, for pregnant employees)
- applying specific employer supports such as for ECEC (for example, employers providing onsite childcare or reserving places in a childcare centre).

For women who are not in the workforce or who work part time, the ability to 'work part time hours', 'vary start finish/times' and 'work school hours' are 'very important' or 'somewhat important' incentives to join or increase participation in the workforce, particularly when compared with men (figure 6.8). Indeed, some of these incentives rate above childcare-related incentives.

Most mothers used some type of flexible work or other family-friendly arrangements to assist with childcare (table 6.6). Around 74 per cent of mothers with a child aged under 13 years (around 1.3 million) and around 86 per cent of mothers with a child aged under 2 years who started or returned to work after the birth of their child (205 500) used some sort of work arrangement to assist with the care of their child. The most common working arrangements used were part-time work, flexible work hours and working from home. However, 7 per cent (over 14 000) of these mothers reported that flexible working arrangements were not available to use.

[42] Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014, p.184

[43] Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014, p.223-225

The findings of other surveys — for example, the Australian Institute of Management Survey 2008 of executives; Baseline Australian Mothers Survey 2010; CareforKids.com.au Survey 2014 of parents; and the Finance Sector Union survey of its members (sub. 174, p. 4) — also reinforce the importance to parents of the availability of flexible work and other family-friendly arrangements. For example, the Baseline Australian Mothers Survey (Martin et al. 2012, pp. 50–51) of some 2600 mothers found that in 2010, many mothers who returned to work after the birth of their child made use of flexible work and other arrangements — 57 per cent used flexible hours, 54 per cent went permanent part time, 39 per cent used shorter hours and 33 per cent worked from home. Also, 70 per cent of mothers who changed jobs on or following return to work did so because they wanted shorter or more flexible hours. A reason for 18 per cent of mothers not returning to work before 13 months was 'couldn't negotiate suitable work conditions'.

There are differences between mothers and fathers in their use of flexible work and other family-friendly arrangements. For example, ABS data indicate that mothers are more likely than fathers to use paid and unpaid leave to provide care, whereas fathers are more likely to use flexible working hours or rostered days off, or work from home to provide care (table 6.7). The subsequent introduction of the Australian Government's Paid Parental Leave scheme is likely to have had an impact on the uptake of parental leave since the survey was undertaken.

Table 6.6 **Use of work arrangements by mothers to assist with the care of children**

2011

	Mothers with a child aged under 2 years		*Mothers with a child aged under 13 years*	
	'000	%	'000	%
Part-time work	134.1	76	532.6	57
Flexible working hours	71.3	40	533.1	57
Work from home	53.3	30	226.1	24
Shift work	18.9	11	86.8	9
Job sharing	13.1	7	27.6	3
Any other work arrangements[a]	10.5	6	21.9	2
All work arrangements used to assist with care of child[b]	**176.5**		**942.5**	

[a] Includes women who used leave arrangements. [b] Individual components do not sum to all work arrangements as more than one working arrangement might be used.

Source: ABS (2012a, 2012b, p. 28).

The Australian Workplace Relations Study

91. In the First Findings report of the Australian Workplace Relations Study (**AWRS**) it was revealed that:

- "Flexibility to balance work and non-work commitments was considered to be the most important aspect of employment for almost one-third (32%) of

employees when considering their overall satisfaction with their current job."[44]

- "A higher proportion of female employees (37%) considered the flexibility to balance work and non-work commitments to be the most important aspect of employment, compared to males (26%)."[45]

- "Employees were most satisfied with having flexibility to balance work and non-work commitments (5.67) and the freedom to decide how to do their work (5.66)."[46]

- "Female employees were most satisfied with the flexibility to balance work and non-work commitments (5.78)."[47]

92. The results highlight the importance of flexible forms of employment to all workers, particularly women.

93. It is essential that existing flexibility is not lost and that the unions' claims are rejected.

Metal Industry Casual Employment Case

94. The 2000 decision of a Full Bench of the AIRC in the *Metal Industry Casual Employment Case*[48] in 2000 is discussed in later sections of this submission. In terms of workforce participation, it is noteworthy that the Full Bench made the following comments which recognise that restrictions on casual

[44] Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

[45] Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

[46] Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

[47] Fair Work Commission, Australian Workplace Relations Study , First Findings Report, January 2015, chapter 6.

[48] Print T4991. In any analysis of the outcomes of this case it is necessary to consider the decision of December 2000 as well as the orders made by the Full Bench in February 2001 as a result of the decision (AW789529, PR901028). After the initial decision was handed down, there were substantial negotiations between Ai Group and the AMWU regarding the wording of the final orders and a contested 'settlement of orders' process before the Full Bench.

employment would have an adverse impact on younger and less advantaged employees:

> … However, in selecting six months, we take into account what we consider to be the potential adverse impact on younger and less advantaged employees of having a lower limit.[49]

Gender Equality

95. As is evident from the above discussion on workforce participation, the availability, and accessibility, of casual and part-time employment is important in furthering gender equality in Australia.

96. It is without doubt that the unions' claims, if granted, would impose barriers to workplace gender equality.

97. Despite many decades of increasing female workforce participation, women generally continue to assume the primary caring responsibilities for children and unpaid domestic work. This cultural reality drives the necessity for flexible forms of work, such as casual and part-time employment.

98. It naturally follows that reducing access to flexible forms of work like casual and part-time employment, would have a greater adverse impact on women than men.

99. We refer to the witness statement of Ms Kay Neill of Corporate Health Group Pty Ltd (**CHG**) who states that the impact of the ACTU claims would result in her business employing fewer people. CHG employs more than twice as many women as men, with women occupying many casual positions, such as nursing positions.

100. On 2 August 2016, the Workplace Gender Equality Agency released its report on Gender Segregation in Australia's Workforce. The report includes the following relevant extract (on p.7) which highlights the importance of part-time employment in furthering gender equality:

[49] Print T4991 at para [116].

Full-time or part-time status by occupation

Some occupational characteristics may have an impact on the level of segregation. For instance, the availability of part-time work increases female participation in occupations.

Male-dominated occupations tend to have a lower percentage of part-time employees when compared to female-dominated and mixed occupations.

This may suggest that women avoid occupations where part-time work is less likely to be available, or that part-time work is more likely to be supported by employers in female-dominated occupations.

Table 7 below outlines the percentage of employees in each occupational category by full-time/part-time status. The high percentage of part-time employees in the male-dominated category of Labourers can be explained by the nature of this work as seasonal or project-related. …

101. As noted above, cultural factors are currently a barrier to gender equality in the workplace. Projects like *The Equilibrium Man Challenge* undertaken by the Workplace Gender Equality Agency attempt to introduce (and normalise) flexible working practices for all workers (not just women).[50]

102. Imposing barriers to men working flexibly would have an adverse impact on women. If a greater number of men worked to facilitate parental responsibilities flexibly (including through the use of casual and part-time employment), a greater number of women would be able to participate in the workforce.

103. In addition, access to casual and part-time work can assist in rectifying gender inequality between men and women in retirement. For example, providing opportunities to increase female participation in the workforce enables women to increase their retirement saving via contributions to superannuation.

104. It is important that flexible work practices are a normal feature of Australian workplaces. The unions' claims, by discouraging the use of casual or part-time employment, would limit the opportunity for flexible work; not only for women, but for men, thereby perpetuating existing cultural barriers to female workforce participation.

[50] See http://equilibriumchallenge.com.au/.

8. THE INCIDENCE AND ROLE OF LABOUR HIRE EMPLOYERS AND EMPLOYEES

105. A high proportion of employees in the labour hire industry are casuals, given the uncertainty surrounding the length of time that a client firm will need the labour provided by a labour hire employee.

106. A recent PC Paper from 2013 confirmed that despite the rapid growth in labour hire in the 1990s, labour hire workers probably became less prevalent at the end of the decade than at the start.[51]

107. Labour hire provides a number of benefits to the community in enabling businesses to operate more efficiently and by providing pathways to employment for job-seekers.

108. The ABS, in August 2014 [52] reported that 5% of all employed persons (599,800) had found their job through a labour hire firm/employment agency.

109. Approximately 124,400 persons, or 21% of those who had found their job through a labour hire firm/employment agency, were paid by a labour hire firm/employment agency.

110. Labour hire workers were most prevalent in the manufacturing industry (19%) and in administrative and support services (16%). Labourers (21%) and Technicians and trades workers (19%) were the most common occupational groups for labour hire workers.

111. The unions' claims, if accepted would have a particularly harsh impact on labour hire firms and labour hire workers. If existing flexibility regarding casual employment is lost, obviously it will be less likely that client companies will use the services of labour hire firms, and labour hire firms will employ far fewer employees.

[51] Shomos, Turner, Will, *Forms of Work in Australia – Productivity Commission Staff Working Paper* (Australian Government, Productivity Commission, April 2013).

[52] ABS, 6333.0 *Characteristics of Employment*, August 2014.

9. WORK HEALTH AND SAFETY

112. Ai Group does not accept that casual employment typically leads to poor health and safety outcomes.

113. The fact that some temporary employment arrangements may be managed poorly by a small minority of employers is not a valid rationale for all temporary work to be demonised.

114. Work Health and Safety (**WHS**) and Occupational Health and Safety (**OHS**) laws across Australia impose obligations on employers in respect of their employees and contractors, as well as other persons relating to the workplace or the employer's undertaking. These obligations require an employer to *eliminate risk or to minimise risk as far as is reasonably practicable*; in doing so there is a specific obligation to consult with the workers when there is likely to be an OHS/WHS impact of a workplace decision. The obligations apply whether the engagement is an ongoing employment arrangement of one that is for a very short period of time.

115. In addition, the WHS laws (which apply in all states other than Victoria and Western Australia) include specific obligations for duty holders with overlapping obligations to consult, cooperate and coordinate with each other in relation to health and safety duties.

116. All jurisdictions have guidance material in place to assist employers to understand the obligations they have to those workers who are not in their permanent employment: contractors, casuals and labour hire employees. This information has been available, and widely promulgated, for more than 10 years.

117. Temporary employment arrangements should not, in themselves, reduce the safety of workers. The obligations of the employer are not lowered because the worker is engaged in an arrangement outside permanent employment.

118. The law requires that casual employees receive induction, training, supervision and other support appropriate to the level of risk associated with

the tasks to be undertaken. There is no legal or ethical reason why standards should be less than those provided to permanent employees.

Labour Hire Arrangements

119. The majority of employees in the labour hire industry are engaged on a casual basis given the uncertainty surrounding the length of time that a client firm will need the labour provided by a labour hire employee.

120. The labour hire relationship does not typically adversely impact upon safety.

121. When engagement involves a labour hire scenario, workers will have two organisations focusing on their safety. This should result in an approach where discussions are occurring between the labour hire company and host employer about how best to provide a healthy and safe workplace.

122. Labour hire companies are well-placed to provide support and assistance to smaller organisations into which they place their workers. Many labour hire companies provide training and system support to their hosts, thus increasing the safety of their own workers and, potentially, the permanent employees of the host employer.

123. We refer to the witness statement of Robert Blanche of the Bayside Group, in which he describes the WHS training delivered through their program WorkPro; a program designed for labour hire companies and their clients to provide and record WHS training delivered to labour hire employees.[53] This is an example of the integrated systems and services provided by leading labour hire companies to ensure the maintenance of high standards of WHS and compliance.

124. The best cooperative systems effectively work together to ensure that all issues are addressed, with responsibility for each clearly allocated to either the labour hire agency or host organisation, e.g. induction responsibilities that

[53] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 18 and Attachment RB-1.

identify what the labour hire company will cover and provide and what the host employer will cover and provide.

125. Furthermore, significant changes introduced by the model WHS laws over the past few years (since 2011) have assisted in better reflecting the arrangements common to the labour hire industry. With the introduction of the term 'person conducting a business or undertaking' (**PCBU**), which replaced the term 'employer', any suggestions that on-hire workers were the sole responsibility of the labour hire firm have been strongly dispelled. The introduction of the term 'worker' replacing the term 'employee' also recognised and captured a broader scope of employment and contracting relationships.

126. There is a misguided view that labour hire workers are more vulnerable to safety risks. The client company and labour hire firm are considered to be PCBU's and are therefore both responsible for the safety of labour hire workers.

127. A series of cases have clarified the legal responsibilities of labour hire companies and client companies. These authorities demonstrate that labour hire companies and host firms have a joint responsibility under WHS legislation to ensure the safety and health of labour hire workers:

- In *Kelly v Humanis Group Limited*[54], the Court found that the safety of a worker at a mine site was beyond the labour hire firm's responsibility and extended to the client company.

- In *Inspector McGrath v DMP Container Labour Pty Ltd*[55], the Industrial Relations Commission found that the on-hire firm and the host employer had the same obligations to the on-hire workers, whilst the workers were under their management and control. Either party could not delegate their duties or rely solely on the other party to provide a safe working environment. Both the labour hire firm and client company were required to develop, implement and monitor systems of work to meet their obligations.

[54] [2014] WADC 43.

[55] [2012] NSWIRComm 40.

- In *B v Rand Transport (1986) Pty Ltd*[56], a truck driver successfully claimed damages from a storage and distribution company for a head injury caused by a forklift operator whilst unloading a truck, even though the forklift operator was not an employee of the company where the uploading took place.

128. These WHS legislative changes and cases have already had a significant, positive impact on the labour hire industry.

129. It is unnecessary and would be counterproductive to introduce further regulation in the form of increased restrictions on casual and part-time employment.

[56] [2013] QDC 172.

10. DEFINITION OF 'CASUAL EMPLOYMENT'

130. In its submissions,[57] the ACTU goes to some length to set out various decisions that have contemplated the legal conception or definition of casual employment. As we understand it, it is the ACTU's contention that there are, in effect, two lines of authority that emerge from their study of the case law. One is that an assessment of whether an employee is a "casual employee" is to be made by considering "the true nature of the employment relationship". The other is that the 'manner of initial engagement is determinative of casual status'. The ACTU sets out its discomfort with both of these outcomes. However, no clear connection is articulated by the ACTU between these issues and its claims.

131. Even under common law, "casual employee" needs to be given a contemporary meaning which reflects the fact that:

- A very high proportion of casuals are employed under industrial instruments and contracts of employment that define a casual employee as "one engaged and paid as such" and where the pattern of hours, type of work and length of the engagement are irrelevant to the determination of whether or not the employee is a casual;

- The FW Act recognises that casuals are often employed on a regular and systematic basis for lengthy periods (for example, see ss.65(2)(b), 67(2) and 384(2));

- Nowadays State and Territory long service leave laws recognise that casuals are often employed on a regular and systematic basis for lengthy periods and these casuals have been granted long service leave entitlements; and

[57] See in particular its submissions of 19 October 2015 (from paragraph 26 onwards.

- Many employees prefer casual employment to full-time and part-time employment because it suits their family responsibilities, lifestyle preferences, study commitments or income preferences.

132. The common law meaning of "casual employee" reflected in some of the old cases harks back to a bygone era when Australia's workplace relations system was rigid. At that time Australian employers were protected from global competition through high tariffs and hence the need for workplace flexibility was less vital. Also, there was little recognition of the importance of increased workforce participation and the need to promote diversity and gender equality in the workplace. Indeed, in that bygone era workforce participation levels were much lower than they now are.

133. The common law meaning of "casual employee" has changed over time, as is evident from many of the more recent decisions of Courts and Industrial Commissions. For the past 20 or so years, Courts and Industrial Commissions have in most instances adopted a contemporary meaning for 'casual employee' and rejected union attempts to impose an outdated and inappropriate meaning upon employers and employees.

134. This is a natural and logical development of the law, given changes in workplaces and society over the past 20 years. As recently stated by a Full Bench of the Commission in *LCR Mining Group v CFMEU*:

> [46] … History is riddled with support for the notion that law that remains static invariably becomes archaic. Law that impedes innovation and is resistant to change has oft been seen to result in injustice and inefficiency.

135. Fortunately, regardless of the position under common law, it is now very well-established that where an award includes a definition of a casual employee, an employee engaged as casual in accordance with that definition is deemed to be a casual employee for the purposes of entitlements under the award and the FW Act. This is the case regardless of the number or pattern of hours that the employee works.

136. Under modern awards and pre-modern awards, a casual employee is very widely defined as "one engaged and paid as such". It is important to note that the definition of a "casual employee", as found in modern awards, has not been put in issue in these proceedings. Neither the ACTU nor its affiliates have called into question or sought to vary the current definition, and therefore there is no need for the Full Bench to deal with the definition of 'casual employment'.

137. The approach of applying relevant award definitions of casual employment, regardless of what the position may be at common law, has a long history.

138. In *Ryde-Eastwood Leagues Club v Taylor,*[58] a Full Bench of the NSW Industrial Relations Commission determined that regular, ongoing employment pursuant to a roster was not inconsistent with casual employment within the meaning of the award. The award defined a casual as a person "engaged and paid as such".

139. In *Markwell Pacific Limited v AWU-FIME*,[59] the Full Court of the NSW Industrial Relations Court held that a group of regular, long-term casual employees were not entitled to severance payments. Although the employees had an ongoing employment relationship with the employer (in some cases extending beyond 10 years' service) and worked a fairly consistent pattern of hours, the Full Court held that they were casual employees. The relevant award defined a casual as an "employee engaged and paid as such".

140. In *Bluesuits Pty Ltd t/as Toongabbie Hotel v Graham*,[60] a Full Bench of the AIRC (Giudice P, McIntyre VP and Jones C) held than an employee engaged as a casual and paid a casual loading was a casual despite union arguments to the contrary. The employee worked a four day week in accordance with a predetermined roster. The relevant award defined a casual as one *'engaged as such'.* The Full Bench held that "an engagement which involves regular

[58] (1994) 56 IR 385.

[59] (1995) AILR 5-044 per Fisher CJ, Baur and Hungerford JJ.

[60] Print S0282, 3 November 1999.

work at the same or similar times each week is within the concept of casual employment".[61]

141. In *CPSU v State of Victoria*,[62] Justice Marshall of the Federal Court held that two employees who were designated as 'casual employees' and paid a casual loading were casuals, despite union submissions to the contrary. Marshall J said: "it is not inconsistent with a casual employment relationship for employees to be engaged on a regular basis pursuant to a roster"[63] and that casual employment does not need to be "informal, uncertain or irregular".[64] Justice Marshall's findings were not disturbed by the Full Court of the Federal Court (Ryan, Moore and Mansfield JJ) on appeal.[65]

142. A contemporary meaning of 'casual employee' was adopted by a Full Bench of the AIRC in the *Metal Industry Casual Employment Case*[66] in 2000.

143. This major case continued for 18 months from August 1999 until orders were issued varying the award in February 2001. The definition of "casual employee" was a central aspect of the case and was highly contested between Ai Group and the AMWU, as highlighted in the following extract from the decision (emphasis added):

> [93] The debate before us about the purpose and effect of defining the concept of casual employment was intense. The dynamic of that debate is the conflict about the desirability and extent of any award restriction on the use of casual employment. From the AMWU's point of view, the merits of such restriction justify the imposition of a criterion or identification of the circumstances in which casual employment is a type of employment within the application of the Award. That approach precedes from an analysis of the circumstances in which there is the greatest justification for use of a contract for irregular, intermittent, or contingent employment. It is predicated upon casual employment not commencing unless the proposed criterion is met.[67]

[61] Ibid at para 14.
[62] (2000) 95 IR 54.
[63] Ibid at 57.
[64] Ibid at 57.
[65] [2000] FCA 759.
[66] 29 December 2000, Print T4991.
[67] 29 December 2000, Print T4991.

144. In the case, the AMWU sought to include the following definition of casual employee:

> **4.2.3(a)** A casual employee is to be employed by the hour. A casual employee shall only be engaged in the circumstances in 4.2.3(b).
>
> **4.2.3(b)** Casual employees may only be engaged in the following circumstances:
>
> - to meet short term work needs; or
> - to carry out work in emergency circumstances; or
> - to perform work unable to be practicably rostered to permanent employees.

145. The Full Bench rejected the AMWU's proposed definition and decided that the award definition should do no more than describe the type of employment (emphasis added):

> [92] The Award now imposes no restriction on the circumstances in which a casual may be engaged, provided the employee is engaged as such. The history of award provisions for weekly hire and contract of employment in the industry does not support the submission made by the AMWU that the meaning of the word "casual" under the award should now be given a meaning associated with only irregular or occasional work. The gradual broadening of the function of the clause militates against the argument. Moreover, for the reasons we have indicated, we are unable to accept that it is sound in principle to attempt to distill from the circumstances in which a type of employment may have been used the determinants and incidents of the type of employment itself.

146. The Full Bench also said (emphasis added):

> [62] The award definition or identification of casual employment may be effectively determinative of employment status on matters of importance collateral to the award relationship itself. Those matters include the unfair dismissal protection. Access to credit, to superannuation schemes, or to long service leave calculations of continuous service may also be affected.

147. The Full Bench decided that a casual should be defined in the *Metal, Engineering and Associated Industries Award 1998* (**Metals Award 1998**) as follows (emphasis added):

> **4.2.3(a)** A casual employee is to be one engaged and paid as such. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 5.1 for the work being performed plus a casual loading of 25 per cent. The loading constitutes part of the casual employee's all purpose rate.

148. The standard definition of 'casual employee' inserted into the Metals Award 1998 by the Full Bench was consistent with the one that was in place for many years under the *Metal Industry Award 1984 – Part I.*[68]

149. The standard definition inserted into the Metals Award 1998 is identical or very similar to the definitions in the vast majority of modern awards (about 80%), including the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**). Nearly all of the remaining approximately 20% of awards either define casuals as "employed by the hour" or do not include a definition.

150. During the Review, the Commission has slightly reworded the standard definition in numerous exposure drafts as follows:

> A casual employee is an employee who is engaged and paid as a casual employee.[69]

151. The above definition reflects the contemporary meaning of casual employee. That is, the key factors which determine that an employee is a 'casual' are:

- The employee is engaged as a casual.
- The employee is paid an hourly rate of pay and a casual loading.

152. A very relevant FWC Full Bench decision, in which the meaning of 'casual employee' under modern awards and the NES was considered, is *Telum Civil v CFMEU.*[70]

153. The Full Bench relevantly stated (emphasis added):

> [12] It appears not to have been in dispute that Telum had recorded all of the Employees in its books as casual employees and had paid them a casual loading, recorded as such on their pay slips. It is more than tolerably clear from the Commissioner's reasons for decision that the case had proceeded before the Commissioner on an assumption that the Employees had been expressly engaged as casuals at the time of their employment, had been paid as casuals throughout

[68] Subclause 6(c).

[69] For example see clause 6.5(a) of the *Exposure Draft – Cement, Lime and Quarrying Award 2014*.

[70] [2013] FWCFB 2434

their employment and had otherwise been treated as casuals by Telum (see especially [2012] FWA 10684 at [54])

…

[21] We do not propose to set out a detailed summary of the state of the general law on what constitutes casual employment. A useful conspectus of the authorities was provided by Boland P 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. It is sufficient to note for present purposes that the notion of casual employment remains "ill-defined" under the general law and calls for the application of criteria that do not deliver a clear and unambiguous answer in many cases but, rather, lead to results on which reasonable minds may differ.

…

[24] There is a long history of regulation of casual employment in Federal awards - including grappling with the issues arising from the nature of casual employment, the increasing casualisation of the workforce and problems associated with employees who are labelled and paid as casuals notwithstanding that they have a regular and ongoing pattern of engagement indistinguishable from 'permanent' full time or part-time employees. That history is set out at length in the decision of the Full Bench of the AIRC in *Re Metal, Engineering and Associated Industries Award 1998* (2000) 110 IR 247 (Munro J, Polities SDP and Lawson C; 29 December 2000) (Metals Casuals Case) and we will not repeat it here. That careful decision is of particular importance and repays close study. The *Metal, Engineering and Associated Industries Award 1998* (pre-reform Metals Award) was the centrepiece of the Federal award system in the decades prior to the award modernisation process. The Full Bench was dealing with an application by the AMWU to vary the provisions relating to casual employment in pre-reform Metals Award to restrict casual employment under the pre-reform Metals Award to what have been described as "true" casuals (employees who work under arrangements characterised by 'informality, uncertainty and irregularity' - (2000) 110 IR 247 at para [109]) and to increase the casual loading.

[25] The *Metals Casuals Case* demonstrates how and why the specification of casual employment in Federal awards had diverged from the (ill-defined) general law position to a position where, by the time of award modernisation process, for many, if not most, Federal awards, an employee was a casual employee if they were engaged as a casual (that is, identified as casual at the time of engagement, perhaps with a requirement of a writing) and paid a casual loading. The Full Bench recognised that this approach had led to a position where employees with regular and systematic hours on an ongoing basis could still be "casual employees" under a Federal award.

…

[38] All of the modern awards contain a definition of casual employment. Those 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.

…

[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:….

…

[44] Such 'casual conversion' provisions were not uncommon in pre-reform Federal award and presuppose that the general law approach to identifying casuals does not apply in the Federal award context and that a provision such as this is required if an employee who is engaged and paid as a casual is to be treated as anything other than a casual for the purposes of a modern award.

[45] The general approach to casual employment in the modern awards is a continuation of the approach explained and adopted in the *Metals Casuals Case* and underscored in *Redundancy Case 2004* (PR032004).

[46] It will be noted that a range of NES entitlements do not apply to a "casual employee":

- parental leave and related entitlements (Div 5 - see s.67(2)),
- annual leave (Div 6 - see s.96)
- personal/carer's (sick) leave and compassionate leave (Div 7 - see s.86)
- notice of termination and redundancy pay (Div 10 - see s.123)
- public holidays (Div 10 - casual employees are not paid unless rostered on for the public holiday)

[47] These are all entitlements of permanent employees that are compensated for in the casual loading: compare *Metals Casuals Case* (2000) 110 IR 247 at [160]ff and *Re Pastoral Industry Award 1998* (2003) 123 IR 184 at [76]ff and esp at [109]-[111].

[48] To adopt the construction of s.123(1)(c) adopted by the Commissioner would allow for double dipping by employees engaged as casuals and paid the casual loading, but who work regular and systematic hours, of the sort that the Full Bench in

the *Redundancy Case 2004* set its face against (PR032004 at [154]). It is unlikely that the legislature intended that outcome. It is an outcome that is inconsistent with the purpose and objects of the FW Act. It is an outcome that would tend to impede productivity and flexibility (cf s.3(a) and (f)) for the reasons explained by the Full Bench in the *Metals Casuals Case*.

[49] Other uses of the expression "casual employee" or the word "casual" in the FW Act support the conclusion that they refer to the characterisation of the employee under the applicable modern award or enterprise agreement.

[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).

…

[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).

[59] The CFMEU placed particular reliance on the decision of Barker J in *Williams v MacMahon Mining Services Pty Ltd* (2010) 201 IR 123. That case was relevantly concerned with the meaning of "casual employee" in s.227 of the *Workplace Relations Act 1996*. Barker J noted (at [31]) that "[t]he parties accept that the WR Act

does not define the expression "casual employee" and so the expression should be given its ordinary common law meaning." This case is concerned with a different statutory context and Barker J's decision does not assist in the proper construction of the expression "casual employee" in s.123(1)(c) of the FW Act.

154. The decision of Full Bench in *Telum Civil v CFMEU* provides a very thorough, logical and compelling analysis of the interaction between the modern award definition of 'casual employee' and the provisions in the FW Act which do or do not apply to casuals. We concur with the conclusion reached by the Full Bench; that an employee is a casual employee for the purposes of the FW Act if they are a casual employee for the purposes of the industrial instrument that applies to them.

155. The reasoning in *Telum Civil v CFMEU* was also recently discussed and adopted by Justice White of the Federal Court in *Fair Work Ombudsman v Devine Marine Group.*[71] Justice White stated (emphasis added):

> 141. The word "engaged" in cl 14.1 of the Award is capable of more than one meaning. On one view, it can refer to the way in which the parties themselves identified their arrangement at its commencement. On another view, it can be a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances. Support for the former construction is seen in the decision of the Full Bench of the Fair Work Commission in *Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434. The Full Bench said at [38]:
>
> > [38] All of the modern awards contain a definition of casual employment. Those 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.
>
> …
>
> 144. It is sufficient in my opinion to state that, in the present case, the former construction draws support from two considerations and should be adopted. First, the term "specifically engaged" in cl 12 indicates that the focus is on the agreement of the parties at the commencement of the employment as to the character of the employment. Secondly, the requirement in cl 14.3 for the

[71] [2014] FCA 1365 at paras [137] – [146]

observance of formality at the time of engagement of a casual employee suggests that the word "engaged" is directed to the agreement made between the parties rather than to the manner and circumstances in which the employee does in fact carry out his or her work.

156. A similar interpretation to that adopted by the Full Bench in *Telum Civil v CFMEU* was taken by a Full Bench in the recent case of *Nardy House v Perry,*[72] in which Ai Group intervened. The Full Bench overturned a decision of Commissioner Riordan who had decided that a casual employee who worked regular hours for 12 months was a part-time employee and not a genuine casual. In its Reasons for Decision the Full Bench relevantly stated (emphasis added):

> [19] Ai Group submits that the Commissioner erred in concluding that Mr Perry was not a 'casual employee' and that accordingly, the decision should be overturned by the Full Bench. It submits that it appears that the Commissioner gave no consideration as to the meaning of 'casual employee' under the relevant award. It submits that regardless of the position under common law, 'casual employee' has a meaning under modern awards that is clear and uncontested. Under modern awards (and pre-modern awards), a casual employee is widely defined as 'one engaged and paid as such', similar to the definition in the award applying to Mr Perry.
>
> …
>
> [26] As we have noted, no question of casual status for the purposes of the Act is concerned. Rather, Mr Perry's employment status was relevant to a consideration of other questions which arose for determination in his unfair dismissal case. In our view, his employment status is to be determined by reference to his contract of employment and the applicable award. Employment status is a function of the common law employment contract provided it is consistent with applicable laws and other instruments. Some awards proceed on the assumption that status is governed by the contract and attach entitlements to employees depending on their common law employment status. Others impose limitations on the scope of casual employment that potentially override the position at common law. The case of Telum concerned the meaning of casual employee for the purposes of the Act but nevertheless applied the relevant award definition.
>
> [27] In this case the award contained a definition of casual employment which we have quoted above. In our view the definition is properly construed as a limitation on the concept of casual employment for employees covered by the award. Even though the definition incorporates the circumstances of engagement as the primary basis for casual status it also excludes full and part-time employees from the definition. Therefore to qualify as a casual employee under the award, it is necessary to find, not only that Mr Perry was engaged and paid as a casual employee, but also that he was not a full time or part-time employee.
>
> [28] Evidence before the Commissioner included the contractual documents to which we have referred. These clearly establish the intended status of casual employment….

[72] [2016] FWCFB 1621.

…

[31] In all of the circumstances we find that Mr Perry was engaged as a casual employee and was not a full-time or part-time employee.[73]

157. As determined by the Full Bench in *Telum Civil v CFMEU*, it would not be appropriate for the Commission to place reliance upon Barker J's judgment in *Williams v MacMahon Mining Services*[74] for the purposes of determining entitlements under the FW Act because the case was concerned with a different statutory context.[75]

158. Further, we submit that the Commission should not rely upon Barker J's judgment for the purposes of determining entitlements under modern awards or the Act for the following additional reasons:

- It appears that the relevant employee in *Williams v MacMahon Mining Services* was not engaged under an award, enterprise agreement or contract of employment which defined "casual employee";
- It appears that the employee in *Williams v MacMahon Mining Services* had working arrangements which were relatively unusual;
- The employee in *Williams v MacMahon Mining Services* was paid a flat hourly rate that, while purporting to include "a loading in lieu of paid leave entitlements", did not separately identify the casual loading or the quantum of it;
- The decision in *Williams v MacMahon Mining Services* was made in 2010 by a single judge of the Federal Court and is not binding on the Commission. Far more weight should be given by the Commission to:
    - The decision of Justice Marshall of the Federal Court in *CPSU v State of Victoria;*[76]

[73] [2016] FWCFB 1621.

[74] [2010] FCA 1321, 30 November 2010.

[75] [2013] FWCFB 2434 at para [59].

[76] (2000) 95 IR 54.

- The decision of the Full Court of the Federal Court in *CPSU v State of Victoria*;[77]
- The 2014 decision of Justice White of the Federal Court in *Fair Work Ombudsman v Devine Marine Group.*[78]
- The 2012 decision of a Full Bench of the Commission in *Telum Civil v CFMEU;*[79]
- The 2016 decision of a Full Bench of the Commission in *Nardy House v Perry*;[80]
- The decision of a Full Bench of the AIRC in *Bluesuits Pty Ltd t/as Toongabbie Hotel v Graham*;[81] and
- The decision of a Full Bench of the AIRC in the *Metal Industry Casual Employment Case*.[82]

159. As stated at the start of this section, "casual employee" has a meaning under modern awards that is clear and uncontested. No variation has been sought to that definition in these proceedings and therefore the Full Bench does not need to and should not address the issue.

[77] [2000] FCA 759.
[78] [2014] FCA 1365 at paras [137] – [146].
[79] [2013] FWCFB 2434.
[80] [2016] FWCFB 1621.
[81] Print S0282, 3 November 1999.
[82] Print T499129, AW789529 and PR901028.

11. A SUMMARY OF THE UNIONS' COMMON CLAIMS

160. The unions' common claims before the Commission relate broadly to the following matters:

- Casual conversion;
- Minimum engagement/payment periods;
- A prohibition on engaging and re-engaging an employee to avoid award obligations;
- A prohibition on increasing the number of casual and part-time employees unless certain conditions are met;
- The requirement to provide certain information to casual employees upon engagement; and
- The exclusion of casual employees from a requirement for a minimum 10 hour break after overtime.

161. Whilst we deal with the variations sought in greater detail throughout our submission, we here summarise each of the claims and categorise them in accordance with their subject matter and proponent.

	A Summary of the Claim	The Relevant Award(s)
1	**ACTU casual conversion claim – 'election' clause**	
	A new provision that would give a casual employee, other than an irregular casual employee, an absolute right to convert to permanent employment.	102 awards[83]
2	**ACTU casual conversion claim – 'deeming' clause**	
	A new provision that would deem a casual employee, other than an irregular casual employee, to have converted to permanent employment.	• *Timber Industry Award 2010* (**Timber Award**) • *Higher Education Industry – General Staff – Award 2010*[84] (**Higher Education General Staff Award**)
3	**ACTU and AMWU casual conversion claim – 'deeming' clause**	
	A new provision that would deem a casual employee, other than an irregular casual employee, to have converted to permanent employment.	• Manufacturing Award • *Graphic Arts, Printing and Publishing Award 2010* (**Graphic Arts Award**) • *Food, Beverage and Tobacco Manufacturing Award 2010* (**FBT Award**)
4	**ACTU and AMWU – Vehicle Division casual conversion claim – 'deeming' clause**	
	A new provision that would deem a casual employee, other than an irregular casual employee, to have converted to permanent employment.	*Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**Vehicle Award**)
5	**ACTU minimum engagement periods claim**	
	The introduction of a minimum engagement period of 4 hours or an increase in a pre-existing minimum engagement period to 4 hours for casual and part-time employees.	• Part-time employees: 70 awards • Casual employees: 66 awards

[83] See Attachment B to the ACTU's submissions dated 19 October 2015.

[84] ACTU submissions dated 20 June 2016 at page 37.

	A Summary of the Claim	The Relevant Award(s)
6	**AMWU minimum engagement claim**	
	• An increase to the minimum engagement period applying to part-time employees to 4 hours. • Limiting the extent to which an employer and employee can agree to reduce the minimum engagement period (i.e. to 3 hours). • Limiting the extent to which an employer and casual employee can agree to reduce the minimum engagement period (i.e. to 3 hours).	• Manufacturing Award[85] • FBT Award[86]
7	**AMWU – Vehicle Division minimum engagement claim**	
	• The introduction of a 4 hour minimum engagement period for part-time employees, with a facilitative provision to agree to 3 hours. • The introduction of a 4 hour minimum engagement period for casual employees.	Vehicle Award[87]
8	**ACTU, AMWU and AMWU – Vehicle Division's claims to insert a prohibition on engaging and re-engaging an employee to avoid an award obligation**	
	The introduction of a provision that prohibits the engagement and re-engagement of an employee for the purposes of avoiding an award obligation.	109 awards[88]
9	**ACTU, AMWU and AMWU – Vehicle Division's claims to insert a prohibition on increasing the number of casual or part-time employees**	
	The introduction of a provision that prohibits an employer from employing additional casual or part-time employees until pre-existing employees are provided with an opportunity to increase their normal working hours.	109 awards[89]

[85] The Manufacturing Award also forms part of the ACTU's claim. See Attachment B to the ACTU's submissions dated 19 October 2015.

[86] The FBT Award also forms part of the ACTU's claim. See Attachment B to the ACTU's submissions dated 19 October 2015.

[87] The Vehicle Award also forms part of the ACTU's claim. See Attachment B to the ACTU's submissions dated 19 October 2015.

[88] See Attachment B to the ACTU's submissions dated 19 October 2015.

[89] See Attachment B to the ACTU's submissions dated 19 October 2015.

	A Summary of the Claim	The Relevant Award(s)
10	**ACTU, AMWU and AMWU – Vehicle Division's claims to introduce a requirement to provide certain information to casual employees upon engagement**	
	The introduction of a provision that requires that upon engagement, a casual employee must be informed in writing that they are employed as a casual, by whom they are employed, their classification level, rate of pay and the likely number of hours required per week.	109 awards[90]
11	**AMWU claim to remove the casual exclusion from provisions requiring a minimum break after overtime**	
	The deletion of the exclusion of casuals from provisions requiring a 10 hour rest break following overtime and the commencement of the employee's next shift.	• Manufacturing Award • FBT Award • *Sugar Industry Award 2010* (**Sugar Award**) • *Oil Refining and Manufacturing Award 2010* (**Oil Refining and Manufacturing Award**)

[90] See Attachment B to the ACTU's submissions dated 19 October 2015.

12. THE CASE MOUNTED BY THE UNIONS

162. The ACTU and its affiliates seek to address what they deem "the phenomenon of *permanent casuals*". This term is used to refer to casual employees who are engaged for a period exceeding six months to work on a basis that is, in general terms, regular, systematic or frequent.

163. The case mounted by the ACTU and its affiliates seeks to portray the engagement of casual labour in a careful and deliberate way. The submissions filed and the evidence called is intended to lead its audience to believe that the Australian casual workforce suffers systematic disadvantages irrespective of the industry in which they are engaged, the work that they perform, the hours that they work, their earnings or their personal circumstances. This is a somewhat difficult proposition to accept in circumstances where the ACTU seeks to rely on the evidence of a gentleman who is paid an annual salary of approximately $120,000 and has recently been converted from casual to permanent employment by a contracting company that performs maintenance work in the mining industry despite not having a *right* to seek such conversion, but is nonetheless "unhappy" because his *preference* is to be so employed by the corporation that operates the mine at which he works.[91]

164. Nonetheless, it is the unions' case that casual employment is detrimental in various respects. In their view, this is so by virtue of the very nature of casual employment as well as the practices of those employers that engage casual employees.

165. The material put before the Commission by the unions is designed to demonstrate that employers choose to employ casual employees because it provides an alternative that is convenient. There appears to also be some suggestion from the unions that this convenience is exploited; that employers are deliberately electing to retain casual employees, often over an extended

[91] Transcript of proceedings on 21 March 2016 at PN6780 – PN6784.

period of time, to reap various benefits in circumstances where they could reasonably be engaged on a permanent basis. We reject these propositions.

166. Perhaps ironically, and presumably inadvertently, the evidence called by the unions in fact serves to establish that there are operational imperatives that necessitate access to a pool of casual labour. The ACTU and AMWU's own witnesses provide the Commission with useful examples of circumstances facing a business that can only be accommodated by the use of casual employees.

167. These situations are not confined such that casual labour can periodically, at the mere whim of the employee, be replaced with a permanently engaged employee. The employment of a casual employee for a period exceeding six months does not in and of itself reflect an ability to thereafter provide them with continuing work.

168. Indeed this is the fundamental flaw that arises from the unions' casual conversion claim; an apparent disregard for the consequences that, as the evidence will establish, are likely to flow for its own constituents in circumstances where an employer is compelled to convert its casual employees to permanent employment in the absence of adequate work that is required to be performed by those employees.

169. The suggestion that employers share an inherent and unjustifiable preference for the employment of casual employees is further undermined by the evidence provided by certain businesses that they recognise and value the benefits that accrue from the engagement of permanent employees.[92] It is uncontroversial that the employment of employees on a part-time or full-time basis provides employers with specific advantages. We do not seek to argue otherwise. Rather, the gravamen of our case is simply that permanent labour cannot replace the flexibility that is afforded by casual employment, which is essential for various reasons that will later become apparent. Further, the use

[92] For example witness statement of Krista Limbrey, dated 24 February 2016 at paragraphs 17 – 18 and transcript of proceedings on 21 March 2016 at PN7253. See also witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 52.

of casual labour is not simply reflective of a cultural bias towards the engagement of employees on this basis. Indeed as the ACTU's expert witness, Professor Raymond Markey, ultimately conceded, the rational decision-making of employers to utilise casual labour is influenced by *regulatory* factors including the rigidity that presently prevails in modern award provisions regulating the engagement of full-time and part-time employees.[93]

170. We proceed to first deal with the evidence called by the ACTU and its affiliates in support of its claims. In support of their casual conversion claims, it is incumbent upon them to establish, firstly, that this group of "permanent casuals" to which they persistently refer are in fact a reality. The unions must then establish that the provision that they have proposed is necessary to achieve the modern awards objective, having regard to that specific group of employees. In respect of their claims to introduce four hour minimum engagement/payment periods, the unions' task is to prove that, in the case of each relevant modern award, the imposition of a four hour minimum engagement/payment is necessary, having regard to the circumstances (including the demographic profile) of employees engaged in that industry.

171. The evidence that the unions have instead sought to bring is a distraction. The Commission's task here is *not* to make a broad discretionary value judgement about the benefits or disadvantages of casual employment as a general proposition. The unions' evidence deviates from what ought to have been a case of far narrower compass.

172. The purpose underlying our comprehensive treatment of the evidence called by the ACTU and its affiliates is to assist the Commission in assessing the relevance and reliability of the material before it; and to provide a filter for that which can appropriately be disregarded. Our analysis will ultimately enable the Commission to conclude that the very vast majority of the evidence called by the unions is either irrelevant to these proceedings or entirely unreliable, and that the evidence that remains does not establish the factual propositions upon which the unions seek to rely.

[93] Transcript of proceedings on 23 March 2016 at PN9058 – PN9075.

173. Additionally, in our submission, large swathes of the evidence should be attributed little if any weight. Various objections to the witness statements tendered were raised by Ai Group[94] pursuant to a direction of the Full Bench issued on 29 February 2016. The objections were raised on the following bases:

- That the evidence is hearsay; that is, it is evidence of a previous representation made by a person to prove the existence of a fact that it can reasonably be supposed that that person intended to assert by the representation;
- That the evidence is in the nature of an opinion that is expressed without there being a proper basis for that opinion;
- That the evidence is speculative in nature;
- That the evidence cannot be tested due to the anonymity of the persons referred to in the evidence and its admission is therefore inherently unfair; and
- That the "evidence" is in fact a submission and does not communicate a matter of fact.

174. These objections were generally noted by the Full Bench and it was observed that submissions may be made at the appropriate time regarding the weight that should be attributed to that evidence. Accordingly, in the submissions that follow we seek to address the weight (if any) that should be attributed to numerous parts of the evidence.

175. We acknowledge, firstly, that by virtue of s.591 of the Act the Commission is not bound by the rules of evidence. Despite this, the Commission and its predecessors have noted that the rules of admissibility of evidence are relevant to proceedings before it.

[94] See submission filed by Ai Group on 10 March 2016.

176. In a passage often cited in subsequent decisions, a Full Bench (Ross VP, Duncan SDP and Bacon C) of the AIRC made the following comments: (emphasis added)

> [48] While the Commission is not bound by the rules of evidence that does not mean that those rules are irrelevant. As the then President of the Industrial Relations Commission of Western Australia said in respect of a similar provisions in the then *Industrial Relations Act 1979* (WA):
>
> > "However, this is not a licence to ignore the rules. The rules of evidence provide a method of enquiry formulated to elicit truth and to prevent error. They cannot be set aside in favour of a course of inquiry which necessarily advantages one party and necessarily disadvantages the opposing party (R. v War Pensions Entitlement Appeal Tribunal: ex parte Bott [1933] 50 CLR 228 Evatt J. at 256 (dissenting)). The common law requirement that the Commission must not in its reception of evidence deny natural justice to any of the parties acts as a powerful control over a tribunal which is not bound by the rules of evidence."
>
> [49] A similar observation was made by the Industrial Commission of New South Wales in *PDS Rural Products Ltd v Corthorn*:
>
> > "First, it is correct to say, as the commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence (s 83). It should be borne in mind that those rules are founded in experience, logic, and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence. Common sense, as well as the rules of evidence, dictates that only evidence relevant to an issue which requires determination in order to decide the case should be received. This means that issues must be correctly identified and defined. This did not happen in this case."
>
> [50] We agree with the above observations. In our view the rules of evidence provide general guidance as to the manner in which the Commission chooses to inform itself.[95]

177. This decision was adopted by a Full Bench of Fair Work Australia (as it then was) in the following terms: (emphasis added)

> [28] The tribunal is not bound by the rules of evidence and therefore has a discretion to admit as evidence material that would not be admissible under the rules of evidence. However, this does not mean that the rules of evidence are irrelevant to the exercise of that discretion in response to an objection to the reception of particular evidence. On the contrary, as was pointed out by the Full Bench in *Hail Creek Pty Ltd v Construction, Forestry, Mining and Energy Union* the rules of evidence "provide general guidance as to the manner in which the Commission

[95] *Hail Creek Coal Pty Ltd v CFMEU* (PR948938).

chooses to inform itself". The rules of evidence are not arbitrary and were developed by reference to notions of what is fair and appropriate and, as such, they often provide a good starting point for a consideration of whether an objection to the reception of particular evidence by the tribunal should be upheld or rejected.[96]

178. More recently, Commissioner Wilson considered the proper approach to be taken in admitting evidence in the context of an application for an unfair dismissal remedy:

> [13] While the Fair Work Commission is not bound by the rules of evidence and procedure, that is not to say the Commission should not have regard to such rules in making its decisions, and for good reason. In this regard, Commissioner Thatcher observed the following;
>
> > Section 591 of the Act provides that FWA is not bound by the rules of evidence in relation to a matter before it. However that does not mean that the rules of evidence are irrelevant. In its decision in Re: Michael King the Full Bench agreed with the following observation of the Industrial Commission of New South Wales in Court Session in *PDS Rural Products Ltd v Corthorn*, which relevantly included:
> >
> > > "... it is correct to say, as the Commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence (s 83). It should be borne in mind that those rules are founded in experience, logic, and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence. ...." [97]

179. Section 590 grants the Commission power to inform itself "in such manner as it considers appropriate". This power is tempered by an obligation on the Commission to exercise its powers in a manner that is fair and just[98]. In performing its functions, the Commission must also take into account "equity, good conscience and the merits of the matter"[99].

180. These matters were deemed relevant by earlier authorities when considering s.110(2)(b) of the WR Act, which relieved the AIRC of the need to apply the rules of evidence. Despite this, the AIRC stated: (emphasis added)

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[96] See for example *The AMIEU v Dardanup Butchering Company Pty Ltd* [2011] FWCFB 3847 at [28].

[97] *Carol Haslam v Fazche Pty Ltd T/A Integrity New Homes* [2013] FWC 5593.

[98] See s.577(a).

[99] See s.578(b).

[27] But s.110(2)(a) does not mean that the rules of evidence are irrelevant. It is clear that members of the Commission are bound to act in a judicial manner and that the principles of natural justice are applicable to hearings before the Commission.

[28] The term *natural justice* in the context of administrative decision making has essentially been equated to an obligation to act fairly. As Kitto J said in *Mobil Oil Australia Pty Ltd v FCT*:

> *"What the law requires in the discharge of a quasi-judicial function is judicial fairness. This is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances."*

[29] In addition to the general obligation to act fairly there is also the statutory injunction in s.110(2)(c) that the Commission act according to *"equity, good conscience and the substantial merits of the case."* In view of these obligations it is appropriate, I think, to have regard to the rules of evidence as a guide to the exercise of the Commission's discretion to accept and exclude evidence."[100]

181. Ai Group submits that careful consideration should be given to the weight attributed to evidence that might otherwise be deemed inadmissible by a strict application of the rules of evidence. In a recent decision of the Commission regarding the Review of the *Textile, Clothing, Footwear and Associated Industries Award 2010*, the Full Bench decided to admit evidence that was objected to by the employer interests, however it noted that:

> To the extent that the evidence involves matters which those opposing the variations did not have an opportunity to challenge, was hearsay evidence and reflects opinion without the identification of specific circumstances, probative value of the evidence is limited. Such evidence falls short in any case of establishing evidence of circumstances applying generally in the TCF industry.[101]

182. We respectfully commend the conclusion there reached to the Full Bench. The rules of fairness and natural justice dictate that evidence that is irrelevant, speculative, based purely on the opinion of a witness or where the evidence cannot properly be tested, should be attributed little if any weight. It does not carry any probative value and therefore, is not "properly directed to demonstrating the facts supporting the proposed variation".[102]

[100] Re *CFMEU* (PR941737). See also *King v Freshmore (Vic) Pty Ltd* (Print S4213) at [60] – [63].

[101] *4 yearly review of modern awards* [2015] FWCFB 2831 at [36].

[102] 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [23].

13. THE ACTU'S EXPERT WITNESS EVIDENCE

183. The ACTU has tendered four reports in these proceedings that were authored by Professor Raymond Markey, Dr Martin O'Brien and Dr Joseph McIvor:

- Report on Casual and Part-time Employment in Australia (**Expert Report**);[103]
- Supplementary Report: Casual and Part-time Employment in Australia (**Supplementary Expert Report**);[104]
- Second Supplementary Report: Casual and Part-time Employment in Australia (**Second Supplementary Expert Report**);[105]
- Third Supplementary Report on Casual Employment: Response to Employer Submissions (**Third Supplementary Expert Report**).[106]

184. We here propose to deal with certain elements of the aforementioned reports that are relevant to the ACTU and AMWU's various claims. The authors' evidence in respect of the ACTU survey is dealt with subsequently, in the relevant chapter of this submission.

Flexibility for Casual Employees

185. The authors of the Expert Report contend that casual employment does not in fact provide employees with flexibility as their hours of work, over which they have little influence, are largely dictated by their employer.[107]

186. The obvious argument that counters the issue raised is that casual employees cannot be compelled to work. That is, they are at liberty to refuse work when it is offered by their employer. This gives casual employees a considerable degree of influence over their hours of work.

[103] Exhibit 110.

[104] Exhibit 110.

[105] Exhibit 111.

[106] Exhibit 111.

[107] The Expert Report at pages 20 – 22.

187. Further, the evidence of Ai Group's witnesses demonstrates that the approach adopted by employers to rostering casual employees' hours is designed to accommodate their availability. For instance, Ms Krista Limbrey provides a detailed explanation of the rostering arrangements of McDonald's Australia Limited (**McDonald's**). Casual employees provide their employer with their "availabilities", which can be altered at any time. Rosters are implemented consistent with the employees' availability, which is often dictated by study commitments.[108] Similarly, Ms Neill observes that many of CHG employees have family caring responsibilities.[109] Casual employees are generally able to "roster themselves off" [110], providing them with an important flexibility during, for example, school holidays.

188. The authors of the Expert Report rely on that part of the ACTU survey that asked respondents why they were engaged on a casual basis. One of the responses that could be selected was that casual employment was the only option offered to them.[111]

189. It is difficult to align this response with the reality of employers recruiting for a particular position in their business on a permanent basis or a casual basis. That is, an employer will generally assess whether it requires additional casual labour or permanent labour, and seek expressions of interest in that role on that basis. This may well be construed by a survey respondent as not having been provided a choice between casual employment and permanent employment by that employer, as the position that they sought to attain was offered as a casual one.

190. We of course observe that it is open to an employee in such circumstances to seek an alternate permanent role elsewhere in the labour market and that ultimately, in such circumstances, the choice is one to be made by the employee.

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[108] Witness statement of Krista Limbrey, dated 12 October 2015 at paragraphs 49 – 63.

[109] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 28.

[110] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 29.

[111] The Second Supplementary Report at page 15.

191. Later in this submission, we give detailed consideration to the eligibility of casual employees to convert to permanent employment pursuant to the provisions proposed. As the Commission is of course aware, the proposed clauses exclude "irregular casual employees"; that is, those who are engaged to work on an irregular, non-systematic or occasional basis. It would appear to us that any arguments put by the authors of the Expert Report regarding the unpredictability of casual employees' working hours are of lesser relevance to the group of casual employees who would be eligible to elect to convert.

192. It should also be noted that the authors do not attempt to grapple with the reasons why employees might face such unpredictability. That is, consideration does not appear to have been given to the extent to which the operational requirements of a business necessitate this flexibility which may, in some cases, result in changes to an employee's hours of work. Equally, the authors have not argued that any unpredictability arises by virtue of an employer's wrongdoing.

The Proposition that Casual Employment is a "Trap"

193. One of the central tenets of the multiple reports prepared by Markey et al is that casual employment is a "trap" and that many casual employees are precluded from converting to permanent employment or better employment opportunities.[112]

194. Putting to one side the question of whether this conclusion is in fact made out in the studies and reports to which the authors refer, we note that this proposition is undermined by the evidence heard by the Commission from many witnesses called by the ACTU and AMWU in these proceedings. Whilst we deal with that evidence in greater detail below, for present purposes we point to the following as examples:

    - Scott Quinn was employed as a casual employee but was later converted to permanent employment by his employer in response to a

[112] Supplementary Expert Report at page 37.

request that he made, noting that he was not bestowed any right to request such conversion pursuant to an industrial instrument applying to him.

- Liamsene Potoi, Stanley Morgan and Matthew Francis give evidence of similar effect.

- James Fornah was a casual employee of Provedore who was converted to permanent employment pursuant to his right to request such conversion in the relevant modern award;

- Aaron Malone is a union official who testified that many such casual employees employed by Provedore were so converted;

- Heidi Kaushal, an AMWU union official, was once employed by a labour hire company and was subsequently directly employed by the host employer for whom she was performing work on a permanent basis; and

- Stephen Murphy gives evidence that certain labour hire employees performing work for B&D Doors were converted to permanent employment with the company upon their informal request.

195. The evidence before the Commission in these proceedings, when considered collectively, does not support the contention that casual employment is a "trap" as suggested by Professor Markey and his colleagues. Rather, the evidence, including that called by the employer parties, suggests that where the engagement of employees on a permanent basis can be accommodated by an employer, it will endeavour to do so. Indeed some employer witnesses, as will later become evident, express a preference for employing permanent employees to the extent that they are able to satisfy operational requirements.

196. The notion that casual employees are engaged perpetually on this basis is not made out on the evidence. To the extent that the unions seek to assert that such employment practices are implemented at large for reasons other than

genuine operational requirements, that proposition has not been established on the evidence either.

The Desire of Casual Employees to be Engaged as Permanent Employees

197. Various aspects of the expert reports deal with the desire of casual employees to be engaged on a permanent basis. For example, at page 37 of the Expert Report, the authors assert that the ACTU survey that was administered for the purposes of these proceedings "showed that around a third (33 per cent) of respondents responded positively to a sub-question asking about the opportunity to convert to permanent employment, while this was true of around 40 per cent of the labour hire sample".

198. The survey question to which the authors refer was in the following terms:

> To what extent do you agree that casual/labour hire workers such as yourself should be able to convert to permanent status, if that is their preference?[113]

199. Apart from the observations we later make regarding the self-serving nature of this question, the responses to this part of the survey do not go to the desire of casual employees to convert to permanent employment. Rather, it deals only with the views of casual employees as to whether, in general terms, they and other casual employees should have a right to seek conversion, if they so choose.

200. The authors of the Second Supplementary Report rely on that part of the ACTU survey that asked respondents why they were engaged on a casual basis. One of the options provided to respondents was that casual employment was the only option offered to them.[114] We refer to the submissions we have earlier made regarding this aspect of the survey.

201. As will later be demonstrated, the ACTU's expert evidence is, to some degree, at odds with the evidence of the ACTU's lay witnesses who, whilst expressing their grievances with casual employment, have not endeavoured to seek an

[113] The Expert Report at page 51.

[114] The Second Supplementary Report at page 15.

alternate form of employment. Indeed in many cases, it is not clear on the face of the evidence that, if those employees were given the option of converting, they would in fact choose to do so.

202. The Second Supplementary Report also refers to responses to the ACTU's survey to demonstrate that a proportion of casual employees have sought to convert to permanent employment. As we will later address in greater detail, these questions in the survey were not limited to employees who presently have a right to convert to permanent employment pursuant to an industrial instrument. Accordingly, this evidence should not be construed as providing the Commission with an indication as to the utilisation or efficacy of current casual conversion provisions.

Industry Characteristics of 'Long-Term' Casual Employment

203. In the Supplementary Expert Report, the authors rely on HILDA data to make certain observations regarding the incidence of 'long-term' casual employees; that is, casual employees who have been employed by their current employer for 6 months or longer.

204. The authors state that Figure 4.1 "shows that substantial majorities of casuals in all industries have worked for their current employer for 6 months or longer".[115] It is trite to observe that the data there reproduced says nothing of the hours worked by such employees. That is, it is possible that a significant proportion of those employees have been employed by their employer for a period exceeding 6 months but on an irregular or intermittent basis. Accordingly, this data cannot be relied upon in support of the proposition that there are a significant number of casual employees who would be eligible to convert under the casual conversion clauses proposed by the unions.

205. Further, the data provides no indication of the reasons why these casual employees are so engaged. That is, it does not have regard for the

[115] The Supplementary Expert Report at page 38.

uncontroversial fact that some casual employees choose to be engaged on a casual basis and do not seek to alter this.

206. Similar observations can be made regarding pages 54 – 56 of the Supplementary Expert Report.

Training

207. The Supplementary Expert Report states that, with reference to AWRS data, casual employees receive less training than permanent employees.[116]

208. At best, this evidence establishes that there might be some correlation between the basis upon which an employee is engaged and the extent to which they receive training. It does not, however, establish the existence of a causal link between the engagement of an employee on a casual basis and the level of training received. That is, the authors do not confirm that the level of training received by casual employees *is by virtue of* their status as a casual employee. Consideration has not been given to whether, in fact, the level of training provided is attributable to factors such as the possibility that the very nature of the work that casual employees are engaged to perform often necessitates less training.

209. The nature of the training referred to in the Supplementary Expert Report is also unclear. For instance, do the authors' observations relate specifically to training provided to an employee to perform the functions of their role? Does it relate to workplace health and safety issues? Or does the reference relate to training provided to an employee during the course of their employment for the purposes of promoting upskilling?

210. A global comparison of the proportion of casual employees and permanent employees that receive training from their employer is not particularly useful for the purposes of these proceedings. It falls well short of a proper investigation into whether there is an association between casual employment

[116] The Supplementary Expert Report at page 59.

and the level of specific training provided to such employees and if so, the underlying reasons for this.

Superannuation

211. The Supplementary Expert Report confirms that there is limited research regarding the impact of casual employment on superannuation earnings. The authors only cite one study that was published some ten years ago regarding the proportion of casual employees that are "not covered by superannuation".[117]

212. The authors also acknowledge that there are no "definitive measures" as to whether the "low incomes of casual employees" contribute to their eligibility to superannuation entitlements.[118]

213. Clearly, there is no compelling evidence before the Commission regarding the impact that casual employment has on access to superannuation payments. As the Commission would be aware, in general terms, an employer is required to make superannuation payments to an employee who is paid $450 or more (gross) in a calendar month. To contextualise this, a casual employee classified at level 1 under the *Fast Food Industry Award 2010* (**Fast Food Award**) will earn in excess of the requisite minimum monthly amount if they work an average of just 4.6 ordinary hours each week in a particular calendar month.

214. To the extent that it is argued that a greater proportion of casual employees (as compared to permanent employees) earn less than the aforementioned monthly amount, we note that this category of casual employees will unlikely include the "permanent casuals" to whom the ACTU and AMWU refer. Rather, it may include those that work fewer hours on an intermittent basis.

[117] The Supplementary Export Report at page 36.

[118] The Supplementary Expert Report at page 36.

Employee Stress

215. The Expert Report states that casual employment has been linked with a range of negative impacts on mental wellbeing.[119]

216. We later come to a study conducted by Professor Sue Richardson et al regarding the impacts of casual employment on mental health. The authors there concluded that there is "almost no evidence that casual or fixed-term contract employment is harmful to the mental health of women or men. Indeed, the analysis suggests that women have higher mental health if employed full time on a casual contract".[120] This study was put to Dr Underhill, an expert witness called by the AMWU, who did not identify any sound basis upon which to refute that conclusion.

217. To the extent that the Expert Report also deals briefly with other health and safety outcomes for casual employees[121], we canvass these issues in greater detail when we deal with the evidence of Dr Underhill and Ms Vallance.

Access to Finance

218. In their Supplementary Expert Report, the authors state that "the precariousness associated with casual employment makes banks more reluctant to extend credit and loans to casual workers".[122]

219. It is not clear that, to the extent that casual employees in fact experience difficulty in obtaining finance, this is *because* they are employed on a casual basis. Indeed the reason may well be due to their earnings.

220. We will later come to the evidence of Colin Aiton, who was called by the ACTU. It became apparent during cross examination that any alleged difficulty encountered by Mr Aiton in obtaining a loan from a financial institution was based on his income level (despite working 38 hours each week) which would

[119] The Expert Report at page 31.

[120] Richardson et al (2012) *Are Casual and Contract Terms of Employment hazardous for Mental Health in Australia?*, Journal of Industrial Relations 54(5): 574 – 575.

[121] The Expert Report at page 31.

[122] The Supplementary Expert Report at page 37.

only be exacerbated if he were converted to full-time employment, given that he would lose his entitlement to a 25% casual loading.[123]

'Short Shifts', Underemployment and Employment Costs

221. The expert reports variously deal with the requirement to work 'short shifts', data relating to the underemployment and fixed costs incurred by employees when they attend work. Each of these issues are relevant to the unions' claims to introduce four hour minimum engagements/payments for casual and part-time employees in a significant number of modern awards. We address these aspects of the expert reports when we later consider the unions' arguments in support of this claim.

[123] Transcript of proceedings on 15 March 2016 at PN2369 and PN2411 – PN2413.

14. THE ACTU'S LAY WITNESS EVIDENCE

222. We here consider the evidence of each of the ACTU's lay witnesses and subsequently seek to summarise their evidence with reference to the ACTU's claim to insert new casual conversion provisions and to introduce four hour minimum engagement/payment periods.

Linda Rackstraw

223. Linda Rackstraw is 57 years old.[124] She was engaged as a casual Crew Member at a McDonald's franchise in Bendigo for a period of 2 years and nine months.[125]

224. A large portion of Ms Rackstraw's statement goes to her hours of work. During cross examination, she accepted that the 'employee history' there provided to her[126] reflects the actual hours she worked during the relevant period.[127] As she was taken through that document, it became abundantly clear that the evidence in her statement is entirely inconsistent with the record of the actual hours she worked.[128]

225. This is a matter that goes squarely to the witness's credibility and should not be overlooked. The Commission cannot place any reliance on Ms Rackstraw's evidence in circumstances where it is quite apparent that substantial parts of her statement were factually inaccurate.

226. In any event, an examination of Ms Rackstraw's employment history suggests that she was an "irregular casual employee" as defined in the ACTU's proposed clause. That is, she was engaged on a non-systematic or irregular basis. The total hours worked by Ms Rackstraw each week varied considerably during the period of 6 April 2014 – 25 July 2015. There does not appear to be any pattern or regularity to her hours of work over the course of

[124] Statement of Linda Rackstraw, dated 8 October 2015 at paragraph 1.

[125] Statement of Linda Rackstraw, dated 8 October 2015 at paragraph 6.

[126] Exhibit 10.

[127] Transcript of proceedings on 15 March 2016 at PN1430.

[128] Transcript of proceedings on 15 March 2016 at PN1408 – PN1462.

this 16 month period. Accordingly, her evidence is not of any relevance to the extent that the ACTU seeks to rely upon it in support of its claim for the insertion of a casual conversion provision in the Fast Food Award.

227. Ms Rackstraw agreed that the variance in her hours was "based on the needs of the store".[129] She helpfully provided examples of instances in which she was required to perform work in addition to that which she had been rostered to perform; those being where another employee was absent from work due to illness[130] or simply did not "turn up" in accordance with the roster.[131]

228. Ms Rackstraw expresses a preference for working "fewer longer shifts than more and shorter shifts" and refers to the cost of petrol that is incurred from travelling to work.[132] Under cross examination however, she confirmed that from her residence to the McDonald's restaurant at Strath Village, the time spent driving was approximately 10 minutes.[133] Furthermore, she spent $10 each week in purchasing petrol, however this cost could not be attributed in its entirety to travel associated with attending work.[134]

Scott Quinn

229. Scott Quinn is a part-time disability support worker, employed by Community Based Support (**CBS**).[135] In his witness statement, he indicates that his employment by CBS, since commencement, has been on a part-time basis.[136]

230. During proceedings before the Full Bench, Mr Quinn stated that in fact his initial engagement by CBS was on a casual basis and that he was later converted to permanent employment pursuant to a request he made to his

[129] Transcript of proceedings on 15 March 2016 at PN1456.
[130] Transcript of proceedings on 15 March 2016 at PN1431.
[131] Transcript of proceedings on 15 March 2016 at PN1456.
[132] Statement of Linda Rackstraw, dated 8 October 2015 at paragraph 24.
[133] Transcript of proceedings on 15 March 2016 at PN1466.
[134] Transcript of proceedings on 15 March 2016 at PN1467 – PN1468.
[135] Statement of Scott Quinn, dated 16 December 2015 at paragraphs 1 and 11.
[136] Statement of Scott Quinn, dated 16 December 2015 at paragraph 11.

employer.[137] We proceed on the basis that in light of paragraph 11 of his statement, the evidence there contained is relevant to his employment as a part-time employee.

231. The *Community Based Support Enterprise Agreement 2014*[138] applies to Mr Quinn[139], to the exclusion of any modern award[140]. Clause 18 of that agreement deals specifically with changes to an employee's roster at short notice:

> 18. SHORT NOTICE CANCELLATION
>
> (a) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their minimum rostered hours on that day.
>
> (b) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. …

232. Mr Quinn's grievances regarding changes made by his employer to his roster can be disposed of once regard is had to the above provision, which expressly contemplates the ability to make changes to an employee's roster at short notice. In any event, we note that such evidence is not of immediate relevance to the ACTU's claims, which do not concern the circumstances in which an employer is able to vary a roster.

233. The aforementioned enterprise agreement does not contain a minimum engagement period for full-time or part-time employees.[141] It is Mr Quinn's evidence that he is rostered to work shifts that vary in length from 30 minutes in duration to 4 hours in length.[142]

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[137] Transcript of proceedings on 15 March 2016 at PN1618 – PN1628.

[138] Exhibit 12.

[139] Statement of Scott Quinn, dated 16 December 2015 at paragraph 14.

[140] Clause 4(c) of exhibit 12.

[141] Statement of Scott Quinn, dated 16 December 2015 at paragraph 39.

[142] Statement of Scott Quinn, dated 16 December 2015 at paragraph 20.

234. Mr Quinn explains that the work he performs is driven by the needs of CBS' clients. This is relevant to both *when* he is required to perform work and the *duration* of his shifts:

> Am I right in saying that it's the client who is determining the length of the appointment?---The length of the engagement is determined by the level of support the client may need.
>
> When you say "level of support", you are talking about the activity that you are performing for the client?---Yes, yes. So therefore a client may require a shower. So you might have a 60-minute shift to give them a shower. Another client may need TED stockings put on or taken off and cleans ones put on. You might only need a 30-minute shift to do that.
>
> …
>
> You say it's "client-dependent", what do you mean by "it's client-dependent"?---Client dependent - if you've got one client that requires a shower, he may require that shower between 8.00 and 9.00 in the morning, because he may need to go somewhere by half past 9. If you've got another client that might just need shopping, so you can put their time band between 8.00 in the morning and 12.00 at lunchtime.[143]

235. The witness speaks of the cost of petrol that he incurs as a result of a sequence of "short shifts" that he is required to perform on a given day for multiple clients. This involves travelling between their places of residence, and travelling to his own place of residence.[144] Under the aforementioned enterprise agreement, however, Mr Quinn is entitled to a "split shifts" payment which compensates him for the majority of the costs he incurs.[145]

236. Ultimately, Mr Quinn concedes that despite his "frustrations" relating to the frequent changes made to his hours of work, he has not been motivated to leave the employ of CBS. Indeed he commends his "bosses" and enjoys the work that he performs.[146]

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[143] Transcript of proceedings on 15 March 2016 at PN1680 – PN1681 and PN1704.

[144] Statement of Scott Quinn, dated 16 December 2015 at paragraphs 27 – 30.

[145] Statement of Scott Quinn, dated 16 December 2015 at paragraph 51.

[146] Transcript of proceedings on 15 March 2016 at PN1733.

Jan Paulsen

237. Jan Paulsen, at the time of preparing her statement, was employed as a part-time registered nurse at the Sunshine Coast Day Surgery.[147] Whilst the modern award covering her employment is not identified in the material before the Commission, we proceed on the basis that it is the *Nurses Award 2010* (**Nurses Award**).

238. It is curious that the ACTU chose to call a witness in support of a claim that is predicated on encouraging conversion to permanent work, who in fact laments the consequences of her engagement on a permanent part-time basis, so much so that she has since resigned from that role and is now engaged on a *casual* basis by the Sunshine Coast University Private Hospital.[148] The reason for this decision is because the latter provides her with "greater flexibility", "more hours" and consequently "enough money".[149] She later explained that she provides care to her partner's daughter who suffers from respiratory complications.[150]

239. Whilst in the employ of the Sunshine Coast Day Surgery, Ms Paulsen had observed that casual employees may be directed to terminate their shift on a particular day at a time earlier than that which was rostered.[151] She explained that this occurred "if operating lists [were] shorter than expected or work [was] completed quicker than expected".[152] The flexibility afforded to the business by casual employees in such circumstances is readily apparent from this evidence. Ms Paulsen agreed that "the employer [believed] that they didn't have enough work for [the casual employees]".[153]

240. Unsurprisingly, the ACTU does not seek to rely upon any aspect of Ms Paulsen's evidence in its submissions of 20 June 2016.

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[147] Statement of Jan Maria Paulsen, dated 13 October 2015 at paragraphs 1 and 5.

[148] Transcript of proceedings on 17 March 2016 at PN3747 – PN3752.

[149] Transcript of proceedings on 17 March 2016 at PN3755 and PN3782 – PN3783.

[150] Transcript of proceedings on 17 March 2016 at PN3774.

[151] Statement of Jan Maria Paulsen, dated 13 October 2015 at paragraph 10,

[152] Statement of Jan Maria Paulsen, dated 13 October 2015 at paragraph 10,

[153] Transcript of proceedings on 17 March 2016 at PN3794.

Vicky Stewart

241. The statement of Vicky Stewart is highly prejudicial. Large segments of her statement refer to unidentified employees and employers. Evidence of this nature cannot be tested and therefore the attribution of any weight to such material is entirely inappropriate.

242. The Commission will recall that paragraph 3 of Ms Stewart's statement was admitted on a limited basis.[154] Vice President Hatcher also observed that it was open to the ACTU to advance Ms Stewart's statement with the relevant details and an accompanying application for appropriate confidentiality orders. It did not, however, do so.[155] This decision of the ACTU should not serve to undermine the interests of respondent parties that remain unable to test the evidence before the Commission.

243. Further, the witness was given an opportunity to provide the relevant details during cross examination, however elected not to do so. In the absence of any admissible evidence before the Commission that might allow it to conclude that there is a proper basis for the relevant employees to whom Ms Stewart refers electing not to disclose their names, the evidence should not be given any weight.[156]

244. At its highest, all that might be deduced from Ms Stewart's evidence is the following:

- The QNU is involved in the negotiation of many enterprise agreements applying to private hospitals. Ms Stewart agrees that the union is not limited to the minimum terms and conditions contained in awards when bargaining on behalf of its members.[157]

[154] Transcript of proceedings on 21 March 2016 at PN6510.

[155] Transcript of proceedings on 21 Mach 2016 at PN6514.

[156] Transcript of proceedings on 21 March 2016 at PN6544.

[157] Transcript of proceedings on 21 March 2016 at PN6530 – PN6532.

- Neither the unidentified employee M[158] nor the unidentified employee T[159] were alleging that their respective unidentified employers were in breach of the relevant unidentified industrial instruments applying to them.

- Ms Stewart does not have any actual knowledge as to why employee M's unidentified employer sought to alter M's hours of work.[160]

- Ms Stewart's sweeping observations regarding the "casualisation" of the workforce engaged in general private health clinics and private hospitals are limited to Queensland[161] and in any event, are not based on any factual analysis.[162]

- Changes in demand, which may result in alterations to theatre lists, give rise to fluctuations in the amount of labour required by a private hospital on a particular day.[163] This is a common occurrence.[164]

- Evidence that goes to changes made to rosters by employers prior to a shift commencing is not relevant to these proceedings as the ACTU's claim will not have any bearing on an employer's ability to do so.

245. We observe again that the ACTU's final written submissions of 20 June 2016 do not make any reference to the evidence of Ms Stewart. Accordingly, the extent to which it seeks to rely on Ms Stewart's evidence and for what purpose is unclear.

Limasene Potoi

246. Limasene Potoi has worked as a disability support worker for Dassi for 18 years, since the time that she completed her higher education.[165] Ms Potoi

[158] Transcript of proceedings on 21 March 2016 at PN6562.
[159] Transcript of proceedings on 21 March 2016 at PN6614.
[160] Transcript of proceedings on 21 March 2016 at PN6573 – PN6581.
[161] Transcript of proceedings on 21 March 2016 at PN6569.
[162] Transcript of proceedings on 21 March 2016 at PN6583.
[163] Transcript of proceedings on 21 March 2016 at PN6608.
[164] Transcript of proceedings on 21 March 2016 at PN6609.

commenced her employment on a casual basis, as she was also studying full-time.[166] Her engagement was later converted during or after 2011, such that she is now engaged on a permanent part-time basis.[167]

247. The *Disability Attendants Support Service Inc Union Collective Agreement 2008* applies to Ms Potoi.[168] Having regard to its terms, it would appear that her engagement was not converted pursuant to a casual conversion provision. It can reasonably be inferred that the alteration to her type of employment occurred either at her request or at the employer's prerogative, based on the operational requirements of the business.

248. Ms Potoi is also a full-time employee of Merri Outreach Support Service (**Merri Outreach**).[169] She explained that there are financial reasons underpinning her decision to undertake a full-time and part-time job simultaneously. That is, she is endeavouring to fulfil debts arising from her tertiary education as well as preparing for the possibility of having a young family.[170] Her complaints as to the need to work so many as 40 hours in a week and the impact that this has on her personal life must be seen in this context.[171]

249. Ms Potoi performs 26 hours of work each fortnight in her role at Dassi. This involves three weeknight shifts commencing at 7.00pm for two and a half hours. She is also rostered to work each Saturday and every second Sunday.[172] It would appear that her hours of work in this role enable Ms Potoi to also perform her full-time role at Merri Outreach on Monday – Friday during the hours of 9am – 5pm.[173]

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[165] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 6.

[166] Transcript of proceedings on 21 March 2016 at PN1297 and PN11317.

[167] Statement of Limasene Potoi, dated 21 December 2015 at paragraphs 8 – 9.

[168] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 16.

[169] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 7.

[170] Transcript of proceedings on 15 March 2016 at PN1344 – PN1345.

[171] [171] Statement of Limasene Potoi, dated 21 December 2015 at paragraphs 25 – 28.

[172] Statement of Limasene Potoi, dated 21 December 2015 at paragraphs 11 – 12.

[173] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 17.

250. Noting that Ms Potoi is engaged on a permanent basis, we proceed on the basis that the ACTU seeks to rely upon her evidence only in support of its claim to introduce a four hour minimum engagement for part-time employees in the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SACS Award**)

251. Ms Potoi expresses the view that she would prefer shifts that are of a longer duration.[174] Given her full-time engagement with Merri Outreach and the reasons for her decision to undertake that role in addition to her part-time employment, it is not in fact clear that she would be able to perform shifts of four hours duration on a weeknight. Further, Ms Potoi has not quantified the actual expenses she incurs by virtue of the travel she undertakes to reach the client's residence.[175] She accepts, however, that whilst she was undertaking tertiary education, "shorter shifts" suited her circumstances as they "allowed [her] to time to study and earn a small income to pay for uni books etc. The short shifts were also good when [she] had time between lectures".[176]

252. We also note that despite the concerns she expresses regarding the performance of "shorter shifts", she regularly accepts additional shifts at Dassi that are two and a half hours in length, which generally arise due to the absence of other staff.[177]

Linda Gale

253. Linda Gale is a Senior Industrial Officer of the National Tertiary Education Industry Union. Her evidence in these proceedings is only of relevance to the ACTU's claim to vary the Higher Education General Staff Award. We anticipate that representatives of employers covered by this award will deal with Ms Gale's evidence and accordingly, we do not propose to here make any submissions in this regard.

[174] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 14.

[175] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 18.

[176] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 22.

[177] Statement of Limasene Potoi, dated 21 December 2015 at paragraph 13 and transcript of proceedings on 21 March 2016 at PN1340.

John Perry

254. John Perry is 56 years old.[178] He was employed by Nardy House on a casual basis for less than 12 months as a Care Support Worker.[179] The SACS Award applied to him.[180]

255. Mr Perry asserts that he worked a minimum of 128 hours each month, however in some instances he performed additional hours of work and consequently, worked in excess of 128 hours of work.[181] An examination of the payslips attached to his statement[182] reveals that there was little consistency as to his specific hours of work. The table below provides a summary of the number of hours Mr Perry worked during the three pay periods relevant:

	13 November 2014 – 26 November 2014	19 March 2015 – 1 April 2015	6 August 2015 – 19 August 2015
Penalty – 50%	0	2	0
Penalty – 100%	0	3	0
Morning shift	40	8	15.5
Afternoon shift	0	40	5
Night shift	24	16	9.5
Saturday	22.5	9.5	22.5
Sunday	9.5	14.5	0

256. Under cross-examination, Mr Perry acknowledged that there were three categories of variances arising from his hours of work:

- The total number of hours worked each week;
- The days of the week upon which those hours were worked; and
- The specific time of the day during which those hours were worked.[183]

[178] Statement of John Perry, dated 19 October 2015 at paragraph 1.
[179] Statement of John Perry, dated 19 October 2015 at paragraph 19 and 46 – 47.
[180] Statement of John Perry, dated 19 October 2015 at attachment JP-5.
[181] Statement of John Perry, dated 19 October 2015 at paragraph 23 – 24.
[182] Statement of John Perry, dated 19 October 2015 at attachments JP-2, JP-3 and JP-4.
[183] Transcript of proceedings on 16 March 2016 at PN3304 – PN3311.

257. There is no proper evidentiary basis before the Commission that would enable it to determine that Mr Perry would in fact have been eligible to convert to permanent employment under the ACTU's proposed clause. It is not a fact in evidence. Accordingly, his general complaints as to the woes of casual employment are not relevant to the proceedings before the Commission, as the ACTU's claim, even if it were successful, would not provide employees in circumstances such as that of Mr Perry, with a pathway to permanent employment.

258. Allegations are made by Mr Perry as to representations that were made to him regarding the basis of his engagement at the time that he was offered his role by Nardy House. We consider that little turns on this but to the extent that the ACTU seeks to rely on this element of Mr Perry's evidence, we note that:

- Had Mr Perry known that the role was to be performed on an ongoing casual basis, absent any assurance of conversion to permanent employment, he would have accepted the offer nonetheless.[184]

- The "terms of engagement" signed by Mr Perry at the commencement of his role[185] and his "employment agreement"[186] made clear that Nardy House did not guarantee ongoing work or regular hours of work.

Judith Wright

259. Judith Wright is the Acting Branch Secretary of the NSW and ACT Services Branch of the ASU.[187] Her substantive position is Deputy Secretary of the Branch.[188] Her evidence relates to the SACS Award.

260. During cross examination, it became apparent that the various assertions Ms Wright makes regarding the "casualization" of the industry covered by the

[184] Transcript of proceedings on 16 March 2016 at PN3292.

[185] Statement of John Perry, dated 19 October 2015 at attachment JP-1.

[186] Statement of John Perry, dated 19 October 2015 at attachment JP-5.

[187] Statement of Judith Wright, dated 18 March 2016 at paragraph 1.

[188] Statement of Judith Wright, dated 18 March 2016 at paragraph 2.

SACS Award[189], the "growing number of casual contracts"[190], the impact of the casual conversion provision in the relevant NSW NAPSA [191] and consequential improvements in "employment practices"[192] are not based on any empirical evidence or analysis of reliable data.[193]

261. Ms Wright gave evidence as to likely impact that the National Disability Insurance Scheme will have on the service provision of employers in this industry. She explained that the purpose of the scheme is to "give the client greater say as to when they want services" and that as a result employers will need to be responsive to how those services are provided.[194] She accepted that this will introduce increased variability to an employer's roster of its employees.[195]

Tracey Kemp

262. Tracey Kemp is a casual Disability Support Worker employed by FSG Australia. The *FSG Australia Certified Agreement 2009 – 2012* applies to her.[196]

263. At the time that Ms Kemp applied for the position in which she now works, she was aware that she would be engaged on a casual basis. Despite this, she pursued the position and at that time, was not seeking employment elsewhere.[197] Furthermore, in the four years that she has been employed by FSG, she has not applied for any permanent part-time positions with an

[189] Statement of Judith Wright, dated 18 March 2016 at paragraph 13.

[190] Statement of Judith Wright, dated 18 March 2016 at paragraph 15.

[191] Statement of Judith Wright, dated 18 March 2016 at paragraphs 31 – 32.

[192] Statement of Judith Wright, dated 18 March 2016 at paragraph 32.

[193] Transcript of proceedings on 21March 2016 at PN6908 – PN6915, PN6933, PN6938 – PN6939, and PN6954 – PN6962.

[194] Transcript of proceedings on 21 March 2016 at PN7000 – PN7001.

[195] Transcript of proceedings on 21 March 2016 at PN7016.

[196] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraphs 1 – 3.

[197] Transcript of proceedings on 14 March 216 at PN467 – PN470.

alternate employer.[198] Indeed she spoke of the high degree of job satisfaction that she enjoys from her current role in the following terms: (emphasis added)

> Would you agree with me that you haven't really made many efforts to move out of casual employment at FSG and find permanent work if you have only actually applied for one job in four years?---I would agree that on the face of it, it looks like that. The current job that I have, the only downside I would say would be the casualization of it, the casual nature of it. Everything else about that job, I really, really enjoy it. I believe that I make a great deal of difference to the people that I work with and it suits the job, the location, the clients that I work with, the nature of the job. Everything about it is really good and I really, really like it. It is just the uncertainty. I really would prefer it to be permanent part time. But apart from that, unless something really happened to make me - you know, the clients changed or the location changed or something that suits me very well changed, I am not predisposed to leaving that job just for one reason which is the casual nature of it.[199]

264. It would appear that the "disadvantages" of casual employment that Ms Kemp laments have not had a bearing so serious or significant that she might be motivated to attempt to find alternate employment.

265. It is Ms Kemp's evidence that she works a regular fortnightly roster, although this has changed during the course of her employment.[200] Importantly, she explains that her employer is unable to guarantee these shifts on a permanent basis due to specific operational reasons:

> Even though my current roster is pretty regular, there is no guarantee of permanent shifts and my roster can change in order to suit the needs of the client (for example, the client may go on holiday with family). Or due to the unforeseen circumstances such as when a client is hospitalised.[201]

266. The above paragraph is reflective of the client-driven nature of the services provided by businesses such as FSG that are covered by the SACS Award. Indeed such evidence establishes the very need for flexible working arrangements in the industry.

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[198] Trabscript of proceedings on 14 March 2016 at PN473 – PN486.

[199] Transcript of proceedings on 14 March 2016 at PN494.

[200] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraphs 5 – 6.

[201] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 7 and transcript of proceedings on 14 March 2016 at PN535 – PN538.

267. Ms Kemp acknowledges that "one of the positives of casual employment" is the flexibility that it affords her, as she is able to refuse work if she so chooses[202]:

> … For instance, once a week I will do a 24-hour shift which consists of a 16-hour sleepover. It starts at 4 pm in the afternoon and goes through to 8 am. And then I will immediately follow that up with an 8 until 4 shift. Sometimes I am offered the next sleepover or the previous day shift, but I won't do them; 24 hours is my maximum. Or if I have got personal things on, yes, I do knock shifts back.[203]

268. She also accepts that she is able to take time off work[204] and that casual employees are in no way precluded from progressing through the classification structure contained in the relevant enterprise agreement[205]. Furthermore, her casual employment status did not present itself as a barrier to securing finance.[206]

269. Ms Kemp states that the "shortest shift [she] has ever worked was three hours"[207]. She nonetheless goes on to express the view that "a two hour shift is of little benefit" once the costs of travel, childcare or other fixed costs are taken into account.[208]

270. It is relevant to note that on her own evidence, Ms Kemp has never worked a two hour shift, she is "able to choose only to undertake shifts close to home in the Ipswich area"[209] and she is not required to obtain childcare[210]. Quite clearly, the opinion she expresses as to the benefit or value that accrues to an employee required to perform a two hour shifts does not have a proper basis and accordingly, should not be given any weight.

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[202] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 10.

[203] Transcript of proceedings on 14 March 2016 at PN518.

[204] Transcript of proceedings on 14 March 2016 at PN563.

[205] Transcript of proceedings on 14 March 2016 at PN578.

[206] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 24.

[207] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 16.

[208] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 16.

[209] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 17.

[210] Witness statement of Tracey Monika Kemp, dated 9 October 2015 at paragraph 20.

Michael Rizzo

271. Michael Rizzo is an experienced industrial officer of the ASU.[211] His witness statement in these proceedings provides a case study regarding meter readers previously employed by Powercor Australia. Their function has since been outsourced.

272. Mr Rizzo's provides a recount of a dispute between the ASU, Powercor, and the various entities to which the relevant work has been outsourced. Mr Rizzo's statement might suggest that the contest that arose related to the conversion of casual employees to permanent employment in the same sense as is here being considered by the Commission. This is not, however, the case. The various negotiations, disputes, proceedings and decisions to which he refers concerned a legal battle as to the appropriate instrument that applied to the relevant group of employees and the entitlements that such an instrument would confer upon those covered by it. In part, the proceedings related to an alleged transfer of business.

273. We can identify no relevance of this evidence to the issues that are here before the Commission. In addition to the above considerations, the evidence does not establish that the relevant group of employees would in fact be eligible to convert. Nor is there any evidence as to the impact that this would have on the operations of the business.

274. Mr Rizzo's evidence should be wholly disregarded.

Kyra Campbell

275. Kyra Campbell is a mother of two young children.[212] She completed her secondary school at year 10 and commenced working towards qualifications in childcare, however she later elected not to pursue this.[213]

[211] Witness statement of Michael Rizzo, dated 22 September 2015 at paragraph 1.

[212] Affidavit of Kyra Campbell, dated 30 October 2015 at paragraph 5.

[213] Transcript of proceedings on PN3852 – PN3855.

276. At the time of preparing her affidavit, she was employed on a casual basis by Ritchie's Super IGA Supermarket.[214] She complains of a reduction in her hours of work[215] but confirmed that she was told that this was based on a business decision made by her employer that was designed to reduce its labour costs.[216] No further details are provided as to the hours that she has in fact worked whilst she was in the employ of Ritchie's Super IGA Supermarket.

277. Since that time, due to a change in her husband's employment, she and her family have moved to a different suburb.[217] She is now employed on a casual basis at a Coles supermarket, performing night fill tasks.[218] Accordingly, the *General Retail Industry Award 2010* (**Retail Award**) is relevant to her employment.

278. Ms Campbell testified that she applied for "quite a few jobs" in her new area of residence, all of which were either part-time or casual positions. The position at Coles was the only one she was offered.[219]

279. Ms Campbell readily accepted that her hours of work will serve to accommodate her caring responsibilities:

> How does that job fit in with how you look after your children?---Because I'm the carer, because my husband words full-time, I can be able to drop them off, pick them up and then hand them over to my husband an go to work.
>
> So it fits in nicely with how you manage the kids?---Yes.[220]

280. She also confirmed that her new role would provide her and her family with adequate finances.[221]

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[214] Affidavit of Kyra Campbell, dated 30 October 2015 at paragraph 3.

[215] Affidavit of Kyra Campbell, dated 30 October 2015 at paragraph 7.

[216] Transcript of proceedings on 17 March 2016 at PN3867.

[217] Transcript of proceedings on 17 March 2016 at PN3834.

[218] Transcript of proceedings on 17 March 2016 at PN3837 – PN3842.

[219] Transcript of proceedings on 17 March 2016 at PN3843 – PN3847.

[220] Transcript of proceedings on 17 March 2016 at PN3849 – PN3851.

[221] Transcript of proceedings on 17 March 2016 at PN3870.

Madeline Minervini

281. Madeline Minervini is a casual retail worker to whom the *Romeo's Retail Group Enterprise Agreement 2012* applies.

282. The evidence provided by Ms Minervini does not establish that she would in fact be eligible to convert to permanent employment pursuant to the ACTU's proposed clause. Indeed her affidavit would suggest quite the contrary: (emphasis added)

> My hours of work vary and are generally between 8 and 14 hours per week. I usually work Wednesday and Thursday evenings and sometimes pick up extra shifts at short notice. I average approximately 9 hours per week.
>
> The lack of regularity and the lack of secure permanent part-time work on a consistent roster have been very difficult for me and have caused me direct financial hardship.[222]

283. The submissions we have previously made regarding the relevance of Mr Perry's evidence in circumstances similar to these are here apposite.

284. During cross examination it became apparent that Ms Minervini's engagement on a casual basis has enables the accommodation of certain personal circumstances:

> So as I understand it, you're going to complete your nursing studies?---Yes.
>
> You're hoping that you'll be a full-time carer for your mother?---Yes.
>
> And I take it you'll continue to work at Romeo IGA to pick up some extra cash?---That's correct.[223]

285. Ms Minervini states that she has "experienced a shortening of shifts from 4 hours down to 3.5 hours" [224]. We note that the enterprising agreement applying to her provides for a three hour minimum engagement for casual employees.

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[222] Affidavit of Madeline Minervini, dated 16 November 2016 at paragraphs 5 – 6.

[223] Transcript of proceedings on 15 March 2016 at PN2260 – PN2262.

[224] Affidavit of Madeline Minervini, dated 16 November 2016 at paragraph 7.

286. The fixed costs in fact faced by Ms Minervini when attending work and the incidence of shifts less than four hours in duration is not known. The evidence is therefore of little probative value.

Stanley Morgan

287. Stanley Morgan is a trade qualified sheet metal worker, aged 60.[225] Having struggled to find employment in the manufacturing industry he was introduced to a role pertaining to disability services by a family friend given his experience in caring for his invalid parents.[226] Since 2000 he has held three casual positions and one permanent part-time position in the disability services industry.[227]

288. We once again observe that the evidence before the Commission does not establish that Mr Morgan would have had an entitlement to convert to permanent employment pursuant to the ACTU's proposed clause. Indeed he describes his hours of work as having been "irregular" and tells of the difficulties he faced as a consequence of fluctuations in his hours of work and pay.[228]

289. Further, we note that:

- The role Mr Morgan performed for the South Australian Education Department was subject to three monthly contractual arrangements. This was because staffing levels were regularly reviewed as children could be removed from the relevant program by their parents.[229] The nature of the work performed was such that the employer could not guarantee ongoing work.

[225] Transcript of proceedings on 24 March 2016 at PN11436 and Statement of Stanley Morgan, dated 26 October 2015 at paragraph 3.

[226] Transcript of proceedings on 24 March 2016 at PN11439 – PN11444.

[227] Statement of Stanley Morgan, dated 26 October 2015 at paragraph 7.

[228] Statement of Stanley Morgan, dated 26 October 2015 at paragraph 13.

[229] Statement of Stanley Morgan, dated 26 October 2015 at paragraph 9.

- Mr Morgan's hours of work at Community Choices were subject to ongoing alterations based on the needs of its clients. Client cancellations were not uncommon.[230] This only serves to establish the need for flexible working arrangements in the disability services industry.

- After three years of casual employment, Centacare has engaged Mr Morgan on a part-time basis for approximately 8.5 years.[231]

Narelle Jenks

290. Narelle Jenks commenced employment with Blue Bird Child Care Centre as a Qualified Child Care Assistant. Four months later, her employment status was altered to permanent part-time.[232] Her witness statement deals primarily with the difficulties that she says arose from unilateral changes made by her employer to her roster while she was engaged on a part-time basis. This evidence is not of any relevance to the matters before the Commission.

291. In any event, we note that Ms Jenks explained in response to questions from the Full Bench that when her shifts were cancelled, this was typically because "the number of children that were booked didn't turn up, or they'd overstaffed". She also testified that the need for additional staff could arise at short notice due to the need to maintain staff to children ratios:

> So for every so many children you need one staff member, so if more children would turn up that weren't actually booked in prior to the beginning of the session then they would need an extra staff member.[233]

292. Ms Jenks expresses a preference for working shifts that are longer than 2 – 3 hours in length.[234] She does not, however, provide any evidence of the fixed costs incurred or other difficulties that arise from performing shifts that are of

[230] Statement of Stanley Morgan, dated 26 October 2015 at paragraph 10.

[231] Statement of Stanley Morgan, dated 26 October 2015 at paragraph 8.

[232] Statement of Narelle Jenks, dated 15 October 2015 at paragraph 9.

[233] Transcript of proceedings on 21 March 2016 at PN7533.

[234] Statement of Narelle Jenks, dated 15 October 2015 at paragraph 14.

less than four hours duration. Rather, she provides an explanation for this in the following terms: (emphasis added)

> … I was regularly rostered to work short hours in the [outside of school care]. As OSHC operates only limited hours and during school vacation periods, the hours of work available in PSHC are less than compared to [long day care].[235]

293. Ms Jenks was previously employed by Wanslea Family Services.[236] Whilst she was initially engaged as a casual employee, she was later transferred to a permanent part-time role.[237] She left this role for the casual position at Blue Bird Child Care Centre when her place of residence moved to a different area and it was the "best job [she] could find".[238]

294. Ms Jenks was working towards a Diploma in Children's Services whilst engaged by Blue Bird Chid Care Centre and she obtained a Certificate IV in Outside of School Care whilst employed by Wanslea Family Services.[239]

295. Ms Jenks is now employed in the public service on a casual basis.[240] She explained her decision to leave a permanent part-time position to casual employment on the basis that her hours of work now enable her to "better balance [her] study and looking after [her] child".[241]

Kylie Gray

296. Kylie Gray was employed as a casual employee by McArthur Management Service (**MMS**) for a period just short of two years.[242] MMS is an agency that provides labour to early childhood education and care centres.[243]

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[235] Statement of Narelle Jenks, dated 15 October 2015 at paragraph 13.
[236] Statement of Narelle Jenks, dated 15 October 2015 at paragraph 7.
[237] Transcript of proceedings on 21 March 2016 at PN7508.
[238] Transcript of proceedings on 21 March 2016 at PN7502 – PN7522.
[239] Transcript of proceedings on 21 March 2016 at PN7475 – PN7479.
[240] Transcript of proceedings on 21 March 2016 at PN7454.
[241] Transcript of proceedings on 21 March 2016 at PN7544 and PN7553.
[242] Statement of Kylie Gray at paragraph 7.
[243] Statement of Kylie Gray at paragraph 9.

297. Ms Gray testified that during 2014 she was rostered to work "regular shifts" at the North Melbourne Children's Centre.[244] However the continuation of this work could not be guaranteed. For instance, it could be brought to an end if the relevant government funding were terminated.[245] Further, she spoke of instances in which her shifts were cancelled if, for example, the young child that she provided care for was absent due school holidays.[246]

298. As we have previously observed in the context of other witnesses called by the ACTU, Ms Gray's evidence concerning the changes made by an employer to an employee's roster is not of direct relevance to the claims before the Commission.

299. At the time of preparing her statement, Ms Gray was employed on a "permanent part time temporary contract" and was applying for a permanent position at North Melbourne Children's Services.

Colin Aiton

300. Colin Aiton is a casual employee of Westend Pallets (Aust) Pty Ltd.

301. Whilst in his statement Mr Aiton declared that he was unable to secure a home loan due to his employment on a casual basis, he conceded during cross examination that if he were converted to permanent employment, his hourly rate of pay would be reduced and consequently, he would fall short of the minimum income required by the relevant financial institution. Accordingly, conversion to permanent employment would not assist him in obtaining a mortgage.[247]

[244] Statement of Kylie Gray at paragraph 13.

[245] Statement of Kylie Gray at paragraph 14.

[246] Statement of Kylie Gray at paragraph 16.

[247] Transcript of proceedings on 15 March 2016 at PN2369 and PN2411 – PN2413.

302. Mr Aiton also acknowledged that his ability to "plan"[248] would not improve if he were converted to permanent employment on account of the fact that his hours of work are presently relatively consistent.[249]

Michael Fisher

303. Michael Fisher was also employed by Westend Pallets (Aust) Pty Ltd on a casual basis.[250] He is now employed by a labour hire agency but continues to perform work for Westend Pallets (Aust) Pty Ltd.[251]

304. Mr Fisher acknowledged that his employment on a casual basis by Flexi Personnel enables him to refuse work whenever he so chooses.[252] He also clarified that his concerns regarding "job security" were predicated on a belief that by virtue of his status as a casual employee, his employment could be unfairly terminated. He was under the impression that he would be better protected against an unfair dismissal if he was converted to permanent employment.[253]

Matthew Francis

305. Matthew Francis is a diesel fitter who was engaged on a casual basis by multiple contractors to perform work at the Blackwater Coal Mine for approximately six years.[254] Mr Francis' statement gives a detailed account of his employment by each of the relevant contractors. All that is relevant for present purposes is that his employment was on a casual basis throughout that period.[255]

306. Mr Francis expresses a strong desire to be employed on a permanent basis by BHP Mitsubishi Alliance (**BMA**); the company that owns the mine at which

[248] Witness statement of Colin Aiton, dated 31 August 2016 at paragraph 27.
[249] Transcript of proceedings on 15 March 2016 at PN2366 – PN2368.
[250] Witness statement of Michael Fisher, dated 1 September 2015 at paragraph 3.
[251] Transcript of proceedings on 15 March 2016 at PN2469.
[252] Transcript of proceedings on 15 March 2016 at PN2493 – PN2494.
[253] Transcript of proceedings on 15 March 2016 at PN2507 – PN2510.
[254] Statement of Matthew Francis, dated 27 October 2015 at paragraph 7.
[255] Transcript of proceedings on 21 March 2016 at PN6692.

he has worked and that outsources the maintenance work performed by employees such as Mr Francis to several contractors.[256] It is trite to observe that the ACTU claim would not facilitate conversion of a casual employee employed by such a contractor to the "host" employer.[257]

307. The witness also accepted that employment on a permanent basis by a contractor would not circumvent circumstances in which BMA terminates the contract with the relevant contractor, to the extent that this results in its employees no longer being required.[258]

308. Mr Francis is now a permanent employee of the Wisely Group, one of the contractors engaged at the Blackwater Coal Mine. The position was offered to him pursuant to enquiries he made with the Wisely Group as to whether any opportunities for permanent employment were available. There is no evidence to suggest that Mr Francis' was entitled under any relevant industrial instrument to elect to convert to permanent employment in certain prescribed circumstances. Whilst Mr Francis is now performing a different role to that which he was previously engaged in, he continues to work at the same mine.[259]

309. The ACTU has not identified which modern award covers the witness.[260] Nonetheless, Mr Francis' evidence reveals that he is by no means award reliant. He is currently earning approximately $120,000 per annum.[261]

Summary

310. The table below summarises the evidence of the ACTU's lay witnesses that we have here considered. In respect of each witness, the relevant modern award has been identified (where this information is known or can readily be identified from the evidence given). Further, to the extent that the evidence

[256] Transcript of proceedings on 21 March 2016 at PN6843.
[257] Transcript of proceedings on 21 March 2016 at PN6846 – PN6847.
[258] Transcript of proceedings on 21 March 2016 at PN6821 – PN6822.
[259] Transcript of proceedings on 21 March 2016 at PN6673 – PN6679.
[260] Transcript of proceedings on 21 March 2016 at PN6848 – PN6849.
[261] Transcript of proceedings on 21 March 2016 at PN6784.

provided by the a witness is of any probative value to the Commission in respect of the ACTU's claim to introduce new causal conversion provisions and four hour minimum engagement/payment periods, this has been identified in short form.

Award	Casual Conversion	Minimum Engagements
1. Linda Rackstraw (casual employee)		
Fast Food Award	• Not a credible witness – no weight should be attributed to the evidence • Evidence not relevant – witness not eligible to convert	• Not a credible witness – no weight should be attributed to the evidence • Witness incurs less than $10/week in petrol • Employee preference for longer shifts
2. Scott Quinn (part-time employee)		
SACS Award	• No relevant evidence	• Evidence establishes that clients of the employer dictate duration and timing of shift • Petrol costs incurred due to travel are largely compensated by employer
3. Jan Paulsen (part-time employee)		
Nurses Award	• No relevant evidence	• Evidence establishes that casual nurses' shifts may be terminated early where there is no work to be performed
4. Vicky Stewart (QNU organiser)		
Nurses Award	• Evidence is highly prejudicial evidence regarding unidentified employees and employers that cannot be tested – no weight should be attributed to the evidence	• Evidence is highly prejudicial evidence regarding unidentified employees and employers that cannot be tested – no weight should be attributed to the evidence
5. Liamsene Potoi (part-time employee)		
SACS Award	• No relevant evidence	• Employee preference for longer shifts but not clear that she could in fact perform such work • No evidence re fixed costs incurred
6. John Perry (casual employee)		
SACS Award	• Evidence not relevant – witness not eligible to convert	• No relevant evidence

7. Judith Wright (Acting Branch Secretary of the NSW and ACT Services Branch of the ASU)		
SACS Award	• No evidence that goes to employee desire or eligibility to convert • No probative evidence as to whether this could be accommodated by the employer	• No relevant evidence
8. Tracey Kemp (casual employee)		
SACS Award	• Evidence establishes that due to client-driven nature of services, employer cannot guarantee ongoing shifts/roster	• No probative evidence
9. Michael Rizzo (National Industrial Officer of the ASU)		
Unknown	• No relevant evidence	• No relevant evidence
10. Kyra Campbell (casual employee)		
Retail Award	• No evidence that witness would be eligible to convert	• No relevant evidence
11. Madeline Minervini (casual employee)		
Retail Award	• Evidence not relevant – witness not eligible to convert	• No probative evidence
12. Stanley Morgan (part-time employee)		
SACS Award	• No evidence that he would be eligible to convert	• No relevant evidence
13. Narelle Jenks (casual employee)		
Children's Services Award 2010 (**Children's Services Award**)	• No relevant evidence	• No probative evidence • Evidence establishes operational reasons for "short shifts" in OSHC
14. Kylie Gray (part-time employee)		
Children's Services Award	• Evidence establishes that due to operational reasons, employer cannot guarantee continuation of work	• No relevant evidence
15. Colin Aiton (casual employee)		
Timber Award	• One of only two witnesses who might be eligible to convert • No evidence as to whether this could be accommodated by the employer	• No relevant evidence
16. Michael Fisher (casual employee)		
Timber Award	• One of only two witnesses who might be	• No relevant evidence

	eligible to convert • No evidence as to whether this could be accommodated by the employer, noting that the witness is now employed by a labour hire agency	
17. Matthew Francis (full-time employee)		
Unknown	• Evidence establishes that permanent employment with a contractor does not provide an employee with a guarantee of ongoing work due to the inherent nature of the work that such companies are contracted to undertake	• No relevant evidence

311. As is self-evident, little turns on the witness evidence called by the ACTU in these proceedings. The ACTU's lay evidentiary case consists of a total of just 18 witnesses including:

- 14 employees; and
- 4 union officials.

312. The evidence given concerns only seven of the 110 awards that the ACTU seeks to vary; those being:

- the Fast Food Award;
- the Nurses Award;
- the SACS Award*;*
- the Higher Education General Staff Award;
- the Retail Award*;*
- the Children's Services Award; and
- the Timber Award.

313. At its highest, the ACTU's lay witness evidence establishes only the following factual propositions relevant to its claims:

- That some casual employees prefer permanent employment.
- That some casual employees, despite expressing such a preference, have not taken steps to alter the basis of their employment with their current employer or to obtain employment with a different employer.
- That some employees choose to leave permanent positions for new casual positions.
- That some casual employees choose to be engaged on a casual basis because it accommodates their personal circumstances, including study and caring responsibilities.
- That some casual employees choose to remain in their current roles because they enjoy the work that they perform.
- That the hours of work of a casual employee can vary considerably. This includes the total number of hours worked, the days of the week on which they are worked and the starting/finishing time.
- That as a result of various operational requirements, an employer cannot guarantee ongoing employment or regular hours of work and accordingly, cannot accommodate permanent employment. These include:
    - The need to replace temporarily absent employees;
    - The need to meet fluctuations in demand; and
    - The need to provide client-centric services over which the employer has little control.

- That some casual employees have converted to permanent employment in the absence of a right to seek conversion pursuant to an industrial instrument, with the consent of their employer.

- That casual employment provides employees with the ability to refuse work when they so choose.

- That some casual and part-time employees experience the cancellation of rostered shifts due to operational reasons.

- That some casual employees express a preference for working "longer" shifts when compared to "shorter" shifts.

- That some part-time employees express a preference for working "longer" shifts when compared to "shorter" shifts.

- That some casual employees incur some unidentified fixed costs associated with travelling to work.

15. THE ACTU SURVEY

314. The ACTU commissioned a survey, which the ACTU, the AMWU and the AMWU – Vehicle Division seek to rely on for the purposes of these proceedings. We commence our analysis of this survey by taking the Commission to the ACTU's submissions of 19 October 2015. At paragraph 6 of those submissions, the ACTU states:

> The Expert Report [Attachment RM-2 to the statement of Professor Markey] 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 [Attachment RM-3 to the statement of Professor Markey] 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').[262]

315. We move then to the statement of Professor Markey and the reports attached therewith. The Expert Report states the following regarding the ACTU survey:

> We also make use of a survey commissioned by the ACTU from April-June 2015 (see Appendix 1 for questions). The study included 838 casuals, 43 labour hire workers and 215 permanent workers. We have largely excluded comparison with permanent workers in our analysis of the data, due to the low relative proportion of workers surveyed, and have treated the survey as primarily one of casual workers. However, HILDA data suggests that labour hire workers are only a small proportion of the workforce as a whole (around 2 per cent), and so some observations on this workforce may be used, acknowledging the small sample.[263]

316. The report goes on to set out certain limitations to the casual sample of the ACTU survey when compared to ABS data, to which we later return. The authors then conclude:

> Acknowledging some limitations – that it is primarily a survey of part-time and not full-time casuals, that older workers are over-represented, and that certain industries are under-represented – we treat the ACTU survey as a useful but less precise guide than the ABS or HILDA data, and defer to those where there is overlap or repetition between the sets of data. Nonetheless, the ACTU survey does provide some unique insights into particular aspects of the experiences of casuals.[264]

[262] ACTU's submission of 19 October 2015 at paragraph 6.

[263] The Expert Report at page 10.

[264] The Expert Report at pages 10 – 11.

317. The remainder of the Expert Report summarises and at certain points draws conclusions based on academic literature, ABS data, the HILDA survey and the ACTU survey. Appendix 1 sets out the ACTU survey questions, which we deal with later in this submission.

318. On 2 October 2015, the ACTU wrote to Professor Markey. That correspondence is annexed to the Supplementary Expert Report. The purpose of the correspondence was to engage the Professor to provide a supplementary report for the purposes of these proceedings. In respect of the ACTU survey, the correspondence states:

> In section 1.2 of your report you refer to a Survey conducted by the ACTU. Are you able to comment on why it was that the survey was conducted and at whose suggestion it was conducted? Did you have any input into the design of the survey? In addition to the comments you have made as to the limitations of that survey, are there any comments that could be made on its design or validity.

319. Having been so prompted, the Supplementary Expert Report, at page 6, deals with the ACTU survey as follows:

> 3. The ACTU survey was suggested by one of this Reports author's (sic), Professor Markey, to the ACTU in February 2015, in order to provide data on some issues pertaining to its claim that were not covered by ABS or HILDA data. It was suggested by Professor Markey that to enhance the survey's validity, it was important that it be representative of the working population as a whole and that it include both union and non-union members. So as to achieve these requirements Professor Markey also suggested that the ACTU engage a survey panel provider such as SSI. The ACTU adopted these suggestions and accordingly, Professor Markey initially approached SSI on their behalf to conduct the survey. The ACTU subsequently contracted the SSI to conduct the survey.
>
> 4. Professor Markey also participated in the survey design. The ACTU designed a draft questionnaire and sought Professor Markey's professional opinion regarding its viability, as well as that of other academics from other institutions. Professor Markey's main advice was that the survey draft was too long, which we understand was the advice of other academics consulted. Professor John Buchanan from the University of Sydney suggested a pared down design, and Professor Markey agreed that it was an adequate design for the purpose. After the survey was administered by SSI, we were provided with the raw data results that have formed the basis of our analysis of the ACTU Survey.[265]

[265] The Supplementary Expert Report at page 6.

The Conduct of the Survey

320. In our submissions of 26 February 2016, Ai Group raised a series of concerns arising from the complete absence of evidence before the Commission as to how the ACTU's survey was conducted. The gravamen of our argument was that very little (if any) confidence could be placed in its results. In the material filed, the ACTU had not been forthcoming with respect to a range of matters regarding its survey, which raised significant doubt as to how the survey was administered.

321. The following specific concerns were identified:

- How was the sample selected? Was it a random selection? If not, on what basis were it chosen?
- Who is SSI? What was the extent of their involvement?
- Who selected the sample of respondents? Was it the ACTU, its affiliates, SSI or the authors of the reports that we have here considered?
- What was the composition of the sample in terms of gender, age, industry in which they work, modern award by which they are covered, modern award reliance, union membership and so on?
- By what medium was the survey conducted – electronically, by hard copies, by telephone or a combination of these? If electronically, using what software or program? Why was it chosen as the means of conducting the survey? Was it suitably rigorous? How did it work? How was it accessed by respondents? Were measures taken to ensure that it could not be tampered with? If so, what were they? Was the survey conducted anonymously?
- What information about the survey was provided to respondents? Were they informed of these proceedings? If so, what were they told? How was this information communicated and by whom? Was it

communicated to all respondents? How was that information presented? When was that information presented – at the time that the survey was completed or preceding it?

322. The ACTU subsequently sought and was granted leave to file further evidence in response to the above concerns. This can be found in the Third Supplementary Expert Report. The authors there seek to fill the evidentiary gaps that we had earlier identified, however it remains the case that there is no evidence before the Commission from SSI, the organisation that administered the ACTU survey. To the extent that the Third Supplementary Report deals with some of the issues identified above, the evidence given is largely based on that which was told to Professor Markey by the ACTU or SSI. For instance:

- The basis upon which the survey sample was to be selected was communicated by the ACTU to SSI. Professor Markey was not a party to these discussions.[266]

- Professor Markey's understanding that the survey results "could not be tampered with" is based only on what he was told by SSI. He has not verified this himself.[267]

323. Without intending any disrespect to Professor Markey, his evidence is in the nature of hearsay and cannot be relied upon for establishing the integrity of the process by which the survey was conducted and the raw results were subsequently generated by SSI and provided to the Professor for analysis.

324. A series of questions also arise regarding the medium by which the survey was in fact conducted. The use of an online survey platform is not immune from discredit. As we understand it, there are various options or functionalities open to the administrator of the survey when it is established and during its operation that can have a significant bearing upon its reliability. The ACTU

[266] The Third Supplementary Report at paragraphs 52 and 57; and transcript of proceedings on 23 March 2016 at PN9601 and PN9636 – PN9637.

[267] The Third Supplementary Report at paragraph 57 and transcript of proceedings on 23 March 2016 at PM6939 – PN6941.

has not provided any direct evidence as to the process that was involved in setting up the survey and whether any such safeguards were implemented.

325. The Commission should have little confidence in the survey commissioned by the ACTU. There is no direct evidence before it about a substantial number of issues associated with the administration of the survey. Such a lack of transparency gives rise to doubt as to the manner in which it was conducted and whether the results that flow from it are statistically sound.

The Survey Questions

326. A list of survey questions can be found at Appendix 1 to the Expert Report. The Supplementary Expert Report suggests that they were prepared by the ACTU in consultation with Professor Markey, Professor Buchanan (who has not been called to give evidence in these proceedings) and other academics, the identities of whom are unknown.

327. Despite the advice sought by the ACTU in respect of the questions and the manner in which they have been crafted, there are several flaws that become readily apparent upon a brief review of them.

328. It also appears that the ACTU has not provided a complete picture of the questions that were asked. That is, where a question was to be answered by selecting one or more of the provided options, these have not necessarily been set out in the ACTU's material.

329. **Question 8** asks: '*Has your employer informed you of your right to convert to permanent employment?*' The question presupposes that the respondent does in fact have a right to convert. It is important to first observe that at present, the modern awards system does not, as such, afford employees a right to convert. Pre-existing casual conversion clauses rather provide employees with a right to *request* to convert. In this way, the question mischaracterises the entitlement.

330. In any event, the questions preceding number 8 do not seek to ascertain whether the respondent is covered by a modern award or enterprise

agreement that contains a casual conversion provision. Therefore, the responses to it are not indicative of the extent to which employers are complying with their obligation under pre-existing casual conversion clauses to notify employees of their right to request conversion. That is, the responses do not provide an indication of the number of employees who have or have not been notified of their right to request conversion under such clauses.

331. **Question 9** asks: '*Have you asked your employer if you could change from being a [casual/labour hire] to be a permanent employee?*' The following two questions are contingent upon the response provided to question 9. They inquire as to "what happened" if a request to convert was made or to request the respondent to explain why they have not made a request to convert.

332. Question 9 is not confined to respondents who presently have a right to request to convert under the industrial instrument that applies to them. That is, the questions preceding number 9 do not seek to ascertain whether the respondent is covered by a modern award or enterprise agreement that contains a casual conversion provision. Thus, the question invites a positive response even in circumstances where a casual employee who does not have a right to request conversion has done so by way of, for example, an informal discussion with their employer in which they have inquired whether there is any possibility that they may transfer to a permanent position.

333. For this reason, the responses to this question are not indicative of the extent to which pre-existing casual conversion clauses are being utilised. That is, the responses do not provide an indication of the number of requests that are made pursuant to such clauses.

334. The responses to **question 9A** must also be seen in this light. Of those respondents who indicate that their request was not granted, the Commission cannot determine the proportion of such employees who do not have a right under an award or enterprise agreement to request conversion to permanent employment. Thus, the responses to this question cannot be considered

evidence of the extent to which requests to convert under pre-existing casual conversion clauses are granted.

335. Option (b) to **question 9B** provides that the respondent has not made a request to convert because '*On-going, permanent or fixed term status is not possible or available*'. To the extent that this response was selected by respondents, we note that it is indicative only of their *perception* that ongoing, permanent or fixed term status was not possible or available. The response does not indicate that this has in fact been the advice, information or response to a request to elect that was provided to the employee by their employer. It rather appears to apply where the employee has decided not to seek conversion based on their understanding or belief that that is the case, which may be due to any number of factors and could in fact be entirely misconceived. The survey does not allow for this level of analysis.

336. **Question 10** is in the following terms: '*To what extent do you agree that [casual/labour hire] workers such as yourself should be able to convert to permanent status, if that is their preference?*' The question is clearly a leading one. It is predicated on the basis that the respondent agrees with the proposition that workers such as the respondent should be able to convert to permanent status if that is their preference. Further, it does not explain what the consequences of such conversion would be (for instance, the employee would no longer receive their 25% loading). This necessarily means that the responses provided to this question should be given little if any weight by the Commission.

337. In any event, it is virtually impossible to contemplate circumstances in which an employee might not agree that employees such as themselves should be afforded a further or greater entitlement. Respondents to the survey are bound to agree to such a proposition. The question is entirely self-serving.

338. **Question 15** asks: '*In the past 3 months, what is the minimum number of hours you have worked in a single shift?*' The question appears to ask the respondent to identify the length of the shortest shift that they have worked in

the preceding three months. The question is framed such that where an employee has worked a shift of a particular length just once in the previous few months, it would be identified by their response.

339. The data gathered from responses to this part of the survey do not establish that there is a phenomenon of 'short shifts' as alleged by the ACTU. Indeed if an employee was recalled to work overtime on a particular occasion in the preceding three months for a period of two hours, but the employee otherwise works shifts that are longer, the respondent's answer to question 15 would be 'two hours'. The responses to this question reveal nothing of the frequency or regularity with which such shifts are worked.

340. Further, neither question 15 not any other question in the survey deals with *why* the employee worked a shift of that length. For instance, a 'short shift' may well have been worked to accommodate the needs of the employee due to their school or university commitments or caring responsibilities. For this reason, the responses to this question are of little probative value as they are provided in the abstract, absent any context.

341. **Question 16** asks: '*To what extent do you agree that workers such as yourself should have a longer minimum shift length?*' We make the very same observations about this question as we have earlier regarding question 10.

342. **Question 18** asks: '*How much say do you have over the hours you work?*' According to the AMWU's submissions, the options provided were:

> (a) Very little say (my boss sets the hours)
> (b) Some say (I can vary hours when I need, but usually set by my boss)
> (c) A lot of say (I can choose when I work)

343. We make the obvious observation once again that the responses to this question can be put no higher than an employee's perception of the level of 'control' that they have over their working hours. This is particularly important in the context of casual employees who cannot be compelled or required to work a particular shift. To the extent that a casual employee is 'rostered' to

work at a particular time and the employee is unable to do so, this in fact gives a casual employee considerable 'say' over their hours.

344. We also note that the responses are drafted such that they include the reason for which the employee considers that they have 'very little say', 'some say' or 'a lot of say'. We anticipate that this may have altered the way in which a respondent answered this question. That is, if an employee's circumstances do not meet any of the descriptors contained in brackets, or where an employee's circumstances are such that they do not fit neatly within any of the options provided, the response may not necessarily be representative of the extent to which they in fact have control over their hours.

345. **Question 19** asks the respondent if they have '*any comments about [their] experience or issues that [they] would like to raise*' regarding working as a casual. It then provides six different options that the employee may choose from, most of which (unsurprisingly) suggest negative consequences or experiences. The question and the responses provided are, in this way, tailored to lead the employee towards identifying adverse effects of casual employment.

346. Further, option (c) ('*I don't get access to training at work because I'm casual*') and option (d) ('*I don't get promotions or reclassification because I'm casual*') draw a causal connection between the absence of access to training and promotions/reclassifications and the respondent's employment as a casual. That is, a respondent that selects either of these options *believes* that they face these consequences because they are a casual employee. The responses can be put no higher. They do not establish that the employee does not have access to training, promotions or reclassification because in fact they are a casual employee.

The Survey Sample

347. The authors' analysis of the ACTU survey is based on the responses of 838 casual employees and 43 labour hire workers. That comes to a total of just 881 respondents. This is a very small sample when regard is had to the fact

that there were over 2 million casual employees engaged in the workforce, as at May 2016. The survey cannot be considered representative of the workforce generally or of any particular industry covered by a modern award.

348. The full profile and demographic characteristics of the sample are not known. This is of course important because a sample that is skewed can have a significant impact on the results. For instance, over-representation of older workers (as is here the case) is more likely to produce higher results of employees seeking longer minimum shift lengths as compared to younger workers who are undertaking secondary or tertiary education.

349. All that is known about the demographics of the survey respondents is that which is set out in the report found at the Expert Report page 10, where the authors of the report identify certain limitations of the ACTU survey when compared to ABS data:

- Casuals working part-time hours were over-represented in the sample. Around 95% of casuals in the sample work part-time, much higher than the 71% in the ABS figures.
- Women were over-represented. 66% of the sample of casuals are women as compared to 54% in the ABS figures.
- Middle aged and older workers are over-represented. Around 54% of the sample is aged 45 and over, including 31% who are 55 and over. By contrast, workers aged over 45 represent only 27% of casuals in the ABS data, including only 13% aged 55 and over.

350. The following information about the sample is not known:

- The modern awards that cover the respondents to the survey.
- The number of respondents covered by specific modern awards.
- The length of service of the survey respondents.
- The number of respondents that were members of a union.

351. The matters listed above would provide information that is crucial to a proper assessment of the relevance and reliability of the ACTU's survey. For instance, in the absence of any evidence as to the specific modern awards by which the survey respondents were covered, the Commission is unable to determine the relevance of the survey responses to specific industries or awards.

16. THE AMWU'S EXPERT WITNESS EVIDENCE

352. The AMWU seeks to advance the evidence of three of its witnesses as that of 'experts'. We here propose to deal with each.

Dr Tom Skladzien

353. The AMWU filed two statements of Dr Tom Skladzien of the AMWU; the first in October 2015 (**Initial Statement**) and another in March 2016 (**Reply Statement**).

354. In his Initial Statement, Dr Skladzien expresses the view that it is extremely hard to quantify the cost of "casualisation" on an individual worker who would prefer to be a permanent employee (paragraph 9). He refers to the AMWU Survey as supporting the view that "the costs are not insignificant". For the reasons set out in chapter 18 of this submission, the AMWU Survey contains serious flaws and cannot be relied upon.

355. At paragraph 11 of his Initial Statement, Dr Skladzien expresses the view that "uncertainty in a general sense" is a significant cost for the economy and therefore where there are individuals in the economy who experience uncertainty there must be economic costs which the AMWU claim could be said to mitigate to some degree. This assertion is so broad that it cannot be given any credibility. Uncertainty for employers, employees and others in the economy arises from a vast array of factors.

356. At paragraph 12 of his Initial Statement, Dr Skladzien outlines the significant pressures and challenges that the manufacturing industry is currently experiencing:

> As the commission is likely aware, the Australian manufacturing industry remains under considerable pressure, with significantly lower profits than the broader economy, and the lowest recorded gross value added and fixed capital investment seen in the industry since 2001. This is a continuation of a long trend of relative decline of the sector lasting decades but recently this relative decline has also lead to an absolute decline in output, employment and investment. It is broadly accepted that without significant policy intervention, manufacturing will continue its relative decline. While the depreciation of the Australian dollar was expected to cause a reversal of

the absolute decline of manufacturing, there currently exists little if any evidence of such a reversal.

357. It is certainty true that the manufacturing industry is struggling but the solution is not to remove existing labour flexibility as the AMWU is seeking. The solution is to preserve existing flexibility, and ideally to allow more flexibility.

358. At paragraph 21 of his Initial Statement, Dr Skladzien concedes that the use of casual employees is justified on flexibility grounds and that casual employment helps businesses deal with ebbs and flows in demand for products. However, he argues that there is "circumstantial" evidence that manufacturing businesses are using casual employees in an attempt to lower labour costs. This argument in not valid because the casual loading in effect results in the cost of casual employees and permanent employees being roughly equivalent. Manufacturing businesses use casual employees to maintain vital flexibility.

359. In addition, in his Initial Statement Dr Skladzien asserts that the increase in the proportion of the manufacturing workforce that is casual has contributed to skill shortages or poor productivity. Ms Toth takes issue with these assertions in her statement. She points out that skill shortages and poor productivity have occurred for other identified reasons which are unrelated to the employment of casuals.[268] Also, as outlined in chapter 21 of this submission, an arithmetic error has been identified in paragraph 56 of Ms Toth's statement regarding the level of casual employment in the manufacturing industry. The correct figures (as can readily be verified by adding the relevant amounts referred to in the statement) are:

November 2001	13.7%
November 2010	15.6%
November 2013	~~19.1%~~ 14.5%

360. With the above correction to the figure in Ms Toth's statement, it can be seen that the level of casual employment in the manufacturing industry fell significantly in the three years leading up to the release of the latest statistics,

[268] Witness statement of Julie Toth, dated 23 February 2016 at paragraphs 60 – 66.

and the level of casual employment in the manufacturing industry remains significantly lower than the level in the broader economy.

361. In his Reply Statement, at paragraph 7, Dr Skladzien concedes that: "In theory, there are compelling reasons to believe that "excessive" labour market regulation could in certain circumstances inhibit employment and productivity growth…". However, he argues that the AMWU claim does not place significant obstacles on the use of casual labour. This argument is unsustainable when the claim would impose major barriers to casual employment.

362. Dr Skladzien's Reply Statement focusses heavily on arguments about the alleged disadvantage that casuals experience in accessing training. However, he conceded at paragraph 15 that for "some casuals, casual employment works as a supplement to off the job study". Also, during cross-examination, Dr Skladzien conceded that:

- If the availability of casual employment was restricted in the manufacturing sector, this would undermine the ability for the sector to attract younger workers.[269]

- In general, older workers are less likely than younger workers to undertake training regardless of whether they are employed on a casual or permanent basis.[270]

- There are individual characteristics that workers have that make them less willing to engage in training regardless of whether they are employed on a casual or permanent basis.[271]

- A research paper prepared by the Melbourne Institute of Applied Economic and Social Research (that he referred to in his Reply Statement) provides a comprehensive discussion about the relevant

[269] Transcript of proceedings on 24 March 2016 at PN11321.

[270] Transcript of proceedings on 24 March 2016 at PN11331 - PN11332.

[271] Transcript of proceedings on 24 March 2016 at PN11334 - PN11336.

issues[272] and an accurate description of the research.[273] After making these concessions, Dr Skladzien was taken to a study by Vandenheuvel and Wooden[274] referred to on page 12 of the research paper in which it was found that, amongst in-house training course participants, much of the difference in favour of permanent workers is really a function of differences in hours worked rather than casualness per se.[275] Dr Skladzien was unaware of the study.[276]

- The short job tenure of many casuals is a factor in them receiving less training compared to other employees.[277]

- Casual workers are often engaged in less skilled roles and the level of skill required for the job may be the reason why less training is offered rather than whether they are employed on a permanent or casual basis.[278]

- He had seen some evidence that an employee's casual employment status has no impact on the amount of training offered and some evidence that it has an impact.[279]

Dr Elsa Underhill – evidence arising from witness statement

363. Elsa Underhill is a Senior Lecturer and Director of Research in the Department of Management at Deakin University.[280] Her witness statement purports to provide an expert opinion on the workplace health and safety consequences of casual employment.[281] The thrust of her evidence is that

[272] Transcript of proceedings on 24 March 2016 at PN11360.
[273] Transcript of proceedings on 24 March 2016 at PN11363.
[274] Exhibit 147.
[275] Transcript of proceedings on 24 March 2016 at PN11364 – PN11368.
[276] Transcript of proceedings on 24 March 2016 at PN11370.
[277] Transcript of proceedings on 24 March 2016 at PN11379 – PN11382.
[278] Transcript of proceedings on 24 March 2016 at PN11387-11394.
[279] Transcript of proceedings on 24 March 2016 at PN11399.
[280] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 1.
[281] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 1.

there is an established link between casual employment and poorer health and safety outcomes.[282]

364. Dr Underhill acknowledges at the outset that casual employment is not homogenous.[283] Accordingly, literature regarding "temporary employment" arrangements in general terms, other than the alleged phenomenon of "permanent casual employment" is not necessarily of relevance to these proceedings.

365. Further, it is Dr Underhill's evidence that the "degree of job insecurity associated with casual employment will be influenced by institutional settings"[284] and that the health and safety outcomes experienced by casual employees are as a result of their job insecurity. The following exchange during cross examination is apposite:

> MR FERGUSON: So different institutional settings in different countries can impact on, I suppose, the level or nature of any link between temporary employment arrangements and occupational health and safety outcomes?---Yes.
>
> And institutional factors which could impact upon such matters could include, for example, the nature of unemployment or health care benefits available to casual employees?---Yes, and the nature of unemployment benefits.
>
> The level of regulatory protection for casual workers for matters such as discrimination, harassment or unfair dismissal could also have a bearing on the nature of any connection?---Yes. That's the nature of the institutional settings that are referred to.[285]

366. Therefore, conclusions reached in international literature regarding the health and safety outcomes of temporary labour in different institutional settings do not necessarily extend to the specific category of casual employees who would be eligible to convert to permanent employment pursuant to the unions' proposed claims. This is because the degree of job insecurity experienced by such employees (if any) may well differ.

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[282] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 2.

[283] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 3.

[284] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 3.

[285] Transcript of proceedings on 22 March 2016 at PN7879 – PN7881.

367. Dr Underhill acknowledges that casual employees who choose to work on such a basis are more likely to report better health outcomes.[286] Importantly, she also agreed that the level of instability and other job characteristics will have a bearing on whether an employee suffers from adverse health effects. Specifically, "the more stable the arrangements, the less adverse their health outcomes".[287] The Commission will of course appreciate the significance of this evidence, given that the ACTU and AMWU assert that their claims to introduce casual conversion provisions are directed towards casual employees who have stable working arrangements.

368. These factors present themselves as the obvious limitations of Dr Underhill's analysis. There is an insufficient connection that can be drawn between the literature to which she refers and the group of casual employees who would be eligible to convert to permanent employment pursuant to the provisions proposed by the unions, noting that of the 21 studies to which she refers only three deal exclusively with Australian data or experiences.[288] As the witness herself explains:

> The heterogeneity of casual employment … means that studies will report variable outcomes depending upon the demographics of the data sample and the institutional arrangements in which the study is set.[289]

369. In the submissions that follow, we deal with some of the literature upon which Dr Underhill relies, for the purposes of establishing that her evidence cannot be relied upon for the proposition that there is an established link between the employment of regular casual employees (i.e. the group of casual employees to whom the ACTU's claim relates) and poorer health and safety outcomes.

[286] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 10 and transcript of proceedings on 22 March 2016 at PN7886.

[287] Transcript of proceedings on 22 March 2016 at PN7888 – PN7889.

[288] Transcript of proceedings on 22 March 2016 at PN7899.

[289] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 10.

Benach et al (2004) Precarious employment: Understanding an emerging social determinant of health, Annual Review of Public Health, 35: 229 – 253

370. Dr Underhill seeks to rely on various elements of the 2014 article of Benach et al. Accordingly, we propose to deal with it in some detail such that the Commission might better understand the full context of the relevant aspects of the paper. We note at the outset that the witness accepted that the study was not focussed exclusively on the Australian context.[290]

371. The authors here consider the impact of "precarious employment" on an individual's health. In describing the concept of precarious employment, they state:

> Although there is still no full consensus on its definition, precarious employment might be considered a multidimensional construct encompassing dimensions such as employment insecurity, individualised bargaining relations between workers and employers, low wages and economic deprivation, limited workplace rights and social protection, and powerlessness to exercise workplace rights.[291]

372. They then go on to deal with research findings in respect of perceived job insecurity and temporary employment.

373. Perceived job insecurity is defined as "a perceptual phenomenon resulting from 'a process of cognitive appraisal of the uncertainty existing for the organisation and the employee'". Relevantly, it is inherently subjective in nature and "more likely to generate findings linked to the individual than to the employment relationship". As is explained by the authors, "job insecurity can arise independent of an objective threat and different individuals can react differently to the same objective threat".[292]

374. Temporary employment is said to include "all forms of nonpermanent contracts".[293] Whilst this might be said to include casual employment in the

[290] Transcript of proceedings on 22 March 2016 at PN7950.

[291] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 230.

[292] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 236.

[293] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 237.

Australian context, it is certainly not confined to such employment arrangements. Indeed the examples provided by the authors are fixed-term employment, project-specific employment, on-call arrangements and temporary-help agency jobs.[294] No distinction is made by the authors in their consideration of the various forms of temporary employment; a matter relevant to the table contained at paragraph 9 of Dr Underhill's statement, which has been extracted from this article.[295]

375. Importantly, the authors make remarks similar to those of Dr Underhill regarding the heterogeneity between different forms of temporary employment: (emphasis added)

> However, substantial heterogeneity exists between various temporary employment arrangements. Analyses contrasting permanent with (different types of) temporary employment do not coincide with a clear-cut division between precarious and nonprecarious employment: Some permanent workers will be precarious, some temporary workers will not, and this may vary within and between countries. Moreover, heterogeneity between countries regarding the levels of social protection and workers' rights limits the generalizability of research findings and cross-national comparisons.[296]

376. Consistent with this, the authors concluded that:

> Employment arrangements need to be understood as part of a progressive continuum from extreme forms of precariousness toward more secure forms such as permanent full-time employment.[297]

Virtanen et al (2005) Temporary employment and health: a review, International Journal of Epidemiology, 34(3): 610 - 622

377. At paragraph 4 of Dr Underhill's statement, she relies on a "meta-analysis" conducted in 2005, that purports to have "confirmed the relationship between

[294] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 237.

[295] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 234.

[296] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 237.

[297] Benach et al (2004) *Precarious employment: Understanding an emerging social determinant of health*, Annual Review of Public Health, 35: 245.

temporary employment and poorer health and safety, including increased psychiatric morbidity and occupational injuries".[298]

378. The paper is a review of reports dealing with temporary employment and health.[299] Those reports do not all deal with the Australian context, as acknowledged by Dr Underhill.[300] Temporary employment is defined by the authors as "paid employment relations other than those with unlimited duration, including fixed-term and subcontracted jobs, as well as work done on projects, on call and through temporary-help agencies".[301] Self-evidently, the group of employees considered in this review is different to the casual employees with whom the ACTU and AMWU's claims are concerned.

379. This is reflected in Table 1,[302] which sets out the studies relied upon and that report an association between temporary employment and health status. A review of the column titled "type of temporary employment" reveals that not one of the studies there referred to concerns casual employment as we know it.

380. In any event, the authors make the following important observations: (emphasis added)

> However, not all temporary jobs necessarily provide inferior status and high insecurity, and some research has suggested that temporary work benefits workers when it allows them to control their work time, sample a variety of work experience, and use their temporary job as a stepping stone into permanent employment. The health effects of temporary employment may also be dependent on the degree of instability in a temporary job. Furthermore, it has been suggested that the health effects of temporary employment may be outcome-specific and that the work conditions of health and temporary workers may depend on the social and environmental context.[303]

[298] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 4.

[299] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 611.

[300] Transcript of proceedings on 22 March 2016 at PN7952.

[301] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 610.

[302] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 612 – 614.

[303] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 610.

381. They also acknowledged that a "high degree of heterogeneity" exists between the studies[304] considered and that "no agreement exists whether temporary employment is a health risk"[305].

382. The authors conclude that:

> Although many studies have been conducted, more research is still needed before firm conclusions can be drawn about the relationship between temporary employment and health.[306]

383. The analysis of Virtanen et al does not stand for the bold proposition made by Dr Underhill at paragraph 4 of her statement. To the extent the authors' findings are relevant to these proceedings, they are qualified in a significant way.

Marucci – Wellman et al (2014) *Work in multiple jobs and the risk of injury in the US working population*, American Journal of Public Health, 104(1): 134 - 142

384. Dr Underhill asserts that seeking to overcome the insecurities associated with casual employment "compounds other risks through incremental fatigue".[307] The basis for this is an article that utilises information from the National Health Interview Survey. That data is a "strategically weighted sample" that is "designed to produce national estimates representative of the US civilian, noninstitutionalised population on a broad range of health topics".[308]

[304] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 617.

[305] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 620.

[306] Virtanen et al (2005) *Temporary employment and health: a review*, International Journal of Epidemiology, 34(3): 620.

[307] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 5.

[308] Marucci – Wellman et al (2014) *Work in multiple jobs and the risk of injury in the US working population*, American Journal of Public Health, 104(1): 134.

385. Whilst the data collected included information regarding the different forms of employment, the authors do not draw any conclusions by reference to them. Instead they state:

> However, there is no way for us to evaluate the effect on injury risk to [multiple job holders] attributable to these characteristics …[309]

386. Noting the observations above and the fact that the study conducted related only to employees engaged in the United States, the research here undertaken does not provide a proper basis for the statement made by Dr Underhill, which purports to relate generally to all casual employees engaged in the Australian workforce.

Mauno et al (2015) The prospective effects of work-family conflict and enrichment on job exhaustion and turnover intentions: comparing long-term temporary vs. permanent workers across three waves, Work & Stress: An International Journal of Work, Health and Organisations, 29(1), 75 – 94

387. This article is cited by Dr Underhill as underpinning the argument that:

> The corrosive effects of the longer term job insecurity spill-over to create work/life family pressures as the consequential financial insecurities create barriers to achieving financial security in housing, education and the like.[310]

388. This study investigated "long-term temporary workers" employed by Finnish universities.[311] As is acknowledged by the authors, the sample utilised is not representative.[312] The basis upon which Dr Underhill seeks to apply the findings of this study to the Australian casual workforce, employed in a broad range of industries and occupations, is not at all apparent.

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[309] Marucci – Wellman et al (2014) *Work in multiple jobs and the risk of injury in the US working population*, American Journal of Public Health, 104(1): 141.

[310] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 5.

[311] Mauno et al (2015) *The prospective effects of work-family conflict and enrichment on job exhaustion and turnover intentions: comparing long-term temporary vs. permanent workers across three waves*, Work & Stress: An International Journal of Work, Health and Organisations, 29(1), 75.

[312] Mauno et al (2015) *The prospective effects of work-family conflict and enrichment on job exhaustion and turnover intentions: comparing long-term temporary vs. permanent workers across three waves*, Work & Stress: An International Journal of Work, Health and Organisations, 29(1), 90.

Tsuno et al (2015) Socioeconomic determinants of bullying in the workplace: A national representative sample in Japan

389. Dr Underhill relies on the above research article in support of the proposition that job insecurity continues to casual workers "being more susceptible to other risks, such as bullying and harassment, and unwanted sexual advances, exposing them to greater risk of poor mental health".[313]

390. The authors of this article based their findings on a questionnaire of 5000 residents of Japan.[314] They make certain findings regarding "temporary workers", who are described as follows:

> Temporary workers ("Haken shain") represent one category of non-regular work. They consist of workers who are dispatched from agencies to work in organisations on a temporary basis. In addition to their lower position in an organisation, dispatched workers are often seen as "someone from outside". Particularly in the context of Japanese culture – which is group-oriented – the temporary worker is at risk of being doubly distanced from his peers, both in terms of the interiority of his social status within the organisation, but also in terms of the distinction between outsiders versus insiders.[315]

391. Dr Underhill has not provided any explanation of the relevance of a study of Japanese workers in very different institutional and cultural settings. Furthermore, the excerpt above indicates that the concept of "temporary workers" is not aligned with the category of casual employment with which we are here concerned.

Ervasti et al (2014) Is temporary employment a risk factor for work disability due to depressive disorders and delayed return to work? The Finnish public sector study, Scandinavian Journal of Work Environment and Health, 40(4): 343 – 352

392. The article by Ervasti et al is relied upon by Dr Underhill in support of her view that certain pressures associated with casual employment "have been linked

[313] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 5.

[314] Tsuno et al (2015) *Socioeconomic determinants of bullying in the workplace: A national representative sample in Japan,* p.1.

[315] Tsuno et al (2015) *Socioeconomic determinants of bullying in the workplace: A national representative sample in Japan,* p.2.

to higher levels of depressive symptoms which may continue through to longer term disabilities and difficulties returning to work post workplace injury".[316]

393. The conclusions reached by the authors of this article are based on a study of Finnish public sector employees.[317] We return to Dr Underhill's observations regarding the heterogeneity of casual employment and the bearing that institutional settings have on the health outcomes of casual employees. This necessarily means that findings in respect of depressive disorders and return to work rates based on temporary employees (defined as those whose employment contract is of a fixed duration set by the employer[318]) employed in Finland by the public sector cannot be assumed to have any relevance to the Australian casual workforce. Indeed Dr Underhill's opening propositions would suggest that they are *not* relevant to these proceedings and cannot be relied upon.

Quinlan et al (2009) Overstretched and unreciprocated commitment: reviewing research on the occupational health and safety effects of downsizing and job insecurity, International Journal of Health Services, 39(1): 1 – 44

394. Dr Underhill expresses the view that casual employees are "less likely to have access to information about the workplace health and safety environment, due to both exclusion from consultative processes (at times linked to shift arrangements), lower levels of task and OHS training and instruction, and less social support at work".[319]

395. The above article that she cites in support of this proposition relates to research into the occupational health and safety effects of both downsizing

[316] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 5.

[317] Ervasti et al (2014) *Is temporary employment a risk factor for work disability due to depressive disorders and delayed return to work? The Finnish public sector study*, Scandinavian Journal of Work Environment and Health, 40(4): 343.

[318] Ervasti et al (2014) *Is temporary employment a risk factor for work disability due to depressive disorders and delayed return to work? The Finnish public sector study*, Scandinavian Journal of Work Environment and Health, 40(4): 345.

[319] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 6.

and job insecurity. Of the 86 studies that were considered, only five were conducted in Australia.[320]

396. In addition, it is not clear that the reference to "temporary employment" incorporates the nature of casual employment that is relevant to these proceedings. Further, we note the following important paragraph that confirms the absence of research confirming the occupational health and safety effects of "temporary employment":

> The review revealed a number of critical gaps requiring further research attention. At the same time, there is far more extensive research into OHS effects for downsizing/restructuring than is the case for neoliberal business and work practices, including subcontracting, home-based work, permanent part-time work, and temporary employment. Even for the latter (but more especially for practices such as self-employment, subcontracting, and part-time work) there seems to be a more rapid accretion of research into downsizing and job insecurity, so this gap shows no sign of narrowing. Put in context, there is an urgent need for more research in these areas, including more differentiated studies (comparing a range of different work arrangements rather than just two or three) and longitudinal studies that provide further insights into causal factors and spillover effects. Researchers need to give serious attention to this if the full effects of precarious employment on health are to be better understood. [321]

Fabiano et al (2008) A statistical study on temporary work and occupational accidents: specific risks and risk management strategies, Safety Science, 46: 535 - 544

397. Dr Underhill cites the above article in order to establish that:

- A Spanish study found that temporary workers experienced an injury rate three times that of permanent employees; and
- Italian studies have confirmed similar injury rates.[322]

398. Apart from the obvious arguments as to the relevance of studies concerning employees engaged in Spain and in Italy, we also note that in this article,

[320] Quinlan et al (2009) *Overstretched and unreciprocated commitment: reviewing research on the occupational health and safety effects of downsizing and job insecurity*, International Journal of Health Services, 39(1): 5.

[321] Quinlan et al (2009) *Overstretched and unreciprocated commitment: reviewing research on the occupational health and safety effects of downsizing and job insecurity*, International Journal of Health Services, 39(1): 10.

[322] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 6.

"temporary work" refers to that which is "supplied by temporary-help agencies and sometimes referred to as 'job in leasing'".[323] Such working arrangements might be akin to what is here considered employment via a labour hire agency. The findings of this study therefore have narrow application. Without more, it cannot be assumed that they are relevant to the proceedings before the Commission.

Saloniemi et al (2010) Do fixed-term workers have a higher injury rate?, Safety Science, 48: 693 – 697

399. Dr Underhill's reliance on this article[324] is undermined by the observations made by its authors in the following terms: (emphasis added)

> .. not even escalating globalisation has been able to homogenise all the labour market structures, so national differences remain. … [325]

400. Further, the authors ultimately reached the following conclusion: (emphasis added)

> The aim of this paper was to investigate the relationship between the incidence of occupational injuries and the type of employment contract. The majority of earlier studies gave us reason to formulate the hypothesis that there was a positive association between fixed term employment and the occurrence of injuries at work. …
>
> Still, our results, while reflecting the situation in Finland, did not confirm the hypothesis of a positive link between fixed-term employment and injuries.[326]

Elsa Underhill - the impact of casual employment on mental health

401. In our submissions of 26 February 2016, Ai Group sought to rely on a paper by Professor Sue Richardson, Laurence Lester and Guangyu Zhang titled: *Are Casual and Contract Terms of Employment Hazardous for Mental Health in Australia*?.

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[323] Fabiano et al (2008) *A statistical study on temporary work and occupational accidents: specific risks and risk management strategies*, Safety Science, 46: 535.

[324] Statement of Elsa Underhill, dated 10 October 2015 at paragraph 6.

[325] Saloniemi et al (2010) *Do fixed-term workers have a higher injury rate?*, Safety Science, 48: 694.

[326] Saloniemi et al (2010) *Do fixed-term workers have a higher injury rate?*, Safety Science, 48: 696.

402. This paper was put to Dr Underhill during cross examination, in response to which she identified that the version of the paper provided to the Commission may not have been subject to a peer-review process and formally published. The Commission requested that we ascertain the status of the document.

403. The paper, as published in the Journal of Industrial Relations can be found at **Attachment 16A**. The conclusions reached by the authors do not deviate substantively from those that appeared in the earlier version of the paper we provided.

404. The following extract provides a useful synopsis:

> Abstract: The risk that flexible forms of employment are harmful to the health of workers is a major public health issue for the many countries, including Australia, where such forms of employment are common or have been growing. Casual, contract and part-time employment in Australia rose rapidly in the decade to 1998 and remains high at 40% of employees in 2011. We investigate the impacts on mental health of employment on these terms and of unemployment. We use nine waves of panel survey data and dynamic random-effects panel data regression models to estimate the impact on self-rated mental health of unemployment, and of employment on a part-time, casual or contract basis, compared with permanent full-time employment. We control for demographic and socio-economic characteristics, occupation, disabilities status, negative life events and the level of social support. We find almost no evidence that flexible employment harms mental health. Unemployed men (but not women) have significantly and substantially lower mental health. But among the employed, only men who are on fixed-term contracts, most especially graduates, have lower mental health than those who are employed on full-time permanent terms. Women have significantly higher mental health if they are employed full time on casual terms. [327]

405. The paper goes on to deal with these issues in greater detail: (emphasis added)

> Australia is an interesting case. There has been an increase in flexible employment, and it remains at high levels. However, there are distinctive protections against, and compensation for, the risks of such employment that are provided by the welfare state and the industrial relations system: we expect these to ameliorate their adverse consequences for workers. First, neither health care nor unemployment benefits are tied to prior or current employment (unlike the insurance schemes variously used in North America and Europe). Second, the industrial relations system requires that casual employees be paid at a higher hourly rate than permanent workers doing the same work, in explicit compensation for the lack of security and paid leave. The typical 'casual premium' is 20–25% of the hourly wage. It is being progressively

[327] Richardson et al (2012) *Are Casual and Contract Terms of Employment hazardous for Mental Health in Australia?*, Journal of Industrial Relations 54(5): 557.

raised to 25% for all modern awards. In addition, employers are equally obligated to contribute to the individual superannuation accounts of casual workers as for permanent workers. Third, casual workers have the same protections as permanent workers against unfair dismissal and discrimination. Fourth, casual employees are entitled to compassionate and carers' leave, although, unlike permanent employees, this is unpaid. They are entitled to penalty rates for work done outside normal business hours and, in most cases, a minimum shift of three hours.

…

An important consequence of the conditions surrounding casual and contract employment in Australia is that these forms of employment might reasonably be preferred by some workers, including people with significant caring responsibilities, workers approaching retirement and full-time students. Casual jobs are not necessarily bad jobs taken because a permanent job is not available.[328]

406. The authors ultimately conclude as follows:

We employed nine waves of nationally representative panel data, for Australia, to examine the impacts of unemployment, or employment on fixed-term contract, part-time or casual terms, on the mental health of female and male employees. The comparison was with those employed on permanent full-time terms.

We find almost no evidence that casual or fixed-term contract employment is harmful to the mental health of women or men. Indeed, the analysis suggests that women have higher mental health if employed full time on a casual contract, including those who did not complete high school. This latter finding is reassuring, since employment on casual terms is particularly concentrated among those who did not complete high school and they show evidence of relatively high persistence in this form of employment. Surprisingly, for women, even being unemployed does not significantly reduce their mental health. As expected, the same cannot be said for men, for whom unemployment seems to be quite harmful. With few exceptions, however, the flexible forms of employment are not harmful to mental health, even for men.

The question that we have explored in this research is whether the objective characteristics of the employment relationship – the contractual form of employment – are systematically associated with better or worse mental health outcomes for workers. Our interest in this stems from the substantial growth in employment on flexible terms, and the concern that these are not healthy ways of employing people. The international literature is ambiguous in its findings. Our conclusions add weight to the view that flexible forms of employment need not be harmful to health. This does not mean that other psychosocial aspects of employment, such as perceived job insecurity, long hours of work, high demands and low levels of autonomy, are harmless. It just means that any such harmful features are not distinctively linked to objective flexible forms of employment. We think it is reasonable to conclude that the many protections that flexible workers have in Australia diminish the risk of harm that they face.

Our findings do not demonstrate that no one suffers from being employed on casual or contract terms. Rather, we interpret the results as showing that if some are

[328] Richardson et al (2012) *Are Casual and Contract Terms of Employment hazardous for Mental Health in Australia?*, Journal of Industrial Relations 54(5): 560 – 561.

harmed, others benefit, so that on average there is no systematic relationship. The particular conditions around employment on casual and contract terms in Australia – in particular, the pay premium for casual employment and the shared access to other employment benefits such as unfair dismissal protections, superannuation contributions, health and unemployment benefits – together with the flexibility they offer (casual) and access to otherwise good jobs (contract), means that for some people these are the preferred forms of employment, or at least are not on balance harmful.

Our results also support previous research which shows that mental health depends importantly on individual attributes and circumstances – and, in particular, adverse life events, disability and social support. It also shows that some work conditions do matter, including a negative impact from working longer hours than preferred and from financial stress.

It appears that the protections offered to Australian flexible workers, combined with their own social support and resilience, are sufficient to ameliorate any harmful effects of employment on casual and fixed contract terms. Australia has been called 'the workers' welfare state' (Castles, 1985). Perhaps it still is.[329]

407. Whilst Dr Underhill made some brief remarks regarding the paper, she accepted that her reservations did not impact upon the findings made by the authors but simply queried the explanation provided by the authors for their findings.[330]

Brian Howe

408. In his statement, Mr Brian Howe states that he has been "asked to write a report about the impact of long term casualisation on both the individual and society and the implications of not having a deeming casual conversion clause in Modern Awards".[331] The alleged "report" appears to be set out at paragraphs 10 to 47 of the statement.

409. The statement reads like a short essay which cites a small number of selective references to research in order to back up a series sweeping generalisations and personal views. Given the nature of the content, the Commission should not give the statement any weight. Mr Howe also refers to the Lives on Hold Report which is addressed in chapter 19 below.

[329] Richardson et al (2012) *Are Casual and Contract Terms of Employment hazardous for Mental Health in Australia?*, Journal of Industrial Relations 54(5): 574 – 575.

[330] Transcript of proceedings on 22 March 2016 at PN8197 – PN8198.

[331] Witness statement of Brian Howe, dated 11 November 2015 at paragraph 1.

17. THE AMWU'S LAY WITNESS EVIDENCE

410. We here consider the evidence of each of the AMWU's lay witnesses and subsequently seek to summarise their evidence with reference to the AMWU's claim to insert new casual conversion provisions and vary existing minimum engagement/payment provisions.

Peter Bauer and Simon Hynes

411. Peter Bauer is the Assistant State Secretary for the Manufacturing Division of the AMWU South Australian Branch.[332] His evidence goes to a dispute between the union and Christie Tea Pty Ltd (**Christie Tea**) regarding the company's refusal to convert three casual employees to whom the FBT Award applied.

412. Simon Hynes is one of the three casual employees of Christie Tea referred to above. It is his evidence that he sought to convert to permanent employment pursuant to the relevant modern award however his request was refused, in part, because the "contracts that the company have were reviewed every twelve months".[333] The AMWU, on behalf of Mr Hynes, filed a dispute. Commissioner Hampton made several recommendations.[334] Mr Hynes remained a casual employee and his employment was not consequently converted.[335]

413. Christie Tea gave three reasons for its refusal to convert the relevant employees:[336]

- The desire to treat all its employees fairly and equally.
- A mixture of permanent and casual employment arrangements will give rise to disharmony and dissatisfaction amongst the majority of

[332] Statement of Peter Bauer, dated 8 October 2015 at paragraph 2.
[333] Statement of Simon Hynes, dated 12 October 2015 at paragraph 7.
[334] Statement of Simon Hynes, dated 12 October 2015 at paragraph 9.
[335] Statement of Simon Hynes, dated 12 October 2015 at paragraph 10.
[336] Statement of Peter Bauer, dated 8 October 2015 at Appendix B.

employees and will lead to a decrease in operational efficiencies, which will then increase costs and "put supply contracts at risk".

- Christie Tea is a contract packer that holds several short term supply contracts that do not have guaranteed supply volumes. This results in "very busy and very quiet times which [the business] must manage responsibly".

414. The business clearly gave detailed consideration to the requests made, sought legal advice and turned its mind to the consequences that the conversions sought would have on the business.[337]

415. During one of the conferences listed before Commissioner Hampton in relation to the dispute notification filed by the AMWU, the company explained the variability of production levels it faces and accordingly, the operational reasons for which it requires access to casual labour:

> Updated data was submitted to the Commissioner demonstrating the actual production hours worked for every month since the commencement of the Modern Award and production employee's total hours during the same period. This data showed the variable nature of our work, monthly production hours ranged from 1022 to 2651 but averaged about 2000 per month. Total individual employee hours for the last 17 months varied between 1769 and 2267 for production/machine operators and an average of 24.45 per week.[338]

416. Christie Tea repeatedly expressed the view in the correspondence attached to Mr Bauer's statement that the part-time provisions contained in the award would impose inflexibility and additional costs that could not be sustained by the business.

417. The statements of these witnesses represent the only evidence in these proceedings of a dispute that has been filed in the Commission in respect of a refusal to convert casual employees pursuant to a modern award. We also note that the union did not seek to make an application to a court of

[337] Statement of Peter Bauer, dated 8 October 2015 at Appendix G.

[338] Statement of Peter Bauer, dated 8 October 2015 at Appendix N.

competent jurisdiction in pursuance of this dispute, despite Commissioner Hampton identifying it as one of the options available to it.[339]

James Fornah

418. James Fornah commenced his employment with the Provedore Group as a casual employee, with the assistance of a job placement agency that offers free services to refugees.[340] He has since been converted to a permanent position.[341] Mr Fornah's evidence provides an example of casual employment providing a pathway to permanent employment for a new entrant to the Australian workforce. The FBT Award applies to him.[342]

419. As we later submit in respect of Mr Malone's witness statement, Mr Fornah's testimony indicates that the dispute settlement procedure contained in the FBT Award is operating effectively, to the extent that it culminated in the resolution of any dispute regarding Mr Fornah's entitlement to request conversion pursuant to clause 13.4 of the award.

420. Clause 10.1 of the award requires that in the event of a dispute about a matter under the award, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee(s) concerned and the relevant supervisor. If such discussion does not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee(s) concerned and more senior levels of management as appropriate. Mr Fornah's evidence confirms that the dispute settlement procedure was successfully implemented to resolve issues pertaining to the conversion of his employment status as well as that of another employee, without the need to escalate the dispute through subsequent stages of the procedure set out in clause 10.1.

[339] Statement of Peter Bauer, dated 8 October 2015 at Appendix F.

[340] Statement of James Fornah, dated 12 October 2015 at paragraphs 2 and 11.

[341] Statement of James Fornah, dated 12 October 2015 at paragraph 20.

[342] Statement of James Fornah, dated 12 October 2015 at paragraph 12.

421. Mr Fornah provides some details in respect of his financial situation.[343] It should be noted that his complaints are made in the present tense in the context of his now permanent employment by Provedore.

422. The AMWU relies on paragraphs 24 and 25 of Mr Fornah's statement in support of the propositions that:

- casual employees are not in fact free to refuse work; and
- casual employees are required to "apply for leave".[344]

423. To this we say that paragraph 24 of Mr Fornah's statement is, again, written in the present tense and is not reflective of whether he was similarly concerned whilst previously employed as a casual employee. Furthermore, the basis for this fear or the consequences that he is fearful of are not evident on the face of his statement. There is no proper basis for inferring, as the AMWU calls upon the Commission to do, that he was fearful of refusing work during his period of casual employment and/or that any such fear was attributable to the basis upon which he was engaged.

Heidi Kaushal

424. Heidi Kaushal is the Regional Secretary of the Food and Confectionary Division of the AMWU NSW Branch. She was once employed by a labour hire company by the name of Skilled Engineering and was performing work for Cerebos. After three months, she was engaged directly by Cerebos on a casual basis for two months and was thereafter converted to permanent employment. Ms Kaushal acknowledged during cross examination that she was "in a position to be offered employment with Cerebos because [she] had been working at that site already as a casual with Skilled Engineering".[345] Her evidence is but one example of engagement via a labour hire provider giving

[343] Statement of James Fornah, dated 12 October 2015 at paragraphs 15 and 23.

[344] AMWU's Response to the FWC Issues Paper, dated 14 June 2016 at paragraph 1.22.

[345] Transcript of proceedings on 16 March 2016 at PN3484.

rise to an opportunity to ongoing employment by virtue of the experience and knowledge acquired by the employee.

425. Ms Kaushal's evidence in respect of Agrana is of little relevance to the claims now before the Commission, as was evident in the follow exchange during the proceedings: (emphasis added)

> VICE PRESIDENT HATCHER: Thank you. Before we go to you, Mr Ferguson - Mr Nguyen, what are paragraphs 22 and 23 actually relevant to?
>
> …
>
> DEPUTY PRESIDENT BULL: If your case is successful, you're not going to make someone a permanent after five months, are you?
>
> MR NGUYEN: Not necessarily, but it doesn't necessarily have to be that in this particular circumstance he would have been permanent and protected; but if it's accepted by the Commission that casuals - whether or not they can or cannot be made permanent - can be treated this when they're casuals, then, I mean, that - - -
>
> DEPUTY PRESIDENT KOVACIC: But, Mr Nguyen, the scenario here is one of where the host employer - and I presume that's the company that's referred to or is it the labour hire company that was telling him - - -
>
> MR NGUYEN: The evidence from Ms Kaushal is that he was no longer required by the host company.
>
> DEPUTY PRESIDENT KOVACIC: So if your claim was successful, nonetheless it wouldn't preclude a host employer - whether it's this particular employer or another employer - from saying to a labour hire company, "We no longer wish to have Mr or Ms A or B working on our site."
>
> VICE PRESIDENT HATCHER: Whether that person was permanent or casual.
>
> DEPUTY PRESIDENT KOVACIC: Yes.
>
> VICE PRESIDENT HATCHER: I mean, it's not an unknown problem, but - - -
>
> MR NGUYEN: I think we agree that what you put is correct, but our case is that a casual who has worked for a certain period of time could have been made permanent. In this circumstance, he hadn't made the qualifying period that we're claiming, but in circumstances where he may have worked for a period of time, then the fact that he raised this issue would not have been an issue if he was permanent.
>
> VICE PRESIDENT HATCHER: Let's say he had been there eight months, not five months, and had been converted to permanent employment under your proposed clause. If the alleged threatening remark is made by the host employer and the host employer, as is common in these arrangements, has a veto over who works on the site, then they would say to the labour hire company, "We don't want this person here

any more", and presumably that would be the end of the engagement regardless of whether that person was casual or permanent.[346]

426. We turn now to deal with that part of Ms Kaushal's evidence that pertains to the Kelso Site of Simplot, at which employees are engaged in the manufacture of frozen food.[347]

427. It is Ms Kaushal's evidence that 13 eligible casual employees at the relevant site sought to convert to permanent employment however none were so converted.[348] We trust that the Commission recalls Ai Group's cross examination of Ms Kaushal well. It brought into sharp focus the unreliability of mere assertions made by union officials that an unidentified group of casual employees performed, in general terms, regular hours of work and were accordingly eligible to seek conversion. As was revealed during the proceedings before the Commission, a proper review of the relevant records can in fact result in a very different assessment of whether a particular employee has the right to seek conversion under the relevant industrial instrument. It highlights the need to adopt a rigorous approach to this analysis. Quite clearly, the Commission cannot rely on the hearsay evidence of union officials who claim that certain casual employees were eligible to convert based on prior representations made to them by those employees.

428. The *AMWU, CEPU and Simplot Australia Pty Ltd National Collective Agreement 2014 – 2017*[349] applies to the relevant group of casual employees employed by Simplot to whom Ms Kaushal refers.[350] It provides for a right to seek conversion to permanent employment at clauses 14.3(c) and 14.3(d). Irrespective of which of those two provisions apply, the right to elect to convert is afforded to casual employees other than irregular casual employees. An irregular casual employee is defined as one who has been "engaged to perform work on an occasional or non-systematic or irregular basis". The

[346] Transcript of proceedings on 16 March 2016 at PN3524 – PN3546.

[347] Transcript of proceedings on 16 March 2016 at PN3548.

[348] Witness statement of Heidi Kaushal, dated 14 March 2016 at paragraphs 24 – 26.

[349] Exhibit 36.

[350] Transcript of proceedings on 16 March 2016 at PN3554.

definition is in the same terms as that sought by the AMWU in its claim now before the Commission.

429. Attached to Ms Kaushal's statement is a form completed by Amanda Mckenzie, one of the 13 casual employees, purporting to exercise her right to elect to convert to permanent employment. The subsequent attachment reveals that her request was refused by the business, as "there [were] no permanent positions available". The letter goes on to explain the company's practice of utilising casual labour: (emphasis added)

> The Company has been utilising casual labour due to a number of operational reasons including absenteeism and leave, production seasonal peaks and the Aldi Repack. However, the forecasted production plan and processes mean we are not in a position to recruit for permanent production positions at present. Further, we are yet to confirm additional forecast product volume to justify an increase in our permanent workforce numbers.

430. This correspondence provides an important insight into some of the reasons for which a food production operation requires the flexibility provided by a casual workforce: the need to temporarily replace absent employees, fluctuations in production due to seasonal factors and varying customer demand.

431. During cross-examination, Ms Kaushal confirmed that she had not inspected Ms Mckenzie's pay records prior to submitting her election to convert[351] but accepted that a timecard[352] provided to her during the proceedings reflected Ms Mckenzie's hours of work.[353] It became apparent as Ms Kaushal was taken through the timecard that the number of shifts worked by Ms Mckenzie and the total hours of work performed each week varied significantly.[354] The table below provides a summary of this data from 14 July 2014 – 5 April 2015,

[351] Transcript of proceedings on 16 March 2016 at PN3559 – PN3567 and PN3600.

[352] Exhibit 37.

[353] Transcript of proceedings on 16 March 2016 at PN3599. See also PN3646.

[354] Transcript of proceedings on 16 March 2016 at PN3568 – PN3598.

which reflects the nine month period preceding the date upon which her request to convert was refused:[355]

	Dates	No. of Shifts	Total Hours	Time Worked[356]
1	14 July 2014 – 20 July 2014	2	16.28	Tues 0710 – 1530 Wed 0700 - 1600
2	21 July 2014 – 27 July 2014	3	17.45	Mon 1130 – 1530 Tues 0830 – 1330 Fri 0700 – 1600
3	28 July 2014 – 3 August 2014	2	9	Wed 0830 – 1330 Thurs 1930 – 2230
4	4 August 2014 – Sunday 10 August 2014	3	27.85	Wed 0700 – 1600 Thurs 0600 – 1600 Fri 0530 – 1600
5	11 August 2014 – 17 August 2014	3	24.23	Wed 0700 – 1600 Thurs 0700 – 1600 Fri 0730 – 1520
6	18 August 2014 – 24 August 2014	3	25.85	Wed 1600 – 0100 Thurs 1600 – 0100 Fri 1600 – 0100
7	25 August 2014 – 31 August 2014	4	30.35	Tues 0700 – 1600 Wed 0700 – 1600 Thurs 0830 – 1330 Fri 0700 – 1600
8	1 September 2014 – 7 September 2014	5	39.30	Mon 0700 – 1600 Tuesday 0700 – 1600 Wed 0700 – 1600 Thurs 0700 – 1230 Fri 0700 – 1600
9	8 September 2014 – 14 September 2014	2	10.95	Mon 1130 – 1530 Wed 0830 – 1600
10	15 September 2014 – 21 September 2014	1	8.45	Fri 0700 – 1600
11	22 September 2014 – 28 September 2014	4	31.8	Tues 0700 – 1600 Wed 0900 – 1600 Thurs 0700 – 1600 Fri 0700 - 1600
12	29 September 2014 – 5 October 2014	5	37.8	Mon 0700 – 1600 Tues 0700 – 1600 Wed 0700 – 1600 Thurs 0700 – 1600 Fri 1930 – 2330
13	6 October 2014 – 12 October 2014	2	16.9	Wed 0700 – 1600 Thurs 1600 – 0100

[355] Clause 14.3(c)(i) of the *AMWU, CEPU and Simplot Australia Pty Ltd National Collective Agreement 2014 – 2017* gives rise to a right to convert where a casual employee, other than an irregular casual employee, has been engaged for a sequence of periods of employment during a period of nine months.

[356] Exhibit 37 at page 8 – 14.

14	13 October 2014 – 19 October 2014	2	12.45	Tues 1200 – 1600 Wed 0700 – 1600
15	20 October 2014- 26 October 2014	3	26.35	Wed 0700 – 1600 Thurs 0600 – 1600 Fri 0700 – 1600
16	27 October 2014 – 2 November 2014	1	4	Wed 0700 – 1100
17	3 November 2014 – 9 November 2014	3	25.35	Tues 0700 – 1600 Wed 0700 – 1600 Thurs 0700 – 1600
18	10 November 2014 – 16 November 2014	0	0	
19	17 November 2014 – 23 November 2014	4	34.8	Tues 0700 – 1600 Wed 0700 – 1600 Thurs 0700 – 1600 Fri 0600 – 1600
20	24 November 2014 – 30 November 2014	5	40.3	Mon 0700 – 1600 Tues 0700 – 1600 Thurs 0700 – 1600 Fri 0600 – 1600
21	1 December 2014 – 7 December 2014	3	20.65	Thurs 0700 – 1600 Fri 1600 – 2345 Sat 1100 – 1600
22	8 December 2014 – 14 December 2014	5	34.85	Tues 0700 – 1600 Wed 0700 – 1600 Thurs 1600 – 0100 Fri 1930 – 2330
23	15 December 2014 – 21 December 2014	2	9.95	Mon 1100 – 1600 Wed 0700 - 1200
24	22 December 2014 – 28 December 2014	2	16.9	Mon 1600 – 0100 Tues 1600 – 0100
25	29 December 2014 – 4 January 2015	0	0	
26	5 January 2015 – 11 January 2015	2	16.9	Mon 0700 – 1600 Tues 0700 – 1600
27	12 January 2015 – 18 January 2015	4	30.85	Mon 0700 – 1600 Tues 0700 – 1600 Wed 0700 – 1600 Fri 0700 – 1600
28	19 January 2015 – 25 January 2015	5	42.82	Mon 0700 – 1600 Wed 0700 – 1600 Thurs 0700 – 1600 Fri 0700 – 1600
29	26 January 2015 – 1 February 2015	1	7.5	Wed 0700 – 1500
30	2 February 2015 – 8 February 2015	4	28.07	Tues 0900 – 1500 Wed 0700 – 1600 Fri 0700 – 1600
31	9 February 2015 – 15 February 2015	4	33.35	Tues 0700 – 1600 Wed 0530 – 1500 Thurs 0700 – 1600

32	16 February 2015 – 22 February 2015	4	33.85	Mon 0600 – 1500 Tues 0600 – 1500 Fri 0700 – 1600
33	23 February 2015 – 1 March 2015	5	34.85	Mon 0530 – 1500 Tues 0700 – 1600 Wed 0700 – 1600 Fri 1100 – 1500 Sat 0700 – 1300
34	2 March 2015 – 8 March 2015	3	21.4	Mon 0700 – 1600 Tues 0700 – 1600 Fri 0700 – 1130
35	9 March 2015 – 15 March 2015	6	37.84	Mon 0900 – 1600 Tues 0900 – 1500 Wed 0700 – 1530 Thurs 0700 – 1100 Fri 0700 – 1600
36	16 March 2015 – 2 March 2015	1	6.45	Fri 0900 – 1600
37	23 March 2015 – 29 March 2015	6	44.8	Mon 0900 – 1600 Tues 0700 – 1600 Wed 0900 – 1500 Thurs 0700 – 1600 Fri 0700 – 1600
38	30 March 2015 – 5 April 2015	4	30.85	Mon 0700 – 1600 Tues 0700 – 1600 Wed 0900 – 1500 Thurs 0700 – 1600

432. As is evident from the table, the number of shifts worked in a week, the total number of hours worked in a week, the days upon which those shifts were worked and the starting/finishing times varied considerably. There is no apparent regularity to Ms Mckenzie's engagement. In our view, she was engaged to perform work on a non-systematic basis or an irregular basis and accordingly, Ms Mckenzie was not entitled to request conversion to permanent employment under the terms of the agreement.

433. We note that the union did not contest Simplot's refusal of Ms Mckenzie's request. Ms Kaushal confirmed, in response to a question from the Full Bench, that the dispute settlement procedure in the enterprise agreement was not invoked.[357]

434. The AMWU's reliance on Ms Kaushal's evidence in respect of Ms Mckenzie would suggest, however, that the union takes the view she did not meet the definition of "irregular casual employee" and accordingly, was entitled to seek

[357] Transcript of proceedings on 16 March 2016 at PN3612.

to convert to permanent employment. This raises a secondary issue as to the basis upon which the casual conversion clause proposed by the AMWU would operate, noting that it contains the very same definition of "irregular casual employee".[358]

435. As the Commission is of course aware, the AMWU has sought a provision that would have the effect of "deeming" a casual employee, other than an irregular casual employee, to have converted to permanent employment unless the employee elects to remain engaged on a casual basis. The proposed clause 13.4(c) deals with the basis upon which the employee's engagement is converted: (emphasis added)

> An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full-time and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.[359]

436. The proposed clause presupposes some pattern or regularity in the employee's hours of work. We return later in this submission to the practical and mechanical difficulties that arise from the above provision in circumstances such as those of Ms Mckenzie. As was observed by Vice President Hatcher in respect of Mckenzie's timecard:

> … I mean, without saying what it shows, on one view it gives an interesting insight into some of the issues that arise from casual conversion, for example, defining regularity, irregularity and that sort of thing.[360]

David Kubli

437. David Kubli is a casual crane driver, forklift driver, oxy operator and hanger operator, employed by GB Galvanizing.

438. As the Commission will recall, Mr Kubli was not required for cross examination on the basis that the relevant parties agree that an enterprise agreement

[358] AMWU's Response to FWC Issues Paper, dated 14 June 2016 at page 132, clause 13.4(b).

[359] AMWU's Response to FWC Issues Paper, dated 14 June 2016 at page 132.

[360] Transcript of proceedings on 16 March 2016 at PN3641.

applies to him.[361] That enterprise agreement – the *GB Galvanizing Service Pty Ltd Collective Agreement 2012*[362] – was tendered into evidence.[363] By virtue of clause 9(a), no modern award is incorporated in the agreement by reference or otherwise. Further, the agreement does not contain a casual conversion provision.

439. Accordingly, Mr Kubli's evidence regarding his desire to convert to permanent employment and that of his colleagues,[364] is not relevant to any assessment that the Commission may seek to make of the efficacy of or compliance with pre-existing casual conversion provisions. Any requests to convert were not made pursuant to a *right* to elect to convert. In such circumstances, there is no obligation on an employer to acquiesce an employee's request, nor is there any express limitation placed on the circumstances in which an employer can refuse the request. For these reasons, the evidence should be disregarded.

Aaron Malone

440. Aaron Malone has been an organiser with the food division of the AMWU for just 19 months. His role appears to primarily relate to the recruitment and re-recruitment of members. Mr Malone's statement commences with evidence in respect of the Provedore Group.

441. That part of his statement that deals with the alleged "fear" experienced by the casual workforce[365] should be entirely disregarded. The basis upon which he formed this view is not made out in the statement. If his conclusions are based on that which was said to him by certain casual employees, it is hearsay evidence that cannot be tested given that the identity of the casual employees is not known. Such evidence is inherently prejudicial and unreliable.

[361] Transcript of proceedings on 16 March 2016 at PN3457.

[362] Exhibit 31.

[363] Transcript of proceedings on 16 March 2016 at PN3464.

[364] Witness statement of David Bernard Kubli, dated 7 October 2015 at paragraphs 20 – 28.

[365] Statement of Aaron Malone, dated 8 October 2015 at paragraphs 13 – 17.

442. Mr Malone expresses the view that "most of the casuals that were working there at the time were eligible" to convert.[366] Under cross examination, however, it became apparent that Mr Malone had reached this conclusion based simply on what was told to him by those employees and "management".[367] Neither his statement nor his oral testimony indicates that an analysis of the employee's records had been undertaken in order to ascertain whether they meet the definition of "irregular employee" at clause 13.4(k) of the FBT Award. Accordingly, his evidence reflects little more than his impression or opinion, absent any proper basis for it.

443. In any event, the evidence establishes that the employer was receptive to the concerns raised by Mr Malone and has since converted casual employees that have requested permanent employment.[368] This indicates that the operation of the dispute settlement procedure in modern awards, which first requires that the parties endeavour to resolve any matter by way of discussions at the workplace, is effective in addressing issues, to the extent that they might arise in specific workplaces, regarding the right to request conversion.

444. Mr Malone goes on to give evidence regarding Peshafruit, to which the FBT Award also applies. His evidence suggests that the vast majority of casual employees there engaged are employed by a labour hire provider. We cannot see the relevance of the evidence he gives regarding the desire of those casual employees to be employed on a permanent basis by Peshafruit. The unions' case does not seek to address such circumstances. That is, it would not provide a labour hire employee with a right to elect to convert to permanent employment with the host employer.

445. Furthermore, the evidence given is largely hearsay[369] and to a significant degree, retells prior representations made by unidentified employees. This

[366] Statement of Aaron Malone, dated 8 October 2015 at paragraph 20.

[367] Transcript of proceedings on 16 March 2016 at PN4835 – PN4838.

[368] Statement of Aaron Malone, dated 8 October 2015 at paragraph 20.

[369] Statement of Aaron Malone, dated 8 October 2015: second sentence of paragraph 33; first and second sentences of paragraph 34; final sentence of paragraph 34 after "casual loading"; paragraph

includes those elements of the statement that the AMWU seeks to rely upon.[370] Such evidence cannot be afforded any weight. By its very nature, it is inherently unreliable and difficult for opposing parties to test or contest.

Steven Murphy

446. Steven Murphy is the Assistant Secretary of the NSW Branch of the AMWU. His witness statement relays his experiences regarding two employers: MRI (Aust) Pty Ltd (**MRI**) and B&D Doors.

447. Mr Murphy's lengthy story-telling regarding his dealings with MRI essentially boils down to the following; some casual employees employed by MRI for a period exceeding 6 months identified that they have not been notified of their (alleged) right to convert to permanent employment, which has been raised by Mr Murphy with the employer.

448. This evidence is of little probative value in light of Mr Murphy's concession during cross examination that he had not undertaken an inspection of any of the relevant employees' records for the purposes of ascertaining whether they are in fact eligible to convert pursuant to clause 9.15 of the *MRI (Aust) Pty Ltd Collective Agreement 2011 – 2012* attached to this statement. That his understanding of their hours of work and by extension, whether they are an "irregular casual employee" is based entirely on what has been told to him. That is, it is hearsay.[371]

449. Mr Murphy's remaining assertions go to representations that have been made to him by unidentified employees of MRI and by senior personnel of MRI. We note that the AMWU seeks to rely on certain aspects of this evidence to establish the perceived consequences of raising this and other issues with

35; paragraph 36; second and third sentences of paragraph 37; second sentence of paragraph 38; first sentence o paragraph 39 after the words "over one year"; third and fourth sentences of paragraph 41; first sentence of paragraph 42 after "management structure"; third sentence of paragraph 42 and final sentence of paragraph 42.

[370] Statement of Aaron Malone, dated 8 October 2015 at paragraphs 34, 35, 37 and 41.

[371] Transcript of proceedings on 16 March 2016 at PN2958 – PN2963.

their employer. Much of this evidence is in the form of hearsay and should not be given any weight.[372]

450. We do not understand the relevance of Mr Murphy's evidence regarding B&D Doors to the AMWU's case. It serves only to establish that where it can be accommodated, an employer may decide to directly employ employees who are there engaged via a labour hire agency. This is an example of an instance in which casual employment by a labour hire agency aids as a pathway to permanent employment.

Liam Waite

451. Liam Waite is a casual graffiti removal specialist employed by a labour hire provider by the name of Concept Engineering. He is engaged at the Flemington Maintenance Centre of Sydney Trains.

452. In addition to the removal of graffiti, Mr Waite also performs project work "as/when required". He says that labour hire employees are "brought in" to perform such work.[373] The evidence suggests that such work is intermittent and undertaken as and when needed, necessitating flexible working arrangements and access to labour at varying times. It appears that Sydney Trains manages this aspect of their operations through the use of casual employees through a labour hire agency.

453. Mr Waite is not by any definition a "low paid" employee. He is paid an hourly rate of $35, which comes to 170% of the C10 rate[374]. He is paid additional overtime rates if he is so required to work.[375]

454. Mr Waite states that he has learnt through his union that he "could convert from the labour hire company (Concept Engineering) over to the host (Sydney Trains). The current Sydney Trains Agreement does not contain this

[372] Statement of Steven Murphy, dated 23 September 2015 at paragraphs 11, 27, 38 and 48.

[373] Statement of Liam Waite, dated 7 October 2015 at paragraphs 12 and 14.

[374] As at the time of drafting this submission, the C10 rate is $20.61 per hour.

[375] Statement of Liam Waite, dated 7 October 2015 at paragraphs 17 – 18.

clause".[376] The basis upon which this advice was provided to him is not set out in his statement. To the extent that it was based on a current modern award clause, it is inaccurate. Existing casual conversion provisions in the modern awards system do not provide such an entitlement. Nor do the instruments cited by Mr Waite and those attached to his statement reveal a right to request conversion from Concept Engineering to the host employer. It would appear to us that the advice provided to him by the union was misleading.

455. During an interview with Concept Engineering when it was recruiting for his current role, Mr Waite "understood that if the work was required and if [he] performed well then the position would be ongoing".[377] The basis upon which he formed this view is unknown. In any event, when he sought a letter from Concept Engineering one month after commencing in that role,[378] the correspondence went no further than to state that "when his position is reviewed later in the year, there is a chance that the position could go permanent".[379] That is, the letter does no more than to confirm the possibility that his employment could be converted. No assurance of conversion was given.

456. The evidence that Mr Waite goes on to give regarding his endeavours to speak with Sydney Trains "management" so as to convert to permanent employment is of little relevance to the claims before the Commission. As we have earlier submitted, the unions' case does not seek to address such circumstances. That is, it would not provide a labour hire employee with a right to elect to convert to permanent employment with the host employer. Further, his evidence cannot be relied upon to establish any factual proposition that the AMWU seeks to put regarding the operation of existing casual conversion provisions.

[376] Statement of Liam Waite, dated 7 October 2015 at paragraph 27.
[377] Statement of Liam Waite, dated 7 October 2015 at paragraph 29.
[378] Statement of Liam Waite, dated 7 October 2015 at paragraph 29.
[379] Statement of Liam Waite, dated 7 October 2015 at Attachment C.

Vinh Thi Yuen

457. Vinh Thi Yuen is an organiser with the Victorian Branch of the AMWU and gives evidence specific to two employers: Lite 'n' Easy and GB Galvanizing.

458. The witness' evidence in respect of casual employees engaged by Lite 'n' Easy can be given little weight. Whilst the meeting referred to was held with 60 – 80 casual workers[380], the evidence does not reveal:

- whether an award or enterprise agreement containing a casual conversion provision in fact applied to those employees;
- if so, the terms of that casual conversion provision and specifically, the relevant eligibility requirements in order for an entitlement to conversion to arise; or
- whether any of the employees present satisfied any such requirements. For instance, there is no suggestion that the witness undertook an analysis of the employees' hours of work or working patterns in order to ascertain their eligibility to convert.

459. The witness also alleges that one unidentified employee equated speaking with her employer with "another way of us getting out the door". The witness goes on to explain that he understood this to mean that the employee thought that if she spoke with her employer regarding an ability to convert to permanent employment, the employee would be "out of work".[381]

460. This element of the statement is quite clearly prejudicial. Not only is it hearsay, it makes reference to an anonymous individual as a result of which, the evidence cannot be tested. The Commission cannot have any confidence that this prior representation was in fact made or that it was made in the terms alleged.

[380] Witness statement of Vinh Thi Yuen, dated 6 October at paragraphs 5.

[381] Witness statement of Vinh Thi Yuen, dated 6 October at paragraphs 10 – 11.

461. The evidence in respect of GB Galvanizing faces similar deficiencies. Reference is made to a group of casual employees and the length of service of some such employees, however the evidence does not make clear whether these employees have any entitlement to request conversion.[382] We return to this issue again below.

462. The witness testifies that the "workers advised that if they wanted to have a holiday, they would need to resign and come back".[383] Little can be made of this statement. It constitutes hearsay, the identity of the casual employees who in fact made such an assertion is not known, the proportion of casual employees engaged at the workplace who claimed to have had such an experience is not set out and the precise meaning or implications of their complaint is unclear.

463. As for the evidence in respect of David Kubli, we refer to the submissions above. For the reasons we have there set out, Mr Kubli does not in fact have a right to elect to convert.

464. We make one final observation regarding the evidence in respect of GB Galvanizing. To the extent that the enterprise agreement[384] earlier identified also applies to the employees to whom this witness refers, the same conclusion must be reached in respect of the relevance of that evidence as that which we have earlier set out regarding Mr Kubli. That is, the evidence cannot be relied upon in support of any proposition made by the unions regarding the operation of pre-existing casual conversion provisions.

Deborah Vallance

465. Deborah Vallance has been employed by the AMWU in various roles since 1990. She is now the Occupational Health and Safety Coordinator of the union.[385] As there has been no such indication from the AMWU, we proceed

[382] Witness statement of Vinh Thi Yuen, dated 6 October at paragraphs 14.

[383] Witness statement of Vinh Thi Yuen, dated 6 October at paragraphs 15.

[384] Exhibit 31.

[385] Statement of Deborah Vallance, dated 8 October 2015 at paragraph 1.

on the basis that it does not seek to advance Ms Vallance's evidence as that of an expert.

466. It is important to note that Ms Vallance's experience relates primarily to the AMWU's membership and specifically, the manufacturing industry.[386] To the extent that she expresses a view about casual employment generally, it is not clear that she in fact has a proper basis for doing so.

467. Large parts of Ms Vallance's statement suffer from the same shortcomings as that of Dr Underhill. That is, the literature upon which she relies refers to "precarious work" generally which, on her own evidence, includes various forms or types of employment, of which casual employment is one. Furthermore, many of the studies relied upon do not deal specifically with the Australian context and accordingly, for the reasons we have earlier explained, are of limited relevance.

468. Ms Vallance refers to a survey conducted in 2012 by the AMWU.[387] There is no evidence before the Commission regarding the conduct of this survey or its raw results. That is, the basis upon which the sample of the survey was selected, the sample size, the industries in which the respondents were engaged, the modern awards by which they were covered, the type of work they performed, the extent to which the sample included labour hire employees, the medium by which the survey was conducted, the method by which respondents were invited to complete the survey, the extent to which respondents were union members, the manner in which the survey responses were captured, the means by which the results were reported and so on. Critically, in the absence of the raw data that underpins the results cited by Ms Vallance, this evidence cannot be tested. Accordingly, it should be given little weight.

469. In any event, the survey results do little more than to identify that a proportion of the casual employees that responded to the survey have not received

[386] Statement of Deborah Vallance, dated 8 October 2015 at paragraphs 1 and 5 – 10.

[387] Statement of Deborah Vallance, dated 8 October 2015 at paragraphs 35 – 36.

training. Ms Vallance does not deal with how this data compared with that in respect of other forms of employment. That is, her evidence does not establish that the relevant group of casual employees received lesser training than a comparable group of permanent employees. Moreover, neither the survey results nor Ms Vallance's interpretation of them founds a causal connection between the employees' employment on a casual basis and the level of training that they have received.

470. Ms Vallance goes on to refer to yet another survey that was conducted by the AMWU in 2015. It was distributed to "AMWU health and safety representatives". The responsibilities of such individuals, their experience, the level of interaction that they have with their membership and the nature of their role are not established by the evidence. Therefore, the basis upon which they have provided responses to this survey is entirely unclear.

471. Additionally, we make the same observations we have made in respect of the earlier survey to the extent that there is no further evidence regarding the conduct of the survey or the responses underpinning the selection of results cited by Ms Vallance. As a result, little confidence can be placed in them.

472. Should the Commission nonetheless consider the survey cited as valuable, we note the following results to which Ms Vallance refers:[388]

- The very vast majority of respondents (76%) indicated that casual/labour hire workers are provided with appropriate safety gear.
- 70% of respondents indicated that they have not noticed any pressures on casual/labour hire workers when compared to permanent workers.

473. The basis for the conclusion reached by Ms Vallance at paragraphs 47 – 48 of her statement is unclear. She asserts that converting casual employees to permanent employment would have a positive impact on the health and safety of casual workers. She does so without having given any consideration to the potential implications that might flow from such conversion (for instance, a

[388] Statement of Deborah Vallance, dated 8 October 2015 at paragraphs 39 – 41.

reduction to an employee's hourly rate of pay or the implications of an employer's inability to retain such an employee because there is no work to be performed). Further, her opinion is not expressly confined to the manufacturing industry, despite the fact that her relevant experience is limited in this way.

474. For these reasons, little weight should be attributed to the broad brushed assertions that Ms Vallance makes at the conclusion of her statement.

Summary

475. The table below summarises the evidence of the AMWU's lay witnesses that we have here considered. In respect of each witness, the relevant modern award has been identified. Further, to the extent that the evidence provided by the witness is of any probative value to the Commission in respect of the AMWU's claim to introduce new casual conversion provisions and vary pre-existing minimum engagement/payment periods, this has been identified in short form.

	Witness	Award	Casual Conversion	Minimum Engagements
1	Peter Bauer (union official)	FBT Award	• Evidence of a dispute filed by the AMWU disputing an employer refusal to convert • Evidence establishes the types of operational challenges faced by an employer in this industry that preclude it from replacing casual employees with permanent staff	No relevant evidence
2	Simon Hynes (casual employee)	FBT Award	As above	No relevant evidence
3	James Fornah (permanent employee)	FBT Award	• Evidence establishes that the dispute settlement procedure is effective in resolving any disputes that might arise regarding casual conversion	No relevant evidence
4	Heidi Kaushal (union official)	FBT Award	• Evidence not relevant – employee referred to does not have right to seek	No relevant evidence

			conversion • No evidence that remaining group of unidentified employees referred to have right to seek conversion	
5	David Kubli (casual employee)	Manufacturing Award	• Evidence not relevant – witness does not have right to seek conversion • No evidence that witness would be eligible to convert pursuant to proposed clause	No relevant evidence
6	Aaron Malone (union official)	FBT Award	• Evidence establishes that the dispute settlement procedure is effective in resolving any disputes that might arise regarding casual conversion • No evidence that unidentified employees are eligible to convert	No relevant evidence
7	Steven Murphy (union official)	Manufacturing Award	• Evidence does not establish that unidentified employees are eligible to convert pursuant to enterprise agreement	No relevant evidence
8	Liam White (casual employee)	Unknown	• Evidence not relevant – neither current casual conversion clauses nor AMWU proposal enable conversion by casual labour hire employee to permanent employment by host employer	No relevant evidence
9	Vinh Thi Yuen (union official)	FBT Award	• No evidence that unidentified employees are eligible to convert pursuant to proposed clause	No relevant evidence
10	Deborah Vallance (OHS Coordinator of the AMWU)	Manufacturing Award	• Evidence does not establish that the conversion of casual employees to a permanent basis will have a positive impact on their health and safety	No relevant evidence

476. As is self-evident, little turns on the witness evidence called by the AMWU in these proceedings. The AMWU's lay evidentiary case consists of a total of just 10 witnesses including:

- 4 employees; and
- 6 union officials.

477. The evidence given concerns only the Manufacturing Award and the FBT Award. There is no evidence in respect of the Graphic Arts Award which also forms part of the AMWU's claim. Further, none of the witness' evidence goes to the variations sought by the union to existing minimum engagement/payment provisions.

478. Vast portions of the union's case are based on the hearsay evidence of paid union officials which, as demonstrated specifically by the evidence of Ms Kaushal, cannot be relied upon. The AMWU has not been successful in establishing that the unidentified employees referred to by these union officials were in fact eligible to convert to permanent employment pursuant to the relevant award or agreement provision. Accordingly, this evidence is of little benefit in these proceedings.

479. At its highest, the AMWU's lay witness evidence establishes only the following factual propositions relevant to its claims:

- That some casual employees prefer permanent employment.
- That employment via a labour hire agency can provide a pathway to permanent ongoing employment by the relevant host employer.
- That the dispute settlement procedure contained in awards is effective in resolving disputes that might arise regarding the application or operation of the current casual conversion provisions, at the enterprise level.

- That there has been one dispute notified by the AMWU in the six years that the modern awards have been in operation concerning an employer's refusal to convert casual employees.

- That the hours of work of a casual employee can vary considerably. This includes the total number of hours worked, the days of the week on which they are worked and the starting/finishing time.

- That as a result of various operational requirements, an employer cannot guarantee ongoing employment or regular hours of work and accordingly, cannot accommodate permanent employment. These include the need to replace temporarily absent employees and the need to meet fluctuations in demand.

18. THE AMWU SURVEY

The Conduct of the Survey

480. The AMWU conducted a survey of casual employees and employees of labour hire agencies. It seeks to rely on the results of that survey in these proceedings.[389]

481. In its submissions, the AMWU states that the ability to respond to the survey was not confined to its members. The union notified members who are engaged on a casual basis of the survey via email and SMS. An invitation to complete the survey was also posted by the AMWU on various social media outlets. The survey was conducted on a website by the name of Survey Monkey.[390]

482. This is all that is known about the conduct of the AMWU's survey. No evidence has been mounted by the AMWU that goes to the means by which the survey was conducted. Further, the raw data of responses to its survey have not been provided to the Commission. Respondent parties, consequently, have not had an opportunity to test or verify the material relied upon.

483. The reason for the union's approach is not apparent. It is rather curious given that it is has not filed evidence in the manner that Ai Group has filed evidence concerning the Joint Employer Survey, and given that the absence of such AMWU evidence gives rise to questions surrounding the integrity of the data. The complete absence of such evidence is startling and allows for very little (if any) confidence to be placed in its results.

484. Given that so very little is known about the conduct of the survey, a raft of questions arise as to the veracity of its results. The scarcity of material before the Commission allows for a number of adverse inferences to be drawn. For instance, there is nothing to suggest that the sample of respondents was not

[389] AMWU submissions dated 13 October 2015 at Attachment 5.

[390] AMWU submissions dated 13 October 2015 at Attachment 5, paragraphs 79 and 81.

carefully and deliberately selected such that it would result in biased responses. It is entirely possible that the sample was taken from employees employed by only selected businesses in which there is heavy union presence. Furthermore, the outcomes of the survey, as cited by the AMWU in its submissions, cannot be confirmed absent access to the originating data.

485. A series of questions can arise regarding the medium by which the survey was in fact conducted. The use of an online survey platform is not immune from discredit. As we understand it, there are various options or functionalities open to the administrator of the survey when it is established and during its operation that can have a significant bearing upon its reliability. The AMWU has not provided any insight into the process that was involved in setting up the survey and whether any such safeguards were implemented.

486. We are also left entirely unadvised as to manner in which respondents were informed of the survey and invited to participate. Was the conduct of the survey preceded by union campaigns that sought to drive the rhetoric underlying the claims before the Commission and were designed to elicit certain responses from survey participants? Were participants of the survey invited to union organised events in order to encourage them to participate in the survey and if so, what were they told?

487. The Commission should have little confidence in the survey commissioned by the AMWU. There is no evidence before it about a number of issues associated with the administration of the survey or its results. Such a lack of transparency gives rise to doubt as to the manner in which it was conducted and whether the results cited in its submissions are accurate. Indeed the Commission cannot be certain that the results cited reflect the complete set of results that were generated from the survey and that they do not reflect a mere subset of the responses received that have conveniently been cherry-picked. Similarly, we can have no confidence that the results have not been impaired by an inadvertent or administrative error.

488. For the reasons set out above, it is our submission that an adverse inference can and should be drawn from the absence of any evidence in this regard.

489. We note that the AMWU has been involved in a number of previous Commission proceedings in which the AMWU has sought to rely on a survey or it has responded to a survey conducted by another interested party. It is therefore well aware of the types of criticisms that are likely to be made of surveys. Despite this, the AMWU has not sought to shield its case from the obvious evidentiary gaps that we have here highlighted. These matters are neither novel nor particularly complex in the context of proceedings such as these. It is surprising that the AMWU has not, in mounting its case, addressed this readily apparent defect.

The Survey Questions

490. The questions asked by the AMWU to survey participants are set out at Attachment 5 of its submissions dated 13 October 2015.[391] We here deal with the terms of those questions and the implications that they have for the weight that can be attributed to the results of the survey.

491. We note at the outset that the logic underpinning the questions is not apparent from the face of the AMWU's submissions. That is to say, it is not clear whether certain questions were asked only of those participants who had responded in a particular way to an earlier question. We have therefore made certain assumptions in our treatment of the survey, which we propose to set out as the relevant matters arise.

492. The **first question** asks the survey participant to select one of seven options as describing their "employment situation". Two concerns arise. Firstly, it is not clear whether those who selected an option other than "casual worker" or "labour hire worker – casual" could, nonetheless, continue responding to the survey. There is no material before the Commission that suggests that such respondents were thereafter precluded from continuing through the survey

[391] AMWU submissions dated 13 October 2015 at Attachment 5, page 57.

questions. It is trite to observe that this is likely to distort the results of the remaining questions which are directed specifically at casual employment.

493. Secondly, the survey proceeds on the basis of self-selection. That is, the casual status of a respondent for the purposes of the survey is determined purely by the manner in which they respond to the first question. To the extent that respondents err in their understanding of the basis upon which they are engaged, this will have a direct bearing on the veracity of the survey results.

494. **Question 2** is in the following terms: *'To what extent do you agree that labour hire workers, such as yourself, should be able to convert to their host employer, if that is their preference?'*. This question is quite clearly self-serving. It asks whether an employee is of the view that they and/or other employees should have access to an additional entitlement or benefit. Naturally, the overwhelming number of responses to such a question will be in the affirmative.

495. Moreover, we do not understand the relevance of this question. As was brought to bear during proceedings before the Full Bench in March 2016, the unions' claims now before the Commission do not seek to provide an avenue for conversion from casual employment by a labour hire agency to direct employment by a host employer. Accordingly, the responses to this question should be disregarded.

496. **Question 3** asks the respondent whether they "work full-time or part-time". The possible responses purport to define "full time" as "38 hours per week" and "part time" as "1 – 37 hours per week".

497. We note firstly that the question does not make any distinction between ordinary hours of work and overtime. As a result of this lack of clarity, it is likely that respondents would have taken differing approaches to responding to the question.

498. Furthermore, the survey presupposes that the options provided are mutually exclusive and does not contemplate the possibility that a casual employee

may, in certain instances, perform 38 hours of work in a particular week however in other weeks, they may perform fewer hours of work. It is unclear how a respondent in such circumstances could accurately respond to this question.

499. Lastly, we observe that the question does not allow respondents an opportunity to identify that they perform more than 38 hours of work per week, if relevant. It is again unclear how such respondents could provide an accurate answer to this question.

500. **Question 5** asks the respondent to select an industry that best describes the one in which they generally work in their main job. This is followed by 19 options as well as the ability to identify some other industry that is not there listed.

501. As we later set out, the responses to this question have not been provided by the AMWU. Accordingly, we do not propose to deal with this issue in great detail. We simply note that the industries appear to have been described in the same terms as the ANZSIC codes. They are general in their terms. For example, the manufacturing industry could include:[392]

- food product manufacturing;
- beverage and tobacco product manufacturing;
- textile, leather, clothing and footwear manufacturing;
- wood product manufacturing;
- pulp, paper and converted paper product manufacturing;
- printing (including the reproduction of recorded media);
- petroleum and coal product manufacturing;
- basic chemical and chemical product manufacturing;

[392] ABS (2006) *Australian and New Zealand Standard Industrial Classification* (1292.0).

- polymer product and rubber product manufacturing;
- non-metallic mineral product manufacturing (including glass and glass product; ceramic product; cement, lime, plaster and concrete product; and other non-metallic mineral product);
- primary metal and metal product manufacturing;
- fabricated metal product manufacturing;
- transport equipment manufacturing;
- machinery and equipment manufacturing (including professional and scientific manufacturing; computer and electronic equipment; electrical equipment; domestic appliance; pump, compressor, heating and ventilation equipment, specialised machinery and equipment; other machinery and equipment); and
- furniture and other manufacturing.

502. As can be seen, responses to this question will not assist the Commission in determining the number of respondents that are employed in a specific industry.

503. **Question 6** asks the respondent how they *'became a casual/labour hire worker'*. Four options are provided, as well as the ability to provide an alternate open answer. The first two possible responses are premised on the notion of an employee having a choice (or not having a choice) between casual employment and permanent employment:

> (a) I was offered a choice between casual/labour hire and permanent (part time/full time), and chose to be casual/labour hire
>
> (b) I was never offered a choice, casual/labour hire employment was all that was offered

504. It is important to note that these concepts are difficult to align with the reality of an employer recruiting for a particular position in their business on a permanent basis or a casual basis. That is, an employer will generally assess

whether it requires additional casual labour or permanent labour, and seek expressions of interest in that role on that basis. This may well be construed by a survey respondent as not having been provided a choice between casual employment and permanent employment by that employer, as the position that they sought to attain was offered as a casual one.

505. We of course observe that it is open to an employee in such circumstances to seek an alternate permanent role elsewhere in the labour market and that ultimately, in such circumstances, the choice is one to be made by the employee. To extent that the unions seek to suggest that employers should, at the time of engagement, offer prospective employees the option of commencing on a permanent basis, they quite clearly hold an unrealistic view of the employment practices that can be espoused by the employers of their membership.

506. **Question 7** similarly asks the survey respondent why they work as a casual/labour hire employee. The first option is that "it was the only work available; [they] had no choice". The observations we have earlier made concerning question 6 of the survey are here relevant.

507. **Question 8** asks: '*Has your employer informed you of your right to convert to permanent employment?*' The question presupposes that the respondent does in fact have a right to convert. It is important to first observe that at present, the modern awards system does not, as such, afford employees a right to convert. Pre-existing casual conversion clauses rather provide employees with a right to *request* to convert. In this way, the question mischaracterises the entitlement (to the extent that such an entitlement in fact exists).

508. In any event, the questions preceding number 8 do not seek to ascertain whether the respondent is covered by a modern award or enterprise agreement that contains a casual conversion provision. Nor does it in any way seek to analyse whether the entitlement to seek conversion would in fact arise under that clause. For example, no attention is paid to whether the casual

employee is in fact an "irregular casual employee" and therefore excluded from the application of the casual conversion clause contained in the Manufacturing Award.

509. Therefore, the responses to this question are not indicative of the extent to which employers are complying with their obligation under pre-existing casual conversion clauses to notify employees of their right to request conversion. That is, the responses do not provide an indication of the number of employees who have or have not been notified of their right to request conversion under such clauses.

510. **Question 9** asks: '*Have you asked your employer if you could change from being a casual/labour hire to be a permanent employee?*' The following two questions are contingent upon the response provided to question 9. They inquire as to "what happened" if a request to convert was made or to request the respondent to explain why they have not made a request to convert.

511. Question 9 is not confined to respondents who presently have a right to request to convert under the industrial instrument that applies to them. Thus, the question invites a positive response even in circumstances where a casual employee who does not have a right to request conversion has done so by way of, for example, an informal discussion with their employer in which they have inquired whether there is any possibility that they may transfer to a permanent position.

512. For this reason, the responses to this question are not indicative of the extent to which pre-existing casual conversion clauses are being utilised. That is, the responses do not provide an indication of the number of requests that are made pursuant to such clauses.

513. The responses to **question 10** must also be seen in this light. Of those respondents who indicate that their request was not granted, the Commission cannot determine the proportion of such employees who do not have a right under an award or enterprise agreement to request conversion to permanent employment. Thus, the responses to this question are not reflective of the

extent to which requests to convert under pre-existing casual conversion clauses are granted.

514. Option (b) at **question 11** provides that the respondent has not made a request to convert because '*On-going or permanent status is not possible or available*'. To the extent that this response was selected by respondents, we note that it is indicative only of their *perception* that ongoing or permanent employment was not possible or available. The response does not indicate that this has in fact been the advice, information or response to a request to elect that was provided to the employee by their employer. It rather appears to apply where the employee has decided not to seek conversion based on their understanding or belief that that is the case, which may be due to any number of factors and could in fact be entirely misconceived. The survey does not allow for this level of analysis.

515. **Question 12** is in the following terms: '*To what extent do you agree that casual/labour hire workers such as yourself should be able to convert to permanent status, if that is their preference?*' The question is clearly a leading one. It is predicated on the basis that the respondent agrees with the proposition that workers such as the respondent should be able to convert to permanent status if that is their preference. Further, it does not explain what the consequences of such conversion would be (for instance, the employee would no longer receive their 25% loading). This necessarily means that the responses provided to this question should be given little if any weight by the Commission.

516. In any event, it is virtually impossible to contemplate circumstances in which an employee might not agree that employees such as themselves should be afforded a further or greater entitlement. Respondents to the survey are bound to agree to such a proposition. The question is entirely self-serving.

517. Survey respondents were asked if they know how their pay and conditions are set at work. The possible answers included an industry award, an enterprise/collective agreement or an individual agreement. If the respondent

was unsure, this could also be indicated. The following question, then asks *'Do you know which award applies to you?'* and is accompanied by a list of all awards.

518. It is unclear whether **question 14** was limited to those respondents that stated in the previous instance that their pay and conditions are set under an industry award. That is, we cannot discern whether the responses to question 14 are intended to capture only those employees to whom a modern award *applies* or whether it also includes employees who are *covered* by a modern award.

519. **Question 18** asks how the respondent's working hours are set. The only options provided are:

(a) I work a regular roster (same hours each week)

(b) I work a rotating roster (different hours week to week but set pattern)

(c) I work irregular hours (change week to week, no pattern)

520. The survey presupposes that an employee's hours of work will neatly fall within the ambit of one of these options. Additionally, the question does not make clear whether the response is to have regard to ordinary hours as well as overtime. It does not provide for the possibility that a component of a casual employee's hours of work are regular or exhibit a pattern, however that employee also works irregular unrostered overtime from time to time. It is unclear how a respondent in such circumstances could accurately respond to the above question.

521. **Question 19** asks: '*How much say do you have over the hours you work?*' The options provided were:

(a) Very little say (my boss sets the hours)

(b) Some say (I can vary hours when I need, but usually set by my boss)

(c) A lot of say (I can choose when I work)

522. We make the obvious observation once again that the responses to this question can be put no higher than an employee's perception of the level of

'control' that they have over their working hours. This is particularly important in the context of casual employees who cannot be compelled or required to work a particular shift. To the extent that a casual employee is 'rostered' to work at a particular time and the employee is unable to do so, this in fact gives a casual employee considerable 'say' over their hours.

523. We also note that the responses are drafted such that they include the reason for which the employee considers that they have 'very little say', 'some say' or 'a lot of say'. We anticipate that this may have altered the way in which a respondent answered this question. That is, if an employee's circumstances do not meet any of the descriptors contained in brackets, or where an employee's circumstances are such that they do not fit neatly within any of the options provided, the response may not necessarily be representative of the extent to which they in fact have control over their hours.

524. **Question 20** asks the respondent if they have '*any comments about [their] experience or issues that [they] would like to raise*' regarding working as a casual or labour hire employee. It then provides six different options that the employee may choose from, most of which (unsurprisingly) suggest negative consequences or experiences. The question and the responses provided are, in this way, tailored to lead the employee towards identifying adverse effects of casual employment. The question is a leading one in the sense that it places in the mind of the survey participant a response that he or she might not otherwise have formulated.

525. Further, option (c) ('*I don't get access to training at work because I'm casual/labour hire*') and option (d) ('*I don't get promotions or reclassification because I'm casual*') draw a causal connection between the absence of access to training and promotions/reclassification and the respondent's employment as a casual. That is, a respondent that selects either of these options *believes* that they face these consequences because they are a casual employee. The responses can be put no higher. They do not establish that the employee does not have access to training, promotions or reclassification because in fact they are a casual/labour hire employee.

526. **Question 24** asks: '*In the past 3 months, what is the minimum number of hours you have worked in a single shift?*' The question appears to ask the respondent to identify the length of the shortest shift that they have worked in the preceding three months. The question is framed such that where an employee has worked a shift of a particular length just once in the previous few months, it would be identified by their response.

527. The data gathered from responses to this part of the survey do not establish that there is a phenomenon of 'short shifts' as alleged by the unions. Indeed if an employee was recalled to work overtime on a particular occasion in the preceding three months for a period of two hours, but the employee otherwise works shifts that are longer, the respondent's answer to question 24 would be 'two hours'. The responses to this question reveal nothing of the frequency or regularity with which such shifts are worked.

528. Further, neither question 24 nor any other question in the survey deals with *why* the employee worked a shift of that length. For instance, a 'short shift' may well have been worked to accommodate the needs of the employee due to their school or university commitments or caring responsibilities. For this reason, the responses to this question are of little probative value as they are provided in the abstract, absent any context.

529. Finally, **question 25** asks the respondent *'whether [they have] ever worked so much overtime that they didn't get a break of at least 10 hours before the start of [their] next shift?'*. There are two difficulties that arise from this question:

- The question presupposes that the respondent has a proper understanding of the distinction between ordinary hours and overtime; and

- The survey does not enquire whether the employee was paid an additional amount to compensate them for this, consistent with the AMWU's proposal in these proceedings.

The Survey Sample

530. The AMWU's submissions provide the following information about the survey sample:[393]

- The sample size was 395.
- Respondents were "predominantly in the manufacturing industry, with representation from other industries covered by the AMWU (mining and construction)".
- 78% of the respondents were men.
- 85% of the respondents identified themselves as members of a union.
- Of the "casual respondents … 55% were full-time and 45% were part-time". We understand this to mean that 55% of respondents selected "full time (38 hours per week)" in response to question 3 of the survey and the remaining respondents selected "part time (1 – 37 hours per week)".
- Almost half of the respondents stated that their pay and conditions are set by an enterprise/collective agreement. Only 19% stated that their pay and conditions are set under an industry award, as compared to 38.9% of the ABS data cited by the AMWU.

[393] AMWU submissions dated 13 October 2015 at Attachment 5, page 42 and 46 – 47.

- The age distribution of the survey respondents differs considerably from the ABS data cited by the AMWU. The AMWU survey respondents fell disproportionately into older age brackets:

ABS Data Age Category	Proportion of Respondents	AMWU Survey Age Category	Proportion of Respondents
15 – 19	19.6%	18 – 20	2%
20 – 24	20.2%	21 – 24	5%
25 – 34	20.1%	25 – 34	19%
35 – 44	13.7%	35 – 44	23%
45 – 54	13.9%	45 – 54	25%
55 – 59	5.2%	55 – 64	21%
60 – 64	4.0%		
65 and over	3.4%	65+	3%

531. The sample size of the survey is a small one. If we were to proceed on the assumption that all respondents were employed in the manufacturing industry generally, it would represent just 0.26% of the casual workforce engaged in the manufacturing industry as at August 2014.[394] It cannot be considered representative of the workforce generally, the manufacturing industry, its subsets, or any other industry covered by a modern award.

532. We deal below with the lack of precision with which the AMWU has outlined the proportion of respondents that are engaged in a particular industry or covered by a specific modern award. For present purposes, we simply note that if the respondents were "predominantly in the manufacturing industry", the survey is clearly not representative of the views of employees engaged in other industries.

533. A high proportion of respondents were men. A significant proportion of respondents were members of a union. It is conceivable that these factors would impact upon the results of the survey. For instance, considerations relevant to female employees (such as bearing primary caring responsibilities) may not be reflected in the survey responses. Similarly, to the extent that respondents were influenced by union propaganda, this may have had a

[394] ABS, 6333.0 - Characteristics of Employment, Australia, August 2014.

greater bearing upon the survey results than might otherwise have been the case.

534. We also note the over-representation of older workers, which is likely to skew the results of the survey. For instance, such employees are more likely to produce higher results of employees seeking longer minimum shift lengths as compared to younger workers who are undertaking secondary or tertiary education.

535. The following information about the sample is not known:

- The proportion of respondents employed directly by their employer on a casual basis as compared to the proportion of respondents engaged by a labour hire agency on a casual basis.
- The proportion of respondents that work in each of the industries identified at question 5, including the manufacturing industry.
- The modern awards that cover the respondents to the survey.
- The number of respondents covered by specific modern awards, including the Manufacturing Award.
- The occupation/job titles attributable to the survey respondents.
- The length of service of the survey respondents.

536. It would appear to us that the matters listed above would provide information that is crucial to a proper assessment of the relevance and reliability of the AMWU's survey. For instance, in the absence of any evidence as to the specific modern awards by which they survey respondents were covered, the Commission is unable to determine the relevance of the survey responses to specific industries or awards. We understand from the AMWU's submissions that the respondents were "predominantly in the manufacturing industry", however the scope of the industry as referred to by the AMWU and the precise proportion of the respondents is not known.

537. The AMWU's decision to conceal this information is concerning and gives rise to serious doubt as to the extent to which the survey can properly be relied upon. At best, the survey results cited may be indicative of the AMWU's representation of the views of a small number of employees who primarily work in one of the 15 industries we earlier identified as likely falling within the ambit of the broad descriptor of the manufacturing industry.

19. THE 'LIVES ON HOLD' INQUIRY AND REPORT

538. The ACTU and its affiliates seek to rely on 'Lives on Hold; The Report of the Independent Inquiry into Insecure Work in Australia' (**Lives on Hold Report**).[395]

539. The Lives on Hold Report was published in 2012[396] after an inquiry into 'insecure work', which was commissioned by the ACTU[397]. The inquiry was conducted by a panel of four[398] and it received written submissions and conducted hearings.[399]. Two of those panel members, Jill Biddington and Brian Howe, were called by the AMWU to give evidence in these proceedings. The submissions that follow are based, in part, from Ai Group's cross examination of Ms Biddington.

540. The inquiry preceding the publication of the Lives on Hold Report has repeatedly been referred to by the ACTU and union movement as an 'independent inquiry'.[400] Without any disrespect to those who conducted the inquiry, on no reasonable assessment could the inquiry be considered 'independent'. The inquiry was commissioned by the ACTU,[401] the panel was selected by the ACTU,[402] at least one of the panel members was paid by the ACTU,[403] the terms of reference were drafted and provided to the panel by the ACTU[404], the ACTU made submissions to the inquiry,[405] the ACTU urged its affiliated unions and union members to make submissions to the inquiry, virtually all of the ACTU's affiliate unions did in fact make such

[395] See attachment R001 to the ACTU's submissions of 19 October 2015, Exhibit 2 and Exhibit 108.

[396] Lives on Hold Report at p.78.

[397] Lives on Hold Report on the sixth page (no page number appears).

[398] Lives on Hold Report at p.2-3.

[399] Lives on Hold Report on the eighth page (no page number appears).

[400] See for example cover page to Lives on Hold Report.

[401] Lives on Hold Report on the sixth page (no page number appears) and transcript of proceedings on 14 March 2016 at PN655.

[402] Lives on Hold Report at p.7 and transcript of proceedings on 14 March 2016 at PN656.

[403] Transcript of proceedings on 14 March 2016 at PN657 – PN658.

[404] Lives on Hold Report at p.1 and transcript of proceedings on 14 March 2016 at PN659.

[405] Lives on Hold Report at p.78 and transcript of proceedings on 14 March 2016 at PN660.

submissions,[406] ACTU staff assisted with the conduct of the inquiry and the preparation of the Lives on Hold Report,[407] the ACTU conducted the inquiry at a time when it was pursuing a campaign against 'insecure work', and since then it has relied on the Report as part of its further campaigns against 'insecure work', including in these proceedings.

541. The terms of reference for the inquiry can be found at page 1 of the Lives on Hold Report. The panel was asked to consider:

- The extent of insecure work in Australia;
- The causes of insecure work and its prevalence in modern Australia;
- The workers that are most at risk of insecure work and why;
- The level of compliance with applicable labour laws and any barriers to their effective enforcement;
- The effect of insecure work on:
    - Financial security;
    - Occupational health and safety of workers and workplaces,
    - Wellbeing and health of workers outside the workplace, including impact on family and other relationships,
    - Training and skills development,
    - Career progression and opportunities;
    - Regional communities;
    - Social inclusion;
    - Community organisations;

[406] Transcript of proceedings on 14 March 2016 at PN664.

[407] Lives on Hold Report at p.7.

- The social and economic cost of insecure work to employees, employers, government, and the Australian community;
- The rights and entitlements/working conditions that can best assist to provide security for workers;
- Relevant international human rights and labour standards.[408]

542. For the purposes of the inquiry, 'insecure work' was defined by the ACTU as 'that which provides workers with little social and economic security, and little control over their working lives'.[409]

543. The terms of reference are not balanced. For example, they do not refer to assessing the benefits of casual and part-time employment to employers, employees and the community. Rather, the terms or reference proceed on the basis that 'insecure work', as defined by the ACTU, is a prevalent and negative feature of the labour market in Australia.

544. The inquiry received written submissions between November 2011 and January 2012.[410] It is important to note that those submissions were primarily provided by unions and workers. Not one of the submissions was filed by an organisation that represents employer interests. At the time that the inquiry was conducted, associations like Ai Group decided against making submissions as we took the view that the inquiry was not in fact 'independent' and was part of a union campaign.

545. The inquiry featured hearings, where evidence was heard primarily from union officials and workers.[411] No employer groups participated in the hearings. Transcript of these proceedings is not publically available and the evidence taken was not sworn evidence, it was not tested by way of cross examination, nor was it subject to the rules of admissibility.[412] The 'case studies' found in

[408] Lives on Hold Report at p.1.
[409] Lives on Hold Report at p.1.
[410] Lives on Hold Report at p.78.
[411] Lives on Hold Report at pp.78–81.
[412] Transcript of proceedings on 14 March 2016 at PN674 – PN675.

the Lives on Hold Report are based on the evidence provided by workers and 'further interviews'.[413] The Report does not specify by whom those interviews were conducted, nor does transcript appear to be available. These 'case studies' are effectively only hearsay.[414]

546. The panel also allegedly 'met with and heard from academics, civil society groups, local indigenous leaders, national union leaders, representatives of The PC and members of the roundtable for the Committee for Economic Development of Australia'.[415] The details of whom the panel met with and the details of those discussions are not known.

547. Under cross examination, Ms Biddington made the following important observations regarding the material received by the panel and the individual employees that participated in the inquiry. They go to the heart of our contentions regarding the relevance and reliability of the Lives on Hold Report:

- The casual employees that participated in the inquiry represent less than 0.02% of all casual employees engaged in the workforce at that time;[416]
- Of the casual employees that participated in the inquiry, the proportion covered by a modern award is not known;[417]
- Of the casual employees that participated in the inquiry, the proportion to whom a modern award applies is not known;[418]
- The nature of the inquiry was such that it attracted persons aggrieved by casual employment rather than those content with it;[419]

[413] Lives on Hold Report on the sixth page (no page number appears).
[414] Transcript of proceedings on 14 March 2016 at PN704 – PN708.
[415] Lives on Hold Report at p.78.
[416] Transcript of proceedings on 14 March 2016 at PN723.
[417] Transcript of proceedings on 14 March 2016 at PN682.
[418] Transcript of proceedings on 14 March 2016 at PN683.
[419] Transcript of proceedings on 14 March 2016 at PN690.

- Despite this, not all casual employees who participated in the inquiry were opposed to casual employment;[420]

- Those employed on a casual basis would prefer to continue such employment than to be unemployed;[421] and

- The vast majority of casual employees that participated in the inquiry were employed by a labour hire agency.[422]

548. Critically, Ms Biddington conceded that the Lives on Hold Report is not representative of those casual employees towards whom the ACTU and AMWU claims to insert casual conversion provisions are directed:

> SENIOR DEPUTY PRESIDENT HAMBERGER: Just to be clear, these weren't predominantly people who were working as casuals but worked regular hours. They weren't people who did - you know, you hear about "permanent casuals", people who are working 30 hours a week, maybe even 38 hours a week, but they are paid as casuals. You are not talking about - these aren't mainly those - these are people who are more marginal, who aren't getting enough hours and are hardly earning enough to make ends meet?---These are very much the isolated people. There are some people who regular casual hours, but they were few and far between and on the days of the hearing, people would pick up work, so they couldn't attend.
>
> Yes?---So this report, I think, represents the most isolated, the least included in our society; the people who so desperately want to work but are unable to.[423]

549. In our view, this renders the Lives on Hold Report wholly irrelevant to the Commission's consideration of the aforementioned claims.

550. The panel assessed the extent of insecure work in Australia by reference to ABS data that goes to the proportion of employees who are engaged in casual employment, fixed-term employment, the number of independent contractors, the proportion of workers that are employed by labour hire agencies, and so on.[424] However, the methodology for arriving at their figure of 40% of the workforce being in 'insecure work'[425] is grossly flawed and

[420] Transcript of proceedings on 14 March 2016 at PN687.

[421] Transcript of proceedings on 14 March 2016 at PN689.

[422] Transcript of proceedings on 14 March 2016 at PN687.

[423] Transcript of proceedings on 14 March 2016 at PN701 – PN702.

[424] Lives on Hold Report at pp.14-17.

[425] Lives on Hold Report at p.5.

overstated. The report cites that Australia's workforce is made up of the following types of workers:

- 62.4% - full-time and part-time;
- 19.3% - casual;
- 9% - independent contractors; and
- 9.3% - business operators.

551. To derive the figure of 40% of the workforce being in 'insecure work', every casual, every business operator and every independent contractor in Australia, as well as some full-time and/or part-time employees would need to be included. This is clearly nonsense. Most independent contractors are happy with their arrangements and have no desire to be employees. Also, business operators cannot be regarded as being in insecure work – they run their own businesses, and commonly employ other people.

552. The report states that about 1.25% of workers are employed by labour hire firms, but these employees are included in the above figures, mostly as casuals, and should not be double-counted.

553. The report also states that 4% of workers are engaged on fixed term contracts but these are also included in the above figures for full-time and part-time employees and should not be double-counted.

554. Whichever way the statistics are cut or added, the alleged figure of 40% of the workforce being in insecure work does not withstand the most cursory scrutiny.

555. It may be that the 40% figure has been derived by adding employees who work particular patterns of hours. The report states that *'(w)orking time insecurity is also experienced in the form of excessive hours'.*[426] No doubt many managerial and professional employees in secure jobs would be

[426] Lives on Hold Report at p.17.

amazed to hear that they have been deemed to be in 'insecure work' in the ACTU's report, simply because they work long hours.

556. At its highest, the Lives on Hold Report represents the views of a panel that was constituted by the ACTU for the purposes of examining what the ACTU describes as 'insecure work', based on anecdotal, untested evidence and submissions that were filed predominantly by the ACTU, affiliate unions and their constituents.

557. To the extent that there might previously have been any doubt about the reliability of the Report's findings, Ai Group's cross examination of Ms Biddington brought to bear the extent to which parts of the Report were taken in their entirety from the submissions made to the inquiry by the ACTU. Ms Biddington acknowledged that the basis for various conclusions reached by the panel was simply the submission filed by the ACTU.[427] Indeed to the extent that the Lives on Hold Report refers to any ABS data, this was taken wholly from the ACTU submission, without further analysis.[428] The sources upon which the ACTU sought to rely in its submissions were verified by *an employee of the ACTU* who was assisting the panel with the inquiry.[429]

558. The Lives on Hold Report does not offer a fair, balanced or thorough examination of any of the issues that arise in these proceedings. It simplistically seeks to demonise all casual employment, irrespective of the circumstances surrounding the employee's engagement, and characterises it as 'insecure work'. It reaches this conclusion absent any rigorous consideration of or evidentiary case regarding the circumstances in which casual employees are engaged, why they are so engaged or their working conditions.

559. The Lives on Hold Report is not a substitute for the need for the unions to mount a proper evidentiary case in these proceedings. It does not provide the ACTU and its affiliates with a means by which it can rectify the deficiencies in

[427] Transcript of proceedings on 14 March 2016 at PN738 – PN790.

[428] Transcript of proceedings on 14 March 2016 at PN791 – PN795 and PN813.

[429] Transcript of proceedings on 14 March 2016 at PN814.

their material. The context in which the inquiry was conducted and the manner in which the Lives on Hold Report was prepared necessarily means that it does not carry the same weight that might otherwise be attributed by the Commission to admissible evidence to which the relevant witness has attested and the veracity of which has been tested.

560. For the reasons we have here provided, the Commission should not give any weight to the Lives on Hold Report. To the extent that it in fact deemed to be of any relevance to the current proceedings, its observations, characterisation of casual employment, conclusions and recommendations must be seen in light of the nature of the inquiry and the terms of reference pursuant to which it was conducted. The unions' assertions that it provides a valid and robust consideration of the impact of casual employment or its characteristics should be wholly disregarded.

The Evidence of Jill Biddington

561. Large parts of Ms Biddington's witness statement contain hearsay evidence that is inherently prejudicial. This is compounded by the references made to unidentified employees and employers. In a submission dated 10 March 2016, we identified the specific elements of Ms Biddington's statement that suffer from these deficiencies. For convenience, we here reproduce that list.

562. In so doing we note that respondent parties are unable to test such evidence. Accordingly, it should not be given any weight.

Paragraph of witness statement	Basis for submission
11 After the words "the request,"	Hearsay
14 Second sentence and numbered bullet points	Hearsay
15 Numbered bullet points and paragraph commencing with "having observed"	Hearsay
16 After the words "in Townsville"	Hearsay
17	Hearsay
18	Hearsay

First and second sentences	
18 Final sentence	Hearsay Evidence cannot be tested due to anonymity of persons referred to
19 Second and third sentences	Hearsay
20	Hearsay Evidence cannot be tested due to anonymity of persons referred to
21	Hearsay
22	Hearsay Evidence cannot be tested due to anonymity of persons referred to
23	Hearsay Evidence cannot be tested due to anonymity of persons referred to
24	Hearsay Evidence cannot be tested due to anonymity of persons referred to
25 Second, third and final sentences	Hearsay
26 First sentence	Submission
26 Second sentence	Hearsay Opinion (speculation)
26 Final sentence	Hearsay
27	Hearsay
29	Hearsay Evidence cannot be tested due to anonymity of persons referred to
30 After the words “over the years”	Hearsay Evidence cannot be tested due to anonymity of persons referred to
31	Hearsay
33 After the words “of consideration”	Opinion (speculation) Hearsay
34 First sentence	Hearsay
34 Second sentence	Hearsay Opinion (speculation)
36 After the words “20 years)”	Hearsay
37 First sentence	Opinion absent proper basis
38	Opinion (speculation)
41	Submission

563. In addition, the matters we have earlier raised regarding the nature of the inquiry and the individual employees who participated in the inquiry, render the evidence irrelevant and unreliable.

20. THE JOINT EMPLOYER SURVEY

564. For the purposes of these proceedings, Ai Group, the Australian Chamber of Commerce and Industry and other employer groups conducted a survey (**Joint Employer Survey**) of employers about casual and part-time employment. It was not conducted by a third party independent of those organisations.

565. The Joint Employer Survey asked respondents a series of closed, numeric and importantly, open-ended questions about their employment practices and sought their views about the impact of the ACTU's claims. The process of conducting the survey and its results are described in the witness statement of Benjamin Waugh, filed by Ai Group, and the attachments to it. We here summarise various aspects of the survey results that are relevant to the unions' common claims.

Profile of the Survey Respondents

566. The Joint Employer Survey was completed by 3,161 employers[430] of small, medium and large enterprises in a vast range of industries. The sample size is a substantial one and by virtue of that fact alone, the survey results carry significant probative value. Indeed it far surpasses the ACTU and AMWU surveys in this respect, which had a sample size of 1,271 and 395 respectively. Collectively, the respondents to the Joint Employer Survey employ 466,002 employees.[431]

567. The respondents to the survey were members of Ai Group or one of the other employer organisations participating in the survey at the time they completed it. We acknowledge that the conduct of the survey did not involve a process whereby the sample was deliberately altered or extended beyond the scope of this group for the purposes of ensuring that it would be statistically representative of all employers in a particular industry or the Australian economy at large.

[430] Witness Statement of Benjamin Waugh, dated 22 February 2016 at paragraph 35.

[431] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page 9.

568. The respondents to the survey are covered by 108 of the 122 modern awards. The most commonly cited awards were:[432]

	Award	Number of Respondents
1	*Clerks – Private Sector Award 2010*	694
2	*Hospitality Industry (General) Award 2010*	407
3	*Manufacturing and Associated Industries and Occupations Award 2010*	389
4	*General Retail Industry Award 2010*	284
5	*Social, Community, Home Care and Disability Services Industry Award 2010*	194
6	*Nurses Award 2010*	136
7	*Storage Services and Wholesale Award 2010*	133
8	*Aged Care Award 2010*	122
9	*Health Professionals and Support Services Award 2010*	116
10	*Professional Employees Award 2010*	105
11	*Road Transport and Distribution Award 2010*	102
12	*Commercial Sales Award 2010*	86
13	*Food, Beverage and Tobacco Manufacturing Award 2010*	77
14	*Restaurant Industry Award 2010*	61
15	*Fast Food Industry Award 2010*	57
16	*Vehicle Manufacturing, Repair, Services and Retail Award 2010*	57
17	*Graphic Arts, Printing and Publishing Award 2010*	54
18	*Live Performance Award 2010*	51
19	*Electrical, Electronic and Communications Contracting Award 2010*	41
20	*Horticulture Award 2010*	41

569. As can be seen, a considerable number of respondents indicated that they are covered by the above modern awards. As we later develop, a consideration of the responses provided by employers covered by these and other modern awards provide an important and valuable insight into the considerations and issues that are pertinent to each of the relevant industries.

[432] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, pages 12 – 13. Whilst the *Miscellaneous Award 2010* was one of the 20 most frequently cited awards, we have not included it in this analysis.

The Engagement of Casual Employees

570. Respondents were asked to provide data as to the proportion of full-time, part-time and casual employees that they employ. The average proportion in respect of each is set out below:[433]

Full-time	Part-time	Casual (does not include employees engaged via a labour hire agency)
45%	19.01%	35.99%

571. This data can be disaggregated on the basis of specific modern awards:[434]

	Award	What percentage of your organisation's employees are employed as casuals? (average)
1	*Clerks – Private Sector Award 2010*	21.02%
2	*Hospitality Industry (General) Award 2010*	69.73%
3	*Manufacturing and Associated Industries and Occupations Award 2010*	16.13%
4	*General Retail Industry Award 2010*	46.34%
5	*Social, Community, Home Care and Disability Services Industry Award 2010*	24.83%
6	*Nurses Award 2010*	26.6%
7	*Storage Services and Wholesale Award 2010*	23.22%
8	*Aged Care Award 2010*	24.22%
9	*Health Professionals and Support Services Award 2010*	23.14%
10	*Professional Employees Award 2010*	14.38%
11	*Road Transport and Distribution Award 2010*	27.66%
12	*Commercial Sales Award 2010*	15.67%
13	*Food, Beverage and Tobacco Manufacturing Award 2010*	39.96%
14	*Restaurant Industry Award 2010*	64.14%
15	*Fast Food Industry Award 2010*	78.06%
16	*Vehicle Manufacturing, Repair, Services and Retail Award 2010*	25.51%
17	*Graphic Arts, Printing and Publishing Award 2010*	26.07%
18	*Live Performance Award 2010*	57.34%
19	*Electrical, Electronic and Communications Contracting Award 2010*	15.79%
20	*Horticulture Award 2010*	43.9%

[433] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page s 15 - 17.

[434] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachments I – AE, pages 15 – 17.

572. As can be seen, the average proportion of an organisation's employees that are employed on a casual basis varies considerably amongst the above industries. The data suggests that the use of casuals is pronounced in the hospitality industry; the retail industry; the food, beverage and tobacco manufacturing industry; the restaurant industry, the fast food industry, the live performance industry and the horticulture industry. It can reasonably be assumed that, as a result, the impact of the unions' claims would be particularly profound in these industries.

573. The survey also sought to ascertain the tenure of the casual employees engaged on a regular basis by these businesses. Notwithstanding criticisms made by AMWU as to the meaning to be attributed to the term "regular" in the survey question, this data is indicative of the proportion of the casual workforce employed regularly by the survey respondents. We note that apart from the data below, there is no evidence that goes to matter.

574. As can be seen, the majority of casual employees employed by a business *on a regular basis* have been engaged for more than six months.[435]

Thinking just about the casual employees your organisation employs on a regular basis, what percentage has been employed for: (average)	
Less than 6 months?	**More than 6 months?**
39.83%	60.17%

[435] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, pages 35 – 37.

575. A similar trend appears in respect of virtually all of the following awards, albeit more marked in certain instances than others.[436]

	Award	Thinking just about the casual employees your organisation employs on a regular basis, what percentage has been employed for: (average)	
		Less than 6 months?	More than 6 months?
1	*Clerks – Private Sector Award 2010*	42.09%	57.91%
2	*Hospitality Industry (General) Award 2010*	37.71%	62.28%
3	*Manufacturing and Associated Industries and Occupations Award 2010*	49.71%	50.29%
4	*General Retail Industry Award 2010*	31.61%	68.39%
5	*Social, Community, Home Care and Disability Services Industry Award 2010*	41.78%	58.22%
6	*Nurses Award 2010*	42.83%	57.17%
7	*Storage Services and Wholesale Award 2010*	47.26%	52.74%
8	*Aged Care Award 2010*	53.68%	46.32%
9	*Health Professionals and Support Services Award 2010*	35.89%	64.11%
10	*Professional Employees Award 2010*	42.31%	57.69%
11	*Road Transport and Distribution Award 2010*	49.22%	50.78%
12	*Commercial Sales Award 2010*	35.85%	64.15%
13	*Food, Beverage and Tobacco Manufacturing Award 2010*	47.46%	52.54%
14	*Restaurant Industry Award 2010*	43.32%	56.68%
15	*Fast Food Industry Award 2010*	47.46%	52.54%
16	*Vehicle Manufacturing, Repair, Services and Retail Award 2010*	44.86%	55.13%
17	*Graphic Arts, Printing and Publishing Award 2010*	43.05%	56.96%
18	*Live Performance Award 2010*	44.35%	55.65%
19	*Electrical, Electronic and Communications Contracting Award 2010*	47.54%	52.47%
20	*Horticulture Award 2010*	47.13%	52.86%

576. These survey results go to the potential impact of the claims mounted by the unions. It is true of course that a proper consideration of whether a casual employee is eligible to convert will require a thorough consideration of the hours that they have in fact worked over the relevant period of time. Nonetheless, the employment of "regular" casual employees for a period exceeding six months, and the fact that such employees, on average, constitute more than half of an employer's casual workforce, suggests that

[436] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachments I – AE, pages 35 – 37.

there may be a noteworthy proportion of employees who would be eligible to convert if the unions' claims were granted.

577. The Commission's Issues Paper asks parties to identify the factors that lead employers to engage casuals. In our submission, the response to this will, to a degree, vary based on the nature of the work performed in a particular industry. This can be seen in the survey responses extracted below, which were provided in answer to one of the following questions:

- Why does your organisation employ casual employees on an irregular basis?
- Why does your organisation employ regular full-time casual employees?
- Why does your organisation employ regular part-time casual employees?

578. Respondents covered by the *Aged Care Award 2010* (**Aged Care Award**) repeatedly refer to the need to cater for their clients' needs, which can be unpredictable and variable:[437]

Response ID	Response – *Aged Care Award 2010*
2026	Many elderly clients only require 1-2 hours care support care in their own homes each week. Also, the number and type of care provided varies from week to week. Therefore, this type of work is best suited to casual employees.
2176	Casual employees are regularly employed by the organisation to meet client needs in the various different regions we service. By having casuals we are able to increase hours as required to meet client demands, decrease hours where demand is low or where necessary not utilise casual employees where there is little or no work available in the area they live in.
3307	The nature or the industry demands a certain number of casuals to fill unplanned sick leave and with Consumer directed care, clients have a choice of who will provide their service and what services they want on a daily basis - this may mean staff are needed one day and not the next - therefore a casual element is required to fulfil consumer preferences
4505	In a 24/7 operation you need a pool of casuals to cover for unexpected leave. The nature of aged care also means requirements on hours may alter due to resident base and this easily management with use of casuals.

[437] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

5753	Casuals Team Members are employed to 1. Cover planned and unplanned periods of leave 2. Provide services on an "as needed" basis 3. To cover workload requirements that are very short term individual engagements 4. To meet the requests and needs of customers, clients, elders 5. To ensure team members are the correct fit for and acceptable to each client 6. To comply with our legislated responsibilities and government policies under both Consumer Directed Care and NDIS service provision 7. Team member choice. Many team members have identified that they prefer the flexibility that being a casual worker provides them 8. Consistent with the intent of the casual classification – to help meet exigencies of a business model that waxes and wanes

579. Employers to whom the SACS Award is relevant identified similar issues, including the specific demands of providing in-home care:[438]

Response ID	Response – *Social, Community, Home Care and Disability Services Industry Award 2010*
382	We employee community care in-home workers on a casual basis. It is not possible to employee these workers part time because their hours depend client demand which fluctuates constantly and is out of our control. We are required by government funding bodies to provide clients with a community worker of their choice, and at a time that suits the client, wherever possible.
2176	Casual employees are regularly employed by the organisation to meet client needs in the various different regions we service. By having casuals we are able to increase hours as required to meet client demands, decrease hours where demand is low or where necessary not utilise casual employees where there is little or no work available in the area they live in.
2272	Due to the nature of the business e.g. different clients, different arrangements every week, we need to be flexible to clients wishes. As a result staff may need to work 2 hours in the morning and 1 hour in the evening
4959	In home care, the Government (actually pioneered by Labor) has introduced the concept of consumer-directed care, which means customer demand is irregular.
5348	The needs of the clients vary from day to day, week to week and month to month. A client may need 3 hrs of personal care one week and the next the personal care plus an escort to an appointment or extra assistance for shopping because they can't get out. We need a flexible workforce that can be available as required. For example, we have often had a call out to a client who has had an episode of incontinence that they need assistance to deal with. It is necessary to call a worker immediately to attend. We need to ask workers who are not working elsewhere at the time and the worker will often go out for a one hour shift to help this client. Or a client may need to go to a hospital appointment that will take a few hours. We can ask a careworker to take them there, leave and then pick them up again a couple of hours later. Many clients would not be able to afford to pay careworkers to be there the whole time. In addition, the workers themselves generally are in

[438] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

	this type of work because they wish to work flexible hours - and have some ability to change hours when needed. Many are 40-60 year old women with families and wish to work around school hours and school holidays. This may include doing an hour or two with regular clients during school holidays so that the client gets their service and the worker still has some income, but not more than 6-8 hours spread over the week.

580. Businesses covered by the Fast Food Award speak of the impact of having a younger workforce on their hiring practices. Their availability (or rather, unavailability) due to other commitments necessarily requires their engagement on a casual basis. This is also reflective of the employees' preferences:[439]

Response ID	Response – *Fast Food Industry Award 2010*
858	Our casual employees are usually students - university and high school. This is their choice. They frequently only work 6 hours a week over two shifts.
867	school and unit students can not be relied upon to attend regular shifts due to study and exam commitments, holidays with parents, going to schoolies, etc
863	Needs of the business and age of workers, often students who can only work a few shifts per week.
872	Suits the needs of the business in fluctuations in trade. Most employees are younger workers and all indicate preference for the casual status which gets the loading in their weekly pays.
1523	because it suits the university/tafe students we hire and allows us to give them daytime shifts and weekend shifts
5634	Because most of our employees are Year 12 students or uni students who are not available full time

581. The Retail Award gives rise to issues associated with the employment of junior labour and the need to satisfy variations in customer demand:[440]

Response ID	Response – *General Retail Industry Award 2010*
256	we have junior casual staff for weekend and holiday hours
854	Give the business flexibility to roster according to need. Can roster fewer employees in quieter times. Don't have to give set hours to the employee. We use Uni/school students and casual work fits well with their study patterns as well as keeping our staffing costs down.
895	To help fill in the times when we need extra help and also to keep young people employed
1216	To cover different shift requirements and to allow junior school students to work after school and weekends
3746	Work place flexibility. Most Casuals in our organization want casual hours as

[439] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

[440] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

	they are students or have young families and want flexibility.
5067	Our younger casuals are our fill ins. We slot them into the gaps we need them to work in based upon what hours they are available. We are a 7 day business and full time and part timers can't always make up the hours we need to run a business each week.
5468	Some are after school/weekend juniors. Others are used to cover long opening hours. When you operate an 11 hour day, 7.6 hrs for a full time employee does not work. Typically we stagger staff starting times with 5 -7 hour shifts

582. Employers covered by the FBT Award speak of the seasonality of the work performed and the need to access casual labour to accommodate these ebbs and flows:[441]

Response ID	Response – *Food, Beverage and Tobacco Manufacturing Award 2010*
204	Due to the nature of the fresh produce industry and varying harvest timings
213	Seasonality of industry means requirements significantly fluctuates throughout the year and between years.
2746	Need a flexible workforce for due to the seasonal nature of the work. Extra employees are needed during the busy times & also to cover when full time employees are absent.
3626	peaks and troughs in labour demand due to seasonality of product
5762	Food manufacturers make to order so each day requires a different number of casual staff

583. Similar considerations are relevant to businesses covered by the *Horticulture Award 2010* (**Horticulture Award**):[442]

Response ID	Response – *Horticulture Award 2010*
213	Seasonality of industry means requirements significantly fluctuates throughout the year and between years.
1147	Levels of work change dramatically based on both seasons and weather. Employing them on a full time (or even permanent part time) would not be financially viable
2732	As a landscape maintenance company our works are seasonal. In addition to this we undertake contract works (verge mowing) for local government council and they control the scheduling. For example due to dry weather prior to Christmas council cancelled a mow run due to start yesterday, with only 1 days notice prior to the Christmas break. This work employs 15 staff for 8 days. Due to these issues which are outside of our control we need to utilize the services of casual employees otherwise we would suffer significant losses having 15 staff being paid but not working for 1.5 weeks.
3648	Ability to be flexible in regard to seasonal conditions with horticulture crop and

[441] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

[442] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

	weather
4566	because there is not enough work for full time. because the variablilty of weather, seasonal factors we need to be flexible

584. Employers covered by the *Hospitality Industry (General) Award 2010* (**Hospitality Award**) also face seasonal fluctuations:[443]

Response ID	Response – *Hospitality Industry (General) Award 2010*
513	To make the difference in demand. The Hospitality industry has a call for large number of staff to cover some functions on a totally irregular basis.
995	Due to low and high peak season for accommodation. Depends on how many rooms we fill each night as to how many casual housekeepers we require.
1424	In hospitality we require full flexibility in rostering to keep up with daily fluctuations in demand across both our accommodation and food and beverage operations. We also need to be able to minimise hours over our quieter periods and have the flexibility to increase them during our busier times. Only Casuals can offer this kind of flexibility.
1960	because the week has peaks and troughs, meaning we need lots of people at the same time, but only for limited periods. exaggerating the situation is you need to have back up numbers, in case someone is sick or leaves or it is extra busy. these people need consistent hours to remain available too.
2724	We service racedays and functions/events which only require employees when they are held. These can be sporadic and irregular so casual workforce is the best way to support.
3380	We are in a tourist area so we need to adjust our employees hours to suit trade. We also get very busy certain times in the year & we need to have a few staff that can increase their hours to match our trade.
5675	FLEXIBILITY - customer demand varies widely according to day of the week, time of day, entertainment provided at the hotel - so we need to be able to react quickly to this change in demand

585. Responses from employers covered by the Manufacturing Award consistently refer to fluctuations in production:[444]

Response ID	Response – *Manufacturing and Associated Industries and Occupations Award 2010*
97	To cover the fluctuations in work load due to the company relying on contracts, a project driven business.
566	We never did this in the past and we suffered the non productive hours as a loyalty to our employees but to remain competitive with continued lowering of margins by our customers we have had to change. With a fluctuating workload we have been forced to reduce our permanent workforce in favour of having a section of our workforce as casual. Paid only when work is available.

[443] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

[444] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

772	Flex up and down due to the demand for product. We deliver quick turnaround times and manufacture what is ordered so we don't need to keep inventory or stock. The actual cost remains low and we continue to be competitive as a high cost country manufacturing plant compared to our other manufacturing plants across the world in low cost countries.
937	Due to work load - primarily in our production and warehouse area where we may have increased volume and/or we are scheduling for stock builds (generally our production is to order).
945	A lot of the work we have available fluctuates depending on the time of the year, so we have a large pool of casuals who work fairly regularly, but at times don't work at all. It gives us the flexibility to roster according to the work load we have and manage times where there isn't much work available.
2084	To cover highs and lows in our work load. Which allows running the manufacturing with lower overheads, I could employ another full-timer but again at various times they would be just standing around costing money producing nothing.
4539	When we have high production requirements we employ a casual workforce, as we are never sure that the work will continue at the higher rate.

586. At **Attachments 20A – 20U** to these submissions, we have extracted responses to the survey questions that go to the basis upon which employers engage casual employees, their reasons for doing so, and the impact that the unions' claim new casual conversion provisions would have on their business. The responses are categorised by reference to each of the following awards covering the relevant businesses:

- **Attachment 20A:** Aged Care Award*;*
- **Attachment 20B:** *Banking, Finance and Insurance Industry Award 2010* (**Banking Award**);
- **Attachment 20C:** *Clerks – Private Sector Award 2010* (**Clerks Award**);
- **Attachment 20D:** *Commercial Sales Award 2010* (**Commercial Sales Award**);
- **Attachment 20E:** *Electrical, Electronic and Communications Contracting Award 2010* (**Electrical Contracting Award**);
- **Attachment 20F:** Fast Food Award;
- **Attachment 20G:** FBT Award;

- **Attachment 20H:** Retail Award;
- **Attachment 20I:** Graphic Arts Award;
- **Attachment 20J:** *Health Professionals and Support Services Award 2010* (**Health Award**);
- **Attachment 20K:** Horticulture Award;
- **Attachment 20L:** Hospitality Award;
- **Attachment 20M:** Manufacturing Award;
- **Attachment 20N:** Nurses Award;
- **Attachment 20O:** *Professional Employees Award 2010* (**Professional Employees Award**);
- **Attachment 20P:** *Restaurant Industry Award 2010* (**Restaurant Award**);
- **Attachment 20Q:** *Road Transport and Distribution Award 2010* (**RTD Award**);
- **Attachment 20R:** SACS Award;
- **Attachment 20S:** *Storage Services and Wholesale Award 2010* (**Storage Award**);
- **Attachment 20T:** Vehicle Award; and
- **Attachment 20U:** *Wine Industry Award 2010* (**Wine Award**).

Use of Labour Hire

587. Questions were also asked regarding the use of labour hire. 19.61% of respondents indicated that their organisation does engage labour hire employees.[445]

588. This data is also available in respect of specific modern awards, which highlights that in certain industries, the use of labour hire workers is prevalent:[446]

	Award	Does your organisation engage labour hire workers? (yes)
1	*Clerks – Private Sector Award 2010*	30.69%
2	*Hospitality Industry (General) Award 2010*	14.25%
3	*Manufacturing and Associated Industries and Occupations Award 2010*	44.22%
4	*General Retail Industry Award 2010*	10.21%
5	*Social, Community, Home Care and Disability Services Industry Award 2010*	17.01%
6	*Nurses Award 2010*	27.94%
7	*Storage Services and Wholesale Award 2010*	45.11%
8	*Aged Care Award 2010*	31.15%
9	*Health Professionals and Support Services Award 2010*	21.55%
10	*Professional Employees Award 2010*	40.95%
11	*Road Transport and Distribution Award 2010*	45.10%
12	*Commercial Sales Award 2010*	50%
13	*Food, Beverage and Tobacco Manufacturing Award 2010*	38.96%
14	*Restaurant Industry Award 2010*	8.20%
15	*Fast Food Industry Award 2010*	0%
16	*Vehicle Manufacturing, Repair, Services and Retail Award 2010*	35.09%
17	*Graphic Arts, Printing and Publishing Award 2010*	35.19%
18	*Live Performance Award 2010*	25.49%
19	*Electrical, Electronic and Communications Contracting Award 2010*	34.15%
20	*Horticulture Award 2010*	36.59%

[445] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page 48.

[446] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachments I – AE, pages 48 – 50.

589. Those respondents that utilise some labour hire workers were then asked why they do so. One of the reasons provided by multiple respondents was the desire to avoid award strictures including casual conversion and other forms of regulation:[447]

Response ID	Response
47	To get around the fact that we must offer permanent roles to casual workers after three months (as per our agreement) or 6 months. It provides us with greater flexibility - we can finish off a temp worker after, say 8 months, without any consequences of having to hire them permanently.
96	Difficulty in servicing casual labour ourselves. Provides a buffer for 6 months offer or permanency
325	Less hassle with abiding by awards and payment of liabilities. if worker is no good we can return them immediately without industrial action.
609	Flexibility and avoidance of Unfair Dismissal legislation
709	TO avoid unfair dismissal. If casual workers were given full time status after 6 months we would move operations to Vietnam and China. Think about why our labour is so expensive.
1044	To remove any IR issues and reduce the administration required for large numbers of casuals
3070	Unfair dismissal laws
5370	Our EBA is linked to old awards which stipulate - Victoria: We must offer permanent work to workers that have worked as a casual for three months. NSW & QLD: Same except after 6 months. This is not an option when you don't have the permanent roles available.
5505	Preferred option for short term spikes of increased demand. Casual workers are treated as permanent after 6 months - too hard to manage with all the rules and Government regulations
5536	more flexibility, not tied down by restrictions per the EBA & modern awards

590. The full set of responses to this question is set out at **Attachment 20V** to our submissions.

Casual Conversion

591. The Joint Employer Survey provides valuable data regarding the utilisation of current casual conversion provisions; a matter that was raised on multiple occasions by the Full Bench during earlier proceedings. Less than 20% of all respondents confirmed that they have received at least one request from an eligible casual employ to convert to permanent employment pursuant to a

[447] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

modern award. The vast majority (73.72%) have not received such a request. The remaining respondents were unsure.[448] An average of 62.58% of the requests received by these businesses were granted.[449]

592. In the table below, we provide this data with reference to specific modern awards that presently contain a casual conversion provision:[450]

	Award	Since 1 January 2010, have any casual employees requested to convert to full-time or part-time permanent employment, where the employee has been entitled to make such a request pursuant to a modern award? (yes)	What percentage of those employee requests to become permanent were granted by your organisation? (average)
1	*Electrical, Electronic and Communications Contracting Award 2010*	14.81%	78.75%
2	*Food, Beverage and Tobacco Manufacturing Award 2010*	29.03%	53.72%
3	*Graphic Arts, Printing and Publishing Award 2010*	24.32%	55.56%
4	*Manufacturing and Associated Industries and Occupations Award 2010*	15.93%	63.69%
5	*Road Transport and Distribution Award 2010*	25.61%	62.95%
6	*Vehicle Manufacturing, Repair, Services and Retail Award 2010*	21.05%	64.38%
7	*Wine Industry Award 2010*	20%	51.25%

593. This data establishes that a small proportion of businesses have received requests for conversion pursuant to a modern award clause but that the majority of those requests have been granted. The phenomenon of large numbers of requests being made and refused, which the AMWU seeks to depict in its material, is not borne out in the results of the Joint Employer Survey.

[448] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page 40.

[449] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page 43.

[450] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachments N, P, R, W, AA, AD and AE, pages 40 and 43.

594. Importantly, the survey sought the views of respondents as to the impact that would be felt by the casual conversion provisions proposed by the unions in these proceedings:

> If casual employees were given the right to convert to permanent full-time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?

595. A complete set of responses to this question are set out at **Attachment 20W** to these submissions. A comprehensive consideration of these responses is not necessary in order for the Commission to appreciate the serious implications that 3,161 businesses perceive would flow from the grant of the unions' claims.

596. Various themes quickly emerge from but a brief review of the responses. We have here sought to provide the Commission with a sample of those.[451]

The claim would have a significant impact on the business, including causing it to become unviable:

Response ID	Response
32	Would hurt us very badly, as we do not have enough work to carry additional costs such as labour in what is a very cost competitive industry. In fact we would have to re-assess whether we could remain in manufacturing at all.
124	We would have an over supply of labour, the cost of manufacturing would increase and ultimately viability to operate in Australia reduced. The argument that alternative work could be provided is not relevant as the work must be of tangible benefit to the company i.e. earn revenue.
200	This would be unworkable in our industry and would make our business completely financially unviable. We have been in business continually for over 27 years. If this change were to occur, we would undoubtedly go out of business.
252	Huge. We would have a big turnover; the casuals are used to cover 'odd' shifts such as impromptu sick leave or ad hoc annual leave, or fill holes in the roster to cover opening hours. If these casuals were not available, permanent staff would be severely impacted, not to mention the budget. The company cannot support putting on permanent staff to 'stand around doing nothing' when it's not busy. Can't see this as a good idea at all for the retail sector.
572	We would have staff idle as their would be no work for them, making us uncompetitive and ultimately go out of business

[451] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment F.

851	Again, see the previous answer regarding seasonal turnover - it would be disastrous. * We simply cannot offer employees the same hours, over the same days, week in, week out. * One of our sites may have to close down - we would go broke trying to do this. * We are quite easygoing with new staff, and allow slow learners additional time to adjust, including a couple with learning disabilities. We would have to be very strict about dismissing anyone that isn't up to scratch by 3 months/end of probation. * We would be unlikely to consider employing people with learning disabilities in future, as it would take too long to see if they will work out long term - we wouldn't have the extra learning time for them. * We would not employ as many staff overall * We would not be able to allow staff to work other jobs that have varying hours, or work with us whilst at Uni, given the timetables vary every 12 weeks. * It would likely be the final straw - we would sell our businesses or close them down, and not consider any business in future that requires employees. It's already to restrictive here as it is.
1009	It would remove the flexibility to respond to demand for booked programs and potentially impact negatively on the budget. This would undermine the long-term viability of the organisation.
1100	It would have a significant impact and potentially threaten our ability to keep trading. If long term casual staff were transitioned into part time staff, we would have a lot of trouble maintaining the cost of wages and no work for them to be performing during off season periods.
1396	We would go broke as we have no regular roster ability and would be forced to pay people to do nothing some weeks. It would not be a viable company any more. We can not predict the work load and each year the work load is different. No regular hours of operation.
1419	This would have a detrimental effect, causing expenses to increase and the business to run a deficit each year. Eventually the business would have to close. This is because there are periods throughout the year where there is no work for casual staff, so if they converted to becoming part-time they would have to be paid each week, regardless of whether there was work for them to do or not.
1654	it would be counter productive and would potentially bankrupt the company. The organisation could not financially sustain casual employees being moved to permanent as the work flow is not stable
1915	The award would need to be more flexible in terms of being able to change hours and shifts. Bottom line is we wouldn't be able to operate. If this was brought in, I would consider closing our business as we wouldn't be able to fill shifts under current award conditions.
2246	negative. may result in paying the employee to fulfill nebulous and unnecessary tasks to meet the minimum obligation when genuine work isn't available. lost revenue. may result in our newly established business not being viable. depletes cashflow.
2964	Our business would fail to operate as the ability to keep the outlay in wages at a level our business can sustain and be able to pay our own wages, depends soley on the flexibilty of casual conditions.
3205	We would not be able to absorb this change, we would need to

	restructure our employment practices and would lose the flexibility within our workforce. We would not be able to sustain the increased costs this would force on our business and may result in us having to close.
3288	I would probably close my business. Not joking or overstating that. I would close my business.
3585	it would almost mean we would have to close our doors. Not worth staying open or if that became mandatory I would have to let 70% of the staff go
4170	Massive. We have no work for them and my husband and I would be better off closing the business and working for someone else.
4245	It would be financially unviable. The business may not be able to afford that person on a full-time wage. A lot of businesses would deliberately move staff on before they reached the 6 month period.
4429	this would not be sustainable for the organisation should most or all of the casual employees make application for permanent part time. our hours / days are dependent on client needs which are dependent on funding available to them.
4961	This would have a significant impact on our business, to the level that we think that the business would be unviable in the medium to long term. Again, I emphasise that Casual employees provide us with a significant level of staffing in suitable weather conditions, that can be sent-home if rainy weather is experienced. Most of our company's work is outdoor, bushland based that cannot be undertaken if unsuitable, usually prolonged wet weather is experienced. We can find office and workshop, wet-weather suitable work for our 8-full-time staff, but we cannot find work for the remaining 17-casual staff, when wet weather is experienced. Most of our company's work is on a "do-and-charge" basis, so if we cannot "do" the work we cannot charge for it. Casual employees allow us to knock off a fair proportion of our work force if unsuitable wet weather is experienced, offsetting the financial burden of paying staff that we cannot charge-out-for.
5753	With no right to refuse a conversion request, it is probable that the Company would consider alternate options such as; 1. using labour hire rather than employing our own casual workers 2. not providing regular work to casuals 3. offering short term contracts rather than ongoing employment 4. contracting out of service provision to brokerage or external service providers 5. immediate ceasing of direct employment 6. immediate phase down of existing employees 7. severe negative impact on the business as this would completely remove any ability to flex resources in accordance with the service demands of our customers and therefore eliminate our ability to be competitive

The business would suffer from a significant loss of flexibility:

Response ID	Response
88	We would lose flexibility. Currently, we are able to extend Casual employment to suit the Casual Employee and/or the Employer (as needs change). If this restriction were put in place, we would necessarily divest ourselves of each Casual before the defined Term could be attained so as to retain flexibility. This would disadvantage the employee and the employer.
154	This would have a significant cost impact for the business & removes the business's flexibility to adequately manage workflow peaks & troughs. We would strongly oppose this
221	a great deal. I do not have the capacity to employ any more full time staff and part time hours are completely inflexible which means I could not respond to the demands of my business
382	It would make it very difficult to provide clients with the flexibility they are entitled to because they would have to accept any worker we allocated to them (rather than have a choice) so that we could guarantee all of our permanent workers had the hours they had to be given. The services we provide are already very low profit margin, so we cannot afford to pay employees for time they don't work. Because the staff are casual, they also have the right to choose to accept or reject shifts that are offered to them, which enhances their work/life balance.
417	We would lose our flexibility to cover gaps in our operations. Our casuals are only used to fill the occasional shift.
807	Massive It would take away the flexibility of rostering. Covering annual leave and sick leave would be a huge problem
1287	It would be detrimental to our business being able to remain flexible to respond to our clients short notice needs - ultimately meaning that the total number of staff employed would fall and so would our capability to service our clients.
1373	It would create more hardship on us and we would lose flexibility, because our industry is very much peaks and troughs. We would be constantly hiring and putting people off and having to pay notice.
1375	that would have a very negative effect on our company. Retail is a very seasonal and fickle industry, we need the flexibilty to increase and reduce our workforce every month
1424	Again, this would make it extremely difficult for us to operate as there is no flexibility with Part Time staff. We need to be able to increase hours one week and reduce them the next to manage our wage costs.
1496	Whilst work may be regular the pattern of shifts and location are not. Ongoing gaps in the same place and time do not occur unless there has been a resignation. No right to refuse would not work for us as we would lose any form of flexibility in our work force. Would find it impossible to roster according to operational needs.
1564	As we use casual staff to accommodate 'short notice' leave (such as sick leave), this would restrict our flexibility in terms of rostering. We are not for profit organisation running on a 'lean' budget and additional penalty rates for the use of part time staff working 'ad hoc' shifts would be prohibitive

1846	ALOT we need to have the flexibility that if there is a massive downturn in work we can let the casual workers go without the need for redundancy that permanent employees are entitled to as that is a massive cost (especially when it is usually a short term thing and we hope to get our casuals back ASAP)
1899	The current modern award has very strict provisions regarding the rostering principles for part time employees. Our organisation has difficulty identifying work that supports those principles. If we were forced to convert casuals to part time it is possible that may result in a breach of the award because of the inflexibility of the part time hours clauses.
2180	It would signal the end of flexibility. Flexible hours, when applied judicially, are a potent method of keeping employment liquid.
2485	This would be devastating as we need flexibility for peak periods. We find it difficult at the moment to cater for permanent part-time hours outside of peak periods which has a major impact on our wages and store profitability.
3011	a big impact, as we need the flexibility due to the nature of the work, nature of the organisation, and nature of contracts constantly changing
3765	Loss of flexibility in covering shifts and ability to add or subtract rostered hours in peak or slow times. Significant cost to the business
3942	We need the flexibility of casual employment. it would reduce our capacity to do business effectively and efficiently. If there was greater flexibility in the award we would convert more casuals to part-time. We often convert casuals to part-time as opportunities arise if it suits our business needs.
4782	Our business is one that requires flexibility in its casual workforce. Factors such as weather (we are a golf club), varying trade and varying closing hours affect the organisations labour requirements. If forced to accurately predict unknown factors that affect our business labour requirements this will cause (a) higher labour costs (b) understaffing when the predictions are inaccurate.
5020	THIS WOULD EFFECT OUR FLEXIBILITY AS A SMALL BUSINESS. TRYING TO ACCOMMODATE HOLIDAYS FOR ALL THE STAFF WITHOUT BEING LEFT SHORT STAFFED WOULD BE DIFFICULT.
5223	Less flexibility to manage our business. If they are employed as casuals then only the employer should have the right to convert them if it suits the business NOT if it suits the employee. The whole point of casuals is flexibility so you can use them when needed.
5693	This would have a major impact. When work is available we employ our casual staff regularly, but when workload drops then they hours also drop. Our casual staff will be employed from 4 hours a week to 30 hours a week dependant on work load

Increased costs would be incurred by the business:

Response ID	Response
135	The Company could not sustain the cost of this as casuals are there to supplement our full-time workforce. Some casuals only work weekends to cover shifts, and if we are forced to employ permanently, our costs would increase and flexibility would decrease.
849	It would not work at all in the retail food business as we do not have the money to afford people on full time or part time basis as it all depends on the sales of the business at the time. We cannot have people doing nothing at work whilst we pay them all because they are on full time or casual basis.
1149	As our demand is seasonal this would have a huge financial impact and mean that we would have to terminate casuals approaching 6 months of employment to prevent this situation. Costing the organisation significant amounts to re-recruit and replace casuals during our peak times.
3133	This has the potential to significantly increase wages to an unsustainable level, as casuals are used mainly to cover temporary absences such as sick leave and annual leave. This would mean that there is an obligation to employ them even though there may not technically be a position available to them.
3484	It would mean that if these casuals did convert, we would need to pay out more money in wages, super & tax.
3488	This would create an added cost burden which we would find difficult to bear.
3653	We would have to let the team member go we currently don't have the ability to put staff on more than casual. There are additional costs that are incurred with full-time and part-time employment such as work cover, superannuation and other insurances additional to holiday and sick leave which would see us not be able to afford them. Added to this, the organisation has no loans or overdraft. Cashflow is priority with us, we can't give staff hours if we can't afford them. Simple.
3799	Significant cost increases. Staff filling in for other sick staff members consequently need to be paid overtime for otherwise normal business hours, as it's outside of their normal hours.
4000	Would not be able to afford the cost of permanent full-time employees if there is none or limited contract work available. Our company depends on winning tenders to provide work for our employees.
4112	This would significantly reduce our flexibility. We would have staff working when we don't need them and see a significant increase in labour cost that is not required.
4815	Increased costs, more absenteeism due to paid annual leave and sick leave and additional costs having to replace these staff. My business is not in a position to wear these costs
4829	huge as when business fell we would have to make redundancies and then reemploy which would increase costs taking into account retraining etc
5271	As our work is inconsistent then this would have a huge negative impact on our business as cash flow would not sustain the wage increase.

5630	There are casual because of the work load, if we had to employ them full time, we would have to pay them even if they didn't have work to perform. Very costly to the business
5785	This would add large additional unnecessary financial cost to the business in additional leave entitlements, not just for accrued leave, but also costs to cover the stores when those people take leave

Businesses would alter their employment practices including ceasing to engage casual employees or hiring fewer casual employees:

Response ID	Response
230	Would not employ casuals in Australia. Would offshore all these roles to the Philipinnes
349	Major expense as we would not have the work for these people and they would be idle. We would have to not employ casual employees
385	I would not employ any casual staff members and would work extra hours myself.
597	As a small business this would be a financial burden. We probably wouldn't continue to employ casual staff.
840	We would either not employ anyone at all or we would employ casuals on the up front basis that the job is only for a period of 2 to 5 months and the job will then cease to exist.
1104	it would become an financial burden that we could not sustain. We would not hire casual employees again.
1425	it wouldnt allow us to be profitable during quieter times which could mean we just dont employ those people and do it ourselves
1582	We would not employ casuals. Casuals are only hired to cover the full-time staff when sick or holidays and when production is busy.
1600	WE would not employ casuals any more as they are employed on a casual basis for flexibility. This works both ways, when they are not available they dont work.
1881	Flexibility of rostering would be negatively impacted and would not be so willing to employ junior employees. Also would be more reluctant to employ without prior experience.
2284	we would not employ them. We cannot guarantee regular work for staff. We are a small business struggling to survive as it is we cannot have extra wages expensive forced upon us.
2788	Dramatically. Would affect the viability of the business. Would cease to employ casuals unless there was a skill shortage or long term contracts from our customers in place.
3041	we would no longer employ casuals and be forced to resort to overtime for permanent staff
3914	We would be very cautious before employing more staff. Often it takes at least 6 months to see the genuine skills and attitude of an employee.
4565	massive! having a 24/7 roster, casual staff are imperative to the flexibility of the roster. If this would happen, majority of the casual positions would not be kept
5060	Because of the financial impact of this we would need to relook at how we employ people and would probably no longer employ casuals.

A consistent concern that there would be insufficient work for converted employees to perform, resulting in redundancies:

Response ID	Response
160	This would have an impact on the organisation as construction can change from being very busy to very quiet overnight and as such, it could place an organisation into difficulty if it found itself overstaffed in a time of low productivity
208	A big and negative impact. The nature and uncertainty of work flow would make it extremely difficult to automatically make casual employees permanent we would end up having to make these employees redundant in down periods and then have industrial problems with re hiring casuals to perform the same role.
515	Longer term the company would be over-resourced and would need to do redundancies. This would have a financial impact on the business and employee morale.
919	The impact would be significant; as we have short-term funded programs it might lead to more redundancies in time. It could lead to a high turnover of employees. It would make filling casual/occasional vacancies very difficult.
927	catastrophic. The amount of work we have for casuals is determined by the amount and type of work we win. we have periods of time where there is little or no work for casuals. On occasions this can be the case for several weeks or months. We would be paying a lot of staff to work and there would be no work for them to do
1403	It would greatly impact us if we than had a really quiet period & still had to find work for all the employees who had converted over to permanent. Or we would have to consider putting them off after the busy period & then having to risk finding good staff again when it got busy.
2269	This would have significant impact. Positions and guarantee of hours would need to be available - what do we do when occupancy is decreased - there is less work and employees need to be asked to take LWOP or annual leave because ward are shut - we can't have staff at work not working. This would not be a flexible and adaptable system to have in place. The employer should have and maintain the prerogative and making decisions on how many F/T, P/T and Casual employees it needs to run a successful business operation.
2527	Large impact as we would not have enough work / positions to cover casuals being converted to full-time employment after 6 months. During lean periods would put organisation under stress to cover additional payroll when income not able to support.
2690	Greatly effect my ability to ramp up/down for seasonal peaks/offpeaks. Result in short term contracts being offered, with employees loosing their position after peak times. Job insecurity would result and in a small country town that is a problem for the staff and the employer.
3610	This would be disastrous for our business as some weeks we have minimal work hours available, so we would be forced to pay people but have no work for them to do.
3889	This will add unnecessary payroll costs for employees who could not be gainfully employed full time. This may also lead to dissaffected

	employees milling around without suffficient work.
4011	We could end up with a lot of staff who are sitting around and being paid to do nothing during the quiet periods or they would be forced to take leave during these times.
4313	This would have significant impact as there is no guarantee that client engagements would extend on a permanent full-time basis and we would therefore be facing redundancy issues
4333	This will increase the staff turnover as any staff with some doubt will have to be terminated, rather than keeping them on as a casual.
4391	A job needs to exist for them to transfer over to ft or part time. Unless this is there, it would be ineffecient or person would have to be laid off shortly afterwards when downturn occurs.
5378	We may not have ongoing work for them if they are employed casually to work on a specific project. Projects come to an end and business requirements change. We would then need to look at termination / redundancy of those employees if we were forced to make them permanent
5772	Massive. Massive cost, operational impact, administative nightmare, more resources required to support. Increase to leave liabilities, ablility to roster would be difficult. Would result in redundancies as would lose the flexibility both the business and the employees.
5777	The work provided to casuals is of an irregular nature to cover planned and unplanned absences. If casuals can convert to permanent part time employment then this will result in them having the employment status of permanent part time with the employer not able to provide the regular work required of this employment status because the work is not actually available. There will be weeks were some work is available, and other weeks where no work is available. This means that employers will be liable to pay these employees even if they have not worked because there is no work available for them to carry out. This would be ludicrous.

The termination of a casual employee's employment before or shortly after they have been engaged for a period of 6 months:

Response ID	Response
92	We would have to cease employment at 5 months. Seasonality means we couldn't carry unused staff.
720	we would not hire a casual employee for more than 6 months. i.e. we would cancel their services prior to them serving 6 months.
756	We would be forced to employ casuals for less than 6 months, then find another casual to replace them. if we employed a casual for 6 months over the busy times of year, and at the end of this time they could become a permanant or part time time, we would have no work for them in the cool months and yet be forced to have them as employees.
762	I would not hire them for longer than 5.5 months as we cannot afford full or part time employment for staff since we do not have enough work for them.
867	I would have to ditch any senior staff who sought such an arrangement after 6 months. I don't have full-time hours to give an employee so this

	would be a ridiculous impost on my business.
1044	We would ensure that no casual employee was employed for more than 6 months. We employ casuals for flexibility. If we lose one more right as an employer it makes you wonder why you would bother employing in Australia.
1047	This would mean that we would change casuals each 5 months as most casuals are not suitable for full-time employment. It would create significant costs due to the costs to train casuals.
1478	We would not be able to support conversion and would mean that we would recruit based on a 6 month or less basis and therefore turning over staff regularly. This would not support the nature of our business and means we would spend many extra hours retraining etc.
1590	Would reduce employment opportunities for casuals on a long term basis. Would put systems in place to ensure no employment periods beyond 6 months
2772	We would review our hiring practices in light of our seasonal work i.e staff would be let go prior to the 6 month cap. This could make it very hard to retain good staff in our business as it would force us to turnover staff (whether we wanted to or not) and consider the use of external contractors for some jobs e.g. maintenance.
2814	We would not retain them to the 6 month mark. This would be unproductive and disruptive but a better solution than having to put people on permanently. Our workloads change dramatically and we cannot sustain additional employees where we don't have an income to cover their wages and on costs.
2830	We would terminate them & pick up another casual on 5 month 29 day cycle
2940	we would have to consider staff turnover prior to 6 months a natural requirement, as the business would have no ability to support this kind of inflexibility. Hospitality is a very organic industry and needs regular change, but this measure would ensure we would have no choice but to let staff go, prior to 6 months.
3143	Detrimental. We would have to look at not going beyond the six month mark as we can not always be sure of funding, how many clients we have in community and who choose us as their preferred provider. This can change rapidly and we would be left with part time employees rather than ride the peaks and lows with casuals
3389	i would terminate their shifts prior to the 6 months...i am unable to support the sick and annual leave....super is another huge expense...my business is too small
3420	The bistro would have to close, which would be detrimental to in-house guests and thereby affect accommodation business. Alternatively, we'd have to dismiss casual employees at 5.5 months, which would cause additional labour/training costs and result in casual employees loosing employment for no reason with their own personal collateral damage. Very inconvenient.
3525	It would increase the turnover of casuals prior to the 6 month mark, to prevent the business being forced in to a position of having to convert them to full-time employment when there may not be eth ongoing need for the role.
4119	The real effect would be that we wouldn't keep anybody on for more than 6 months which ultimately penalises good employees.
4244	we are a small business with huge seasonality so this would not work

	for us. We would have to turn over staff after 6 months. Ridiculous. This is not what our staff want.
4286	We would not employ any casual for longer than 6 months so that such a clause could not be invoked. There are employed as casual because we only want them for a short period of time.
4370	We would employee less staff and investigate options to not keep staff any longer than 6 months to avoid this situation and potential problem staff.
4645	This would be totally unacceptable. Many casuals employees would not meet our full time employment standards. The additional cost and loss of flexibility are further negative factors. The most obvious action would be to dismiss all casuals just prior to the 6 months to avoid the problem.
4894	We would start sacking casuals at 5.5 months. We prefer to have permenant employees, but having unbudgeted additional staff that this would create would send us broke. We only have as much money as we are funded.
5219	We would not be able to hire casuals for more than 6 months, this would be a very ridiculous law to enforce upon small businesses. You would find some people within our industry only hiring people for 5 months as casuals then never using them again I would fear.

Concerns relating to the seasonality of work faced by the business:

Response ID	Response
14	This would be a major hindrance on the business as the jobs that the casuals are employed for are seasonal and there is no need for their employment for the remaining 6 months of the year.
213	Very high impact on us. Business is seasonal and also depends on crop volumes. Therefore varies both within a year, and also between years. Most likely would end up ensuring we do not have more than 6 months, which is bad outcome for both employee and the business. As ana example, a low crop years may reduce our labour requirement by half. Seasonality often means we finishing activities in December, with no work until start new harvest several months later. This would be unaffordable for our business.
802	we would be unable to have all our employees on perm employment as the work is seasonal and there is no work available during the 10 week of school holiday periods annually
945	This would reduce our flexibility of managing the seasonal periods. We don't always have a set period of hours each week available, and although a lot of our casual employees do regular hours, there is never a guarantee that we will have work coming in.
1395	This would have a detrimental effect on our business due to the seasonal nature of our activities. It would mean having to pay a lot of staff when there was no work for them to do. Our expenses would increase enormously, meaning that we could no longer afford to operate the business.
2015	we are a regionally based hotel that suffers from significant seasonality swings in our business demand. this was severely impact our business in a negative way.

2665	In this seasonal business, we would have far too many employees with not enough work in the off season.
2804	This would severely limit our staffing flexibility and add costs to the business in carrying staff when not needed. We operate in a coastal holiday destination so need more staff in summer months but not in winter.
3435	This is totally impractical for a small Hotel operation in Tasmania. In the peak season we run at 95% occupancy but in the winter months this drops down to 35%. So we can not give anyone permanent part time work. In winter we may only need 1 housekeeper for 2 hours every second day. It all depends on the occupancy
3648	Major impact as we need to be able to be flexible due to seasonal conditions of the crop. We would most likely have to put people off for a period so they have no continuous service and re-employ them later. We would not want to do this as our employees are mainly long term and also want reasonably continuous employment. We have occasionally offered permanancy to some employees but generally they prefer to remain casual.
3800	This would have a significant effect on our business. It ties you into something that based on the seasonality of hospitality that you can't commit to. eg: Spring/Summer we are super busy which might cover the 6 month period and then Autumn/Winter we may not be able to carry casuals as FT or PT employees b/c we are not as busy.
5791	Big impact, there isn't enough hours for regular hours as hospitality is very seasonal, so the regular hours they may get asked to do in December wouldn't be required to be worked in eg June.

Fewer employment opportunities for casual employees:

Response ID	Response
182	We would not employ casuals on the same regular basis that we do now. We would then have to revert to having our full time employees work longer hours and more overtime. This would not be good for them and their family lives.
308	This would cause us to significantly cut back on head count, creating less employment and opportunities for casual staff. As a highly season retail business, with a great variation in customer traffic during different days of week, we require flexability in work hours and head count. If we were forced to change casuals to full time/part time, would seriously need to consider the viability of our business model
792	We would not be able to employ as many Casuals as contracted hours could become difficult to be met each pay period.
803	I would tend to employ less staff as I would lose the flexibility of being able to tell staff not to come in when it is quiet. Wages are my biggest overhead by more than double anything else, and to have to pay sick leave and annual leave to a part time employee would severely impact my business - plus the current staff don't want it any way.
859	It would result in us reducing our workforce considerably. Instead of attempting to service the customers effectively, we would accept that we would lose business with not enough staff to handle the peaks.
1151	We would change our employment practices. Employ less staff and

	work greater overtime in needed. Rely on senior staff to cover if needed. In short we would cut our workforce.
1319	We would not employ casual's and we would not be able to offer our permanent staff the flexibility that they enjoy now.
1523	We generally have 12 staff in each store. If half of them decided to convert to permanent full time after 6 months of regular employment, I would need to consider reducing alot of other staff hours as we rely heavily on the flexibility of our casuals.
2601	It would have an impact because it would mean that we would be forced to employ less casuals and would force us to try and struggle through busy periods. We would also probably only employ casuals during the busy Christmas period or only when needed. As it is we try to give casuals as many shifts as we can to keep them in employment.
2808	1. Disastrous 2. We would not have the hours to convert all casuals. 3. We would have to lay-off some of the casual staff 4. Costs overall would have to increase, as there would be no flexibility in staffing levels throughout, we would not be able to staff higher during busy periods and lower when not so busy.
3578	Business is hard enough at the moment so it would encourage me to have less staff and give more work load to existing employees.
3680	we would lose flexiable in rosters, reduced number of staff , as full timers hrs would take the hrs of the casuals, Full timers would have to complete split shifts.this would impact the business no flexiable and an extra cost in wages due o over time penatles
3883	The whole structure of the way we employ staff would change and we would be less likely to employ staff
4298	I wouldn't employee a casual staff member. full time employees would be asked to work overtime for the extra hours.
4527	Yes, we may be more likely to either not employ casuals at all, or only employ them for less than 6 months. Alternatively we may delay employing anyone until we know we have enough work to fill a permanent part-time or full-time position. The idea of casual employees is that they are a flexible employment option, this change would remove that flexibility.

Increased use of labour hire and contractors:

Response ID	Response
363	We would not hire casuals direct, but employ via an employment agency.
535	As a small employer this would be disastrous and I would move to contractors rather than casuals.
557	We are a small business therefore we need to be adaptable to survive in a competitive ever changing market. I cannot guarantee specific hours to my casual employees. If I had to guarantee hours in permanent part time I would find another way to keep our business adaptable to change. Maybe I would move from casual employees to contractors.
1110	either look at using agency staff or if that avenue was closed off as well, we would terminate employment before the 6 months was up

1146	It would force us as employers to use labour hire or have to make staff redundant if the industry suffers economic downturns.
1362	We don't require any additional permanent workers so this would impact us and our casuals because we would then only book positions through a temp contract agency.
2062	This would make us use labour hire as we need a casual workforce to cover the leave periods that can not be rostered for.
2689	we would face difficulties for a high percentage of our casuals as we have no certainty of hours we can offer. Currently when we have a part time position on offer an existing casual is usually successful in changing their status of employment. However to offer regular employment after 6 months would be difficult and place us in a position to externally source casual employees from an agency. We are of the opinion this is not in the best interests of the client and employee in regard to quality care and stability of employment
3081	We are too small a business to guarantee hours so I would have to get the work done using either contractors or outsourcing.
3732	We would cease to use casual labour and use labour hire firms or contractors.
4725	Devastating - our work is seasonal and for 35-40% of the year we would have no work for them to do!!! We would probably move our entire casual work force to contract labour hire, thus depriving workers of the per hour loyalty bonus we pay for longer term employees
5218	would be less than ideal and we would not employ anyone but try and use only sub contractors who employ others
5358	We would not be able to sustain Part-time workers we would probably use a labour hire company to supply casuals and not employ casuals or part-time employees ourselves
5370	This has a great impact on us. Some of our employees fall under a pre modern award that forms part of an EBA. It is very difficult to manage casuals that have the potential to ask to convert to permanent. It is for this reason that we generally have to employ people through a temporary agency which impacts the business due having to pay higher hourly rates and it effects the worker as they receive a lower rate of pay than they would if we employed them direct as a casual. Managers juggle the casual workers and know they have a life span within the organisation as a casual. Therefore this means that they need to employ a new casual and go through the training of the new worker even though they had a great worker already trained up.
5385	We would not use casual labour anymore, we would use labour hire as it restricts the business between projects or during quiet periods.

Concerns associated with the increased administrative burden that would result:

Response ID	Response
479	More time consuming with regards ton paying wages, monitoring allowable annual leave, sick leave entitlements etc
568	A huge impact. Small business are time poor and should be able to employee staff on the basis that best suits the business extra administration would have an negative effect
614	This would increase administration when "groups" of employees would be on differing terms of employment. Even for casuals with fairly fixed hours, they tend to vary from time to time, and administering leave arrangements when hours may vary for part-timers is time consuming
1351	The burden of payroll administration would increase. Also staff management in general
3520	A significant impact, as the employment conditions for the employee would alter requiring administrative changes, ie pay rate, employment agreement wording, notice for resignation etc etc

Minimum engagement periods

597. The survey asked respondents two questions that deal with minimum engagement periods:

- What would be the effect on your organisation if all part-time employees were entitled to a four (4) hour minimum engagement period per day/shift?
- What would be the effect on your organisation if all casual employees were entitled to a four (4) hour minimum engagement period per day/shift?

598. At **Attachments 20X – 20ZD** we have extracted the responses to these questions in respect of the following awards:

- **Attachment 20X:** Aged Care Award*;*
- **Attachment 20Y:** Fast Food Award;
- **Attachment 20Z:** Health Award;
- **Attachment 20ZA:** Horticulture Award;

- **Attachment 20ZB:** Hospitality Award;
- **Attachment 20ZC:** Nurses Award; and
- **Attachment 20ZD:** SACS Award.

599. We deal with this part of the survey in chapter 23 of this submission where we address this element of the unions' claims:

Offering additional hours of work to existing employees

600. Respondents were asked the following question:

> Before you increase the number of casual and part-time employees in your business, do you currently offer the hours to be performed by that casual or part-time employee to existing casual and part-time employees performing similar work?

601. 33.83% respondents reported that they always do. 23.26% reported that they often do and 25.85% said that they sometimes do.7.33% reported that they do not.[452]

602. The employer responses in this regard are dealt with in greater detail in chapter 25 of this submission.

[452] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page 45.

21. Ai GROUP'S EVIDENCE

603. We here consider the evidence of each of Ai Group's witnesses. The evidence demonstrates that:

- Casual employment as a percentage of the workforce has been reasonably stable since 1998.
- Greater labour market flexibility helps to improve workforce participation and reduce unemployment. This will result in productivity benefits.
- Many casual employees choose casual engagement because it suits their personal circumstances, such as study commitments or caring responsibilities.
- There are legitimate operational reasons due to which businesses engage casual employees to perform work on a basis that is not irregular, non-systematic or occasional, for a period that exceeds 6 months.
- Seasonal fluctuations pose a serious challenge for employers, particularly in the agricultural, horticultural and food industries, and necessitate access to a pool of casual employees.
- Employers require access to a pool of casuals for various other reasons including replacing temporarily absent employees and meeting fluctuations in production and/or demand.
- The introduction of the casual conversion provisions proposed would impose a serious new administrative burden on employers, particularly those that employ a large number of casual employees.
- The introduction of the casual conversion provisions proposed would lead to a large number of casual employees being terminated.

- The conversion of casual employees to permanent employment will remove an important flexibility that is required by businesses to meet fluctuating customer demand.

- The conversion of casual employees to permanent employees without a right of refusal will result in circumstances in which converted employees are made redundant because there is no work for them to perform.

- The casual conversion provisions proposed would lead businesses to increase their use of labour hire employees, contractors or to relocate the work offshore.

- The casual conversion provisions proposed would be particularly problematic for labour hire agencies and would seriously undermine their business model.

- Employers endeavour to accommodate and encourage permanent employment where they can do so, having regard to the operational needs of the business.

- There are legitimate operational reasons due to which businesses require casual and part-time employees to perform work for less than 4 hours on a particular engagement.

- The introduction of four hour minimum engagements would hamper business' ability to engage school-aged employees.

- The introduction of four hour minimum engagements/payments would increase employment costs as employers would be required to engage/pay employees in circumstances where there is no work to be performed by them.

Julie Toth

604. Julie Toth is Ai Group's highly qualified and experienced Chief Economist. She is an expert on the economic effects of the labour market.

605. Ms Toth's evidence deals with casual employment data published by the ABS in various different reports, and how such data should be analysed given the methods of collection and other relevant factors.

606. Her evidence shows that casual employment as a percentage of the workforce has been reasonably stable since 1998 at 19% to 20% of the workforce.[453]

607. She accepts that there has been a rise in the level of casual employment in the manufacturing industry since 2001 but points out that this can be explained by the substantial changes that occurred in the manufacturing industry over the period and the significant increase in the relative proportion of food manufacturing – a sector in which casuals are more common than in other sectors of manufacturing.[454]

608. An arithmetic error has been identified in paragraph 56 of Ms Toth's statement regarding the level of casual employment in the manufacturing industry. The correct figures (as can be readily verified by adding the relevant amounts referred to in the statement) are:

November 2001	13.7%
November 2010	15.6%
November 2013	~~19.1%~~ 14.5%

609. With the above correction, it can be seen that the level of casual employment in the manufacturing industry fell significantly in the three years leading up to the release of the latest statistics.

[453] Witness statement of Julie Toth, dated 23 February 2016 at paragraph 19.

[454] Witness statement of Julie Toth, dated 23 February 2016 at paragraph 56 – 59.

610. At paragraph 36 of her statement, Mr Toth states that the general consensus of the research on labour market flexibility is that greater labour market flexibility helps to improve workforce participation and reduce unemployment. She explains the productivity and employment benefits that flow from maintaining flexibility in the labour market.

611. Ms Toth responds to the reports of Professor Markey et al. She highlights that the paper only addresses two types of flexibility within firms, and fails to examine broader measures of labour flexibility across the economy or population.[455]

612. With regard to the ACTU claims about worker and job seeker preferences, Ms Toth highlights that such claims are inconsistent with ABS data on unemployment, underemployment and part-time work.[456]

613. Ms Toth takes issue with Dr Skladzien's assertion that the increase in the proportion of the manufacturing workforce that is casual has contributed to skill shortages or poor productivity. She points out that skill shortages and poor productivity have occurred for other reasons that she identifies which are unrelated to the employment of casuals.[457]

614. The ACTU's cross examination of Ms Toth did not impact upon the above propositions.

Mark Goodsell

615. Mark Goodsell is the Director of Manufacturing and NSW Director of Ai Group. His responsibilities include engaging with member companies in the manufacturing industry in order to understand the structural, technological and other changes acting upon Australian manufacturing for the purpose of better representing and servicing this sector of Ai Group's membership.

[455] Witness statement of Julie Toth, dated 23 February 2016 at paragraphs 44 – 45.
[456] Witness statement of Julie Toth, dated 23 February 2016 at paragraphs 49 – 53.
[457] Witness statement of Julie Toth, dated 23 February 2016 at paragraphs 60 – 66.

616. Mr Goodsell's evidence goes to the major structural changes that are currently occurring in the manufacturing industry driven by global competition, a prolonged period of high value for the Australian dollar, technological changes and many other factors.

617. As stated by Mr Goodsell, in this environment the flow of work is often inconsistent and unpredictable. While a season or spike in workload often continues for more than six months, this does not change the fact that future work is unpredictable and employers need the flexibility to engage casuals as needed.

618. Mr Goodsell's evidence demonstrates that in the current environment of transition for the manufacturing industry, workplace flexibility is vital. Such flexibility influences decisions by businesses on whether or not to invest in Australian manufacturing operations. Casual labour operates as a buffer that helps to protect the majority of employees from the adverse effects of line, plant or site closures.[458]

619. In his statement, Mr Goodsell outlines the major disruption that would result from the AMWU's casual conversion claim, and the adverse effects for businesses and workers, including more workers being terminated and less workers being hired.

620. The cross-examination by the ACTU and AMWU did not undermine the above propositions.

Krista Limbrey

621. Ms Krista Limbrey is a People Insights and Recruitment Manager for McDonald's. Prior to this, she was employed in a number of roles including HR Business Partner NSW/ACT, National Training and HR Design Consultant, National Operations Consultant and Restaurant Manager of the Thornleigh restaurant. In total, she has been employed by McDonald's for over 12 years.

[458] Witness statement of Mark Goodsell, dated 26 February 2016 at paragraph 26.

622. Ms Limbrey was called by Ai Group to give evidence in support of our claim to introduce a facilitative provision that enables an employer and employee to agree to reduce the casual minimum engagement period, as well as in response to the ACTU's common claims.

623. Ms Limbrey provided a statement dated 12 October 2015 [459] (**First Statement**), a statement in reply dated 24 February 2016 [460] (**Second Statement**) and was cross-examined by the SDA during proceedings on 21 March 2016. We note that large parts of Ms Limbrey's evidence were uncontested.

624. McDonald's applies an enterprise agreement nationally titled the *McDonald's Australia Enterprise Agreement 2013*[461]. Its coverage includes stores that are owned by McDonald's as well as those operated by franchisees. The agreement, as per the Fast Food Award, stipulates a three hour minimum engagement for casual employees and does not contain a casual conversion clause. Therefore, Ms Limbrey's evidence is of obvious relevance to these proceedings. Furthermore, at paragraph 24 of her Second Statement, Ms Limbrey expresses the uncontested view that although there is an enterprise agreement in place, the terms of the Fast Food Award will affect McDonald's future enterprise agreements. We note that the aforementioned enterprise agreement has a nominal expiry date of 24 June 2017.

625. Ms Limbrey's First Statement provides important information regarding the size and scope of McDonald's as a business in the fast food industry, as well as the composition of its workforce:

- **Number of restaurants:** As at 19 May 2015, there were 943 McDonald's restaurants in operation in Australia. Of those, 165 were

[459] Exhibit 81, including annexures KL-1 to KL-6.

[460] Exhibit 83.

[461] AE402596.

company-owned restaurants and the remaining 778 were operated by franchisees.[462]

- **Composition of restaurants:** As at 2 October 2015, there were 737 "freestander" restaurants, which are typically located in a standalone building and include a drive through and restaurant dining area. Another 207 food court and in-store restaurants were also in operation.[463]

- **Number of employees:** As at 19 May 2015, McDonald's employed 98,911 individuals.[464] Of those, 20,759 were employed directly by McDonald's and 78,152 were employed by franchisees.[465]

- **Type of employment:** As at 19 May 2015, 15,953 of all employees employed directly in a restaurant by McDonald's were engaged on a casual basis.[466] As at the same date, 59,995 of all employees employed by a franchisee operating a restaurant were engaged on a casual basis.[467] In each case, this constitutes 76.8% of all employees.

- **Age profile of employees**: As at 19 May 2015, 82% of casual employees employed directly in a restaurant by McDonald's were aged 18 or under.[468] As at the same date, 75% of casual employees employed by a franchisee operating a restaurant were aged 18 or under.[469] Most of McDonald's employees are at school or undertaking some kind of study.[470]

[462] Paragraph 4 of the First Statement.
[463] Paragraph 6 – 7 of the First Statement.
[464] This includes employees employed in restaurants. It does not include corporate employees.
[465] Paragraph 28 of the First Statement.
[466] Paragraph 35 of the First Statement.
[467] Paragraph 36 of the Second Statement.
[468] Paragraph 38 of the First Statement,
[469] Paragraph 40 of the First Statement.
[470] Paragraph 42 of the First Statement.

626. From the evidence above, the following factual propositions can be distilled, each of which lend support for the proposition that Ms Limbrey's evidence is relevant to these proceedings and should be given considerable weight:

- That McDonald's is an employer of significant size and proportions;
- That McDonald's employs a very large number of employees;
- That three-quarters of McDonald's workforce is engaged on a casual basis; and
- That the vast majority of these casual employees are aged 18 or under and/or undertaking some kind of study.

627. Ms Limbrey's evidence also goes to the constraints within which food court and in-store restaurants' hours of operations are determined. At paragraphs 8 – 10 of her First Statement, Ms Limbrey states that:

- 125 food court restaurants do not trade 24 hours a day, 7 days a week;
- Very few in-store restaurants trade 24 hours a day, 7 days a week; and
- The trading hours of food court restaurants are typically determined by the shopping centre within which they are located and any applicable regulation. Examples of these trading hours can be found at paragraph 11. In numerous instances, the relevant food court restaurant closes on a Monday – Friday between 5 – 6pm.

628. Ms Limbrey's evidence establishes that the trading hours of in-store and food court restaurants is a matter that, to a very significant degree, sits beyond the scope of McDonald's purview. That is, the relevant restaurant may be compelled to close at a specific time due to the opening hours of the shopping centre in which it operates. It can reasonably be inferred that such conditions are faced also by other fast food operators in shopping centres.

629. Despite the SDA's attempts to establish the contrary during cross examination, Ms Limbrey confirmed that the performance of tasks in order to

facilitate the closing of a store does not necessarily provide a means by which such employees could be engaged for a minimum of three hours.

630. Relevantly, a significant proportion of employees employed by food court and in-store restaurants are casual employees under the age of 17.[471] More specifically, 74% of employees employed in food court and in-store restaurants are casual employees and of those, 49% are under the age of 17 and likely to be school students.[472]

631. Based on her analysis set out at paragraphs 64 – 103 of the First Statement, Ms Limbrey concludes that:

- On weekdays before 4pm, very few 14 – 17 year old employees are available to work.[473]
- On weekdays between 4pm and 8pm, a very high proportion (60 – 68%) of 14 – 17 year old employees are available to work.[474]
- On weekdays after 8pm, the availability of employees of all ages declines by the hour. The difference is the greatest for employees aged 14 – 17 years.[475]

632. The incidence of shifts worked that are less than four hours in length is documented in Ms Limbrey's Second Statement:

- During a five week period, 29% of shifts worked by level 2 employees in five limited trading hour restaurants were less than four hours in duration.
- During a one week period, 15.4% of shifts worked by level 2 employees in ten 24/7 free standing restaurants were less than four hours in duration.[476]

[471] Paragraph 12 of the First Statement.
[472] Paragraph 13 of the First Statement.
[473] Paragraph 104(a) – (b) of the First Statement.
[474] Paragraph 104(f) of the First Statement.
[475] Paragraph 104(i) of the First Statement.

633. Based on the above analysis, Ms Limbrey expressed the concern that "an increase to the minimum engagement period for employees from three hours to four hours would have a significant impact on the ability of McDonald's restaurants to hire young people and to regularly engage them in employment".[477] She also considers it "likely that McDonald's restaurants would not be able to continue to employ this quantity of employees, because we would be forced to give more hours to existing employees".[478] Her experience with the business and the nature of her role provides a proper basis for her opinion in this regard.

634. Ms Limbrey's oral testimony went to the significant administrative burden that would arise from an obligation notify its casual employees if and when their entitlement to request conversion crystallises. This is not an assessment that can be made by the payroll systems utilised by McDonald's (noting that franchisees utilise and independently manage one of a selection of payroll systems[479]). Rather, it would require a very time consuming manual task, bearing in mind the substantial number of casual employees engaged by the business:

> So what would that entail specifically?---So you'd have to look at that employee's history for the last - someone would have to go in and look at that employee and that employee's hours of work for the last year I suppose, because if you were to look at an average it wouldn't be reflective of what they regularly did, because particularly with our employees they might be not available for a whole period of five - you know, four, five, six weeks, for exams or holidays or whatever, so if you looked at an average it's probably not reflective, so you'd have to go in and look at that person and each week.[480]

635. Over the past two years, McDonald's has endeavoured to promote and increase permanent employment opportunities for its workforce.[481] Indeed from July 2014 to January 2016, there has been a 10.04% increase in the

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[476] Paragraph 34 of the Second Statement.

[477] Paragraph 32 of the Second Statement.

[478] Paragraph 41 of the Second Statement.

[479] Transcript of proceedings on 21 March 2016 at PN7283.

[480] Transcript of proceedings on 21 March 2016 at PN7318.

[481] Paragraph 17 of the Second Statement.

proportion of permanent level 2 employees employed by company-owned restaurants.[482]

636. Ms Limbrey emphasised however that McDonald's ability to convert its casual employees to permanent employment is tempered significantly by the needs of the business. Importantly, the employee must be available to work on days and at times that align with the restaurant's operational requirements such that the relevant restaurant can commit to providing the employee with at least 10 hours of work each week.[483]

637. It is also important to note the witness' evidence regarding employee response to the business' initiative in this regard:

> SENIOR DEPUTY PRESIDENT HAMBERGER: And you don't have problems with people - I mean, this might be a difficult question but, you know, when you have these discussions with people offering them part-time work, who presumably they don't get the casual loading, they get some - - -?---All the time.
>
> Sorry?---Sorry, all the time. So whilst there has been an increase, a huge proportion of young employees if you were to have that discussion with them would straight away, "no way, not interested", because of that significant difference. And often we get lots of questions - if someone does change to part-time - that we often get calls from our end at a corporate level; they ask why they're getting paid less all of a sudden. It might be one of their parents or it might be the employee calling to find out why all of a sudden he used to get, you know, $100 a week and now he's getting a lot less.[484]

638. Ultimately, McDonald's requires access to casual employees "as the sales volumes of our restaurants fluctuate from day to day and week to week which means that the number of shifts and hours that they have available from one week to the next differs".[485] Furthermore:

> … many of our casual employees enjoy the flexibility that comes with casual employment, including dictating when they will be available to work. Many of our employees also do not want to commit or are unable to meet the minimum number of

[482] Paragraph 18 of the Second Statement.

[483] Paragraph 17 of the Second Statement and transcript of proceedings on 21 March 2016 at PN7266

[484] Transcript of proceedings on 21 March 2016 at PN7255 – PN7266.

[485] Paragraph 6 of the Second Statement.

hours required for a part-time employee on a weekly basis, and this we employ them as casual employees.[486]

639. Noting McDonalds' position in the fast food industry and the number of casual employees it engages, the impact of the claim would be considerable. Further, it can reasonably be inferred that elements of Ms Limbrey's evidence are also relevant to other fast food operators who conduct their businesses under similar circumstances.

Benjamin Norman

640. Benjamin Norman is the Director of Human Resources for the Viterra Group of companies (**Viterra**).[487] Mr Norman's evidence provides a key example of a business to which the engagement of casual employees is essential. Importantly, as we later detail, there are circumstances in which casual employees are engaged by the business on a regular basis for a period exceeding 6 months however, the inherent nature of the work performed by its employees is such that Viterra is unable to predict or guarantee the continuance of that work. The ACTU's claim poses a serious risk to Viterra's operations. Accordingly, we propose to deal with Mr Norman's evidence in some detail.

641. Viterra's operations include:

- Grain packing and processing facilities, which receive grains, lentils and pulses from Viterra's customers (i.e. the growers of these commodities). The commodity is unloaded, fumigated, cleaned, subject to quality control and stored until it is loaded into shipping containers for export.[488]

- A grain storage and handling network, consisting of more than 90 country grain receival sites and six grain port terminals. At the port

[486] Paragraph 12 of the Second Statement.

[487] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 1.

[488] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 6.

terminals, Viterra provides assembly, freight, port storage, throughput and ship loading services.[489]

642. Viterra's storage and grain handling system consists of push and pull logistics:[490]

- The push system involves receiving grain and other commodity from growers during harvest. The timing and volume of commodity received from growers cannot be accurately planned in advance.[491] The push system is also greatly influenced by the weather, which can impact upon a growers' ability to produce grain and on Viterra's ability to operate.[492]

- The pull system enables global traders to ship grain when the market demands it. Demand can vary throughout the year and from year to year and is a matter beyond Viterra's control.[493] Viterra's operations are also heavily reliant on shipping and rail transport providers. It is not uncommon for shipping vessels to arrive outside their scheduled windows or fail survey, or for trains to be cancelled or delayed.[494]

643. Viterra's employment arrangements can be summarised as follows:

- Viterra employs approximately 1,000 employees outside of harvest, including full-time, part-time and casual employees.[495] During harvest, it engages an additional 1,500 casual employees.[496]

- Employees employed in container and grain storage operations are covered by the Storage Award. There are three enterprise agreements

[489] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 5.
[490] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 7.
[491] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 8.
[492] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 10.
[493] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 12.
[494] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 13.
[495] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 16.
[496] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 17.

currently in operation that apply to these employees. None contain a casual conversion clause.[497]

- The Clerks Award applies to all staff wholly or principally engaged in clerical work at operational and non-operational sites. There are no enterprise agreements in place that apply to these employees.[498]

- The *Stevedoring Industry Award 2010* (**Stevedoring Award**) covers employees wholly engaged to complete stevedoring activities such as ship loading and unloading. An enterprise agreement applies to these employees. It does not contain a casual conversion clause.[499]

- The *Miscellaneous Award 2010* (**Miscellaneous Award**) applies to laboratory staff that do not require tertiary level qualifications. All of these employees are engaged on a casual basis. There is no enterprise agreement applying to these employees.[500]

- The Professional Employees Award and the Manufacturing Award also cover Viterra, however it does not engage any casual employees under either of these awards.[501]

644. Based on his experience to date, Mr Norman expressed concern that if the ACTU was successful, Viterra would be "faced with claims from unions for the new casual conversion clauses to be included in the next round of enterprise agreements", noting that the agreements currently in place have a nominal expiry date of 2016.[502]

[497] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 23.
[498] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 24.
[499] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 25.
[500] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 26.
[501] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraphs 27 – 28.
[502] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 53.

645. The need for a casual workforce is articulately described by Mr Norman as follows:

> The highly variable and unpredictable workflow requires a flexible workforce. The ebbs and flows in the volume of work as well [as] the variations to when the work is to be performed can only be met if Viterra has access to a reserve of casual employees. A permanent workforce does not provide Viterra with sufficient flexibility.[503]

646. He further details the use of casual labour in specific parts of business:

- Harvest is the busiest time of the year. It occupies approximately 10 – 12 weeks per annum. The precise timing and duration of the harvest is contingent upon the weather. An additional 1500 casual employees are engaged to primarily focus on the push system described above. The majority of these casual employees are terminated when harvest ends, as there is no longer any work for them to perform. The remaining casual employees will continue in Viterra's employ for varying lengths of time.[504]

- Casual employees are also engaged throughout the year in almost all areas of the business. Their hours of work vary significantly over the course of their engagement.[505]

- Employees covered by the Storage Award are responsible for the out-turning of crop during and outside harvest.[506] The number of employees required each day varies significantly and is largely contingent upon the orders made for export. Viterra has little control over when this work is to be performed; it is determined entirely by the activity of exporters and is not confined to the harvest period.[507] There is also considerable uncertainty associated with the delivery of commodity by rail and the arrival of ships. There may be days or weeks at a time during which

[503] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 49.
[504] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraphs 32 – 33.
[505] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 34.
[506] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 35.
[507] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 36.

there is no work for Viterra's casual employees to perform because few loads of commodity have been received or there are fewer orders for export.[508]

- The workload of clerical employees fluctuates in tandem with the flow of commodity. They perform various administrative duties, including those related to logistics.[509]

- The volume of work performed by employees to whom the Miscellaneous Award applies and its timing is contingent upon when Viterra receives commodity; a matter over which it does not have any control. The hours worked by these employees vary considerably.[510]

- Work performed by employees covered by the Stevedoring Award depends entirely on the movement of ships in and out of the grain terminals. The length of the shipping stem and the timing of ships coming into the port is primarily determined by grain traders and exporters.[511] Weather conditions also have a significant impact on how and when shops can be loaded.[512]

647. The application of the ACTU's proposed clause and the serious impact that it would have on Viterra's business and its employees is set out in the following excerpt of Mr Norman's statement: (emphasis added)

> Some casual employees are, over a period of several months, engaged to perform work on a basis that might be considered regular or systematic. Their hours of work may be relatively routine, particularly during and after harvest. However, this occurs virtually by coincidence. Viterra is not in a position to know in advance that a casual employee will be required to work such hours nor is there any guarantee that there will remain work on an ongoing basis for that employee. For example, the experience of draught typically results in a drop in the demand for Viterra's packing and processing services. Alternatively, a drop in the global demand for grain can suddenly result in less out-turning work. If Viterra was forced to convert its casual

[508] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 37 – 38.
[509] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 40.
[510] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 43.
[511] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 45.
[512] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 46.

employees, such unexpected events would leave Viterra with no choice but to make those employees redundant.[513]

648. During proceedings before the Full Bench, Mr Norman confirmed that casual employees may be engaged in work that is immediately preceding or following the conclusion of the harvest. Such casual employees may work on a regular basis for longer than six months.[514] This is followed by periods during which there is no work to be performed by those employees; typically during the months of June, July and August.[515]

649. Mr Norman explained that the length of the harvest may also vary. In 2007/2008, Viterra received 1.8 million tonnes of commodity whilst in 2010 – 2011 it received approximately 9 million tonnes.[516] Such a large quantity of grain results in a longer harvest and directly impacts the length of time over which its casual employees are engaged:

> What effect did that have on these casuals?---A big effect. Back in 2008-09, 07-08, admittedly before my time, but I am told this, it wasn't just casuals not being able to work, but also redundancies and permanent employees not having work. In 2010 we couldn't get enough people to stay open as long as we wanted to.
>
> Does that affect the length of time casuals are engaged?---Yes.
>
> VICE PRESIDENT HATCHER: Did you also have problems in bumper seasons with storage facilities in the sense of silos have limited capacity; once they're full, they're full?---Yes, yes. And that's why we need more people to get it out of our silos and on to boats.
>
> MR FERGUSON: And those sorts of problems have an impact on the length of time casuals work?---Yes.
>
> What's that impact?---On a bigger season they would work for longer because we would have more boats to deliver grain to.[517]

650. The evidence also reflects Viterra's efforts to offer permanent employment to its casual employees in the limited circumstances that this can be accommodated, however Mr Norman notes that in his experience "an offer of

[513] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 50.

[514] Transcript of proceedings on 18 March 2016 at PN5186 – PN5192.

[515] Transcript of proceedings on 18 March 2016 at PN5195 – PN5198 and PN5213 – PN5214.

[516] Transcript of proceedings on 18 March 2016 at PN5205.

[517] Transcript of proceedings on 18 March 2016 at PN2506 – PN2510.

converting to permanent position will often be refused as the employee would prefer to remain engaged as a casual".[518]

651. Mr Norman also provides important evidence regarding the training and safety obligations concerning all employees including those engaged on a casual basis:

- All employees undergo training relevant to their role at the commencement of their employment. There is no differentiation in the training offered to a permanent employee and a casual employee performing the same role.[519]
- If a casual employee, during the course of their employment, is required to perform additional or different work, they will receive the training necessary to perform that work.[520]
- All employees, including casual employees, undertake the same safety training when they commence employment.[521]
- Viterra's fatigue management policy applies to all employees, including those engaged as casuals.[522]

652. The ACTU's proposal to require an employer to offer additional hours of work to pre-existing part-time and casual employees before engaging additional such employees "would be very problematic for Viterra for multiple reasons"[523]:

- The performance of additional hours of work by pre-existing employees may be in breach of the business' fatigue management policy.[524]

[518] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 52.
[519] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 54.
[520] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 55.
[521] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 56.
[522] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 57.
[523] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 59.
[524] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 60.

- The tasks performed by certain employees require a very specific skills set. Even if the requirement is to offer additional hours only to those employees who perform "similar work", those employees may not possess the requisite skills. This would undermine their productivity.[525]

- It may be necessary to engage additional employees such that there are a greater number of employees working side-by-side simultaneously in order to ensure that the relevant work is performed within a particular timeframe.[526] Examples include the loading of a train or ship within a specified period of time, and the receipt and processing of grain as it is delivered during harvest.[527]

Paula Colquhoun

653. Paula Colquhoun has been the human resource manager for the Mitolo Group for seven years.[528] The Mitolo Group is in the business of growing potatoes and onions for sale to major supermarket supply chains and produce markets.[529] It trials, plants, grows, harvests, washes, grades, packs and distributes potatoes, potato seed and onions.[530]

654. At the time of making this statement, the Mitolo Group's workforce of 345 employees included 197 part-time employees and 72 casual employees.[531] Casual employees are engaged for two primary purposes: harvest and land management/planting.[532]

[525] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 61.
[526] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 62.
[527] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraphs 63 – 64.
[528] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 1.
[529] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 3.
[530] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraphs 4 – 5.
[531] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 9.
[532] Transcript of proceedings on 16 March 2016 at PN2722.

655. The Mitolo Group's casual employees can also be categorised by reference to their length of service:

- 48.65% of its casuals have been engaged for less than six months.[533] Those employees are involved in the harvesting of crop.[534] However not *all* employees who are engaged for the harvest are engaged for less than six months; some may be engaged for a longer duration.[535]

- 51.35% of its casuals have been engaged for more than six months.[536] Those employees are involved in planning and land management as well as the harvesting of crop.[537]

656. Accordingly, a significant proportion of its employees may be eligible to seek conversion pursuant to the ACTU's proposed clause.

657. The *Maranello Trading Pty Ltd Farm Employee Collective Agreement,*[538] which is underpinned by the Horticulture Award, applies to the very vast majority of those casual employees.[539] The Mitolo Group's remaining employees are covered by the following awards:

- the Manufacturing Award, noting that the business does not employee any casual employees covered by this award[540];

- the Wine Award*;*

- the Clerks Award, nothing that there is no enterprise agreement applying to such employees[541]; and

- the RTD Award.

[533] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 14.
[534] Transcript of proceedings on 16 March 2016 at PN2724.
[535] Transcript of proceedings on 16 March 2016 at PN2856.
[536] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 14.
[537] Transcript of proceedings on 16 March 2016 at PN2724 – PN2725.
[538] Exhibit 23.
[539] Transcript of proceedings on 16 March 2016 at PN2820.
[540] Transcript of proceedings on 16 March 2016 at PN2812.
[541] Transcript of proceedings on 16 March 2016 at PN2797.

658. Apart from the Manufacturing Award, none of the industrial instruments applying to employees of the Mitolo Group contain a casual conversion provision.[542]

659. The relevance of Ms Colquhoun's evidence should not be tainted by the application of certain enterprise agreements to the business. Based on her experience and involvement in enterprise bargaining,[543] she expressed the view that the award variations sought "will impact greatly on any new enterprise agreement or if we revert back to the underpinning award".[544]

660. Seasonal factors have a direct bearing on the number of casual employees required by the business at a particular point in time and creates an obvious difficulty for the business if it were required to convert all casual employees that so sought conversion:

> 11. Staff numbers vary throughout the year. During peak seasons when onions and potatoes are harvested our number of employees increases. … This enables the product to be harvested upon sales demands, weather permitting as well as when the potatoes and onions are ready to prevent deterioration of the product.
>
> 12. The Mitolo Group employs casual staff to enable short term labour for harvest. During peak harvest the number of casuals can increase between 25 – 30%. Once harvest is complete in a particular region, or pivot there is no further work for these harvest crew to perform.[545]

661. Whilst the Mitolo Group does engage some casuals to work on a regular and systematic basis for more than 6 months at a time, "due to the nature of the work there is not enough work for them for the full 12 months of the year".[546] During certain months of the year "there is no work to do for a selection of our casual workforce" due to planting and harvesting schedules.[547] Furthermore, the hours worked and the days of the week during which that work is performed "will also fluctuate greatly due to the weather and harvesting

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[542] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraphs 23 – 25.

[543] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 26.

[544] Transcript of proceedings on 16 March 2016 at PN2849.

[545] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraphs 11 – 12.

[546] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 18.

[547] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.

demands".[548] In this regard, Ms Colquhoun's evidence provides a very clear example of the reasons why the casual conversion provision proposed by the ACTU in the horticulture industry is entirely unworkable.

662. The ACTU has sought the introduction of a four hour minimum engagement for all casual and part-time employees in the Horticulture Award. Ms Colquhoun provides the following examples of circumstances in which this would be impracticable for the business because it would not in fact have any work for the employees to perform for that duration:

- A change in weather conditions can cause harvest to cease for the day. As the business' pivots are located in remote areas, there is no work for the harvest crew to perform thereafter.[549]

- Potatoes are harvested according to sales requirements. If only a small amount of a particular product is required, that work will be completed in less than four hours.[550]

- "There will also be circumstances where there may be a small amount of that pivot that has been left due to [the business] not be able to overload [its] trucks to send them down from that site, so there may (sic) require another small dig to complete that particular pivot".[551]

663. Ms Colquhoun also comments that "due to the nature of horticultural work and the quality, weather, yield and sales demand, [the Mitolo Group is] unable to predict a pattern of work or hours for our casual workforce. Placing an obligation to provide a casual their likely number of hours of engagement is not achievable".[552]

[548] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 17. See also transcript of proceedings on 16 March 2016 at PN2744 – PN2755.

[549] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.

[550] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.

[551] Transcript of proceedings on 16 March 2016 at PN2753.

[552] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.

Robert Blanche

664. Robert Blanche has held the position of Director and Chief Executive Officer for Bayside B.W.E. Pty Ltd for 40 years.[553] Bayside B.W.E. is part of the Bayside Group of companies, all of which provide recruitment and employment services.[554] Its main business is placing temporary on hire workers with other businesses.[555] Those clients primarily use Bayside's services for on-hired workers to meet peaks and troughs in workflow and demand from their customers.[556]

665. The Bayside Group employs up to 2000 on hire casuals on any given day.[557] Approximately 90% of its workforce is constituted by casual employees[558], of which approximately 99% perform work on Bayside's clients' sites.[559] The flexibility provided by casual employment is part of Bayside's core business model.[560]

666. The length of service of a particular casual employee is primarily determined by the requirements of Bayside's clients.[561] The employee's availability and to some extent, their performance, may also be relevant.[562] The average period of service for a casual employee employed by Bayside is nine months.[563]

[553] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 1.
[554] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 3.
[555] Witness statement of Robert Blanche, dated 23 February 2016 at paragraphs 4.
[556] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 5.
[557] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 10.
[558] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 11.
[559] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 13.
[560] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 12.
[561] Witness statement of Robert Blanche, dated 23 February 2016 at paragraphs 14 – 15.
[562] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 15.
[563] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 14.

667. Approximately 95% of Bayside's casual and part-time employees are covered by modern awards.[564] The business advised that the following 23 modern awards are relevant to its business:

- Aged Care Award*;*
- *Airline Operations – Ground Staff Award 2010* (**Airline Operations Ground Staff Award**)*;*
- Banking Award*;*
- *Building and Construction General On-Site Award 2010;*
- *Cleaning Services Award 2010* (**Cleaning Award**)*;*
- Clerks Award*;*
- *Educational Services (Post-Secondary Education) Award 2010;*
- *Educational Services (Schools) General Staff Award 2010;*
- *Electrical Power Industry Award 2010* (**Electrical Power Award**)*;*
- FBT Award*;*
- Health Award;
- Higher Education General Staff Award;
- Manufacturing Award*;*
- *Medical Practitioners Award 2010* (**Medical Practitioners Award**)*;*
- Miscellaneous Award;
- Nurses Award;
- *Pharmaceutical Industry Award 2010* (**Pharmaceutical Award**);

[564] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 26.

- Professional Employees Award;
- *Rail Industry Award 2010* (**Rail Award**)*;*
- SACS Award*;*
- Storage Award*;*
- Vehicle Award*;* and
- Wine Award.[565]

668. In Mr Blanche's 40 years of experience with the business, a request for conversion from a casual employee has never been received.[566]

669. Mr Blanche testified that Bayside would "be unable to run [its] business" if the ACTU and AMWU claims to insert new casual conversion provisions were granted.[567] As he explained whilst under cross examination: (emphasis added)

> … The greatest difficulty for us would be not having the work to be able to provide them and the type of business that we operate.
>
> If that came up, an assignment came to an end, you'd have to try to place them elsewhere within your 6000 employee organisation. Is that right?---No, I don't deal with 6000 employee organisations. I deal with about 200 employers who may or may not have a need for that particular skill set.
>
> So you have to try to find somewhere to put them among the 200 employers with whom you deal and if you can't do that and they've been with you longer than a year, then you have to pay redundancy pay?---Correct.[568]

[565] Exhibit 65.

[566] Transcript of proceedings on 18 March 2016 at PN5732 – PN5733.

[567] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 28.

[568] Transcript of proceedings on 18 March 2016 at PN5700 – PN5702.

670. His statement also provided insight into this difficulty, which is indicative of that which would be faced by labour hire agencies generally:

> Many client projects have very specific end dates and require staff with very specific skills which could then not be easily transferred to another client at the end of the project.
>
> If a host employer requires an employee for an 8 month project and we place them and they automatically become permanent after 6 months, then we would likely be faced with terminating the employee's employment after 8 months on the basis of no ongoing permanent work and in addition, carry the cost of permanent entitlement liability that we could not recover from the client.[569]

671. In response to a question from Deputy President Bull during the proceedings, Mr Blanche stated that the reasons for which casual employees leave Bayside's employment included there being "a lot of people that go into direct employment with the client after three months".[570] For example, during 2014 – 2015, 125 casual employees of Bayside were converted to full-time employment with a particular client.[571]

Kay Neill

672. Kay Neill has been the Chief Executive Officer of CHG since 2001.[572] CHG provides workplace health services to a wide range of businesses, including pre-employment assessments, immediate response to trauma, ongoing provision of primary health care services, injury management, prevention services, allied health treatment, psychology services, health promotion initiatives, and physical and vocational rehabilitation.[573]

673. CHG wholly owns Corporate Health Group Defence (**CHG Defence**), which undertakes specialised medical assessments to ensure candidates enlisting in

[569] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 29.

[570] Transcript of proceedings on 18 March 2016 at PN5753.

[571] Witness statement of Robert Blanche, dated 23 February 2016 at paragraph 20 at transcript of proceedings on 18 March 2016 at PN5734.

[572] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 1 and transcript of proceedings on 16 March 2016 at PN2885.

[573] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 8.

the Australian Defence Force meet the required medical standards for entry.[574]

674. As at 2 February 2016, CHG employed 232 employees[575], including health professionals from a range of medical and allied health disciplines.[576] Approximately 45% of those employees were engaged on a casual basis.[577] Approximately 75% of CHG's casual and part-time employees are covered by the Nurses Award and the Health Award.[578]

675. The nature of the services provided by CHG, their location, timing and duration are contingent upon:

- the identity of its clients;
- the services required by its clients at a particular point in time; and
- the period of time over which that service is required.[579]

676. Ms Neill's statement provides the following examples which illustrate that the provision of CHG's services are based on the needs of its clients, can fluctuate from time to time and may be on a non-ongoing basis:

- The period of time over which CHG's services are required may be determined by the period of the patient's recovery from a specific illness or injury.[580]
- CHG's services may be sought in response to a Government department or large organisation implementing redundancies.[581]

[574] Witness statement of Kay Neill, dated 24 February 2016 at paragraphs 1 and 10.
[575] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 18.
[576] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 12.
[577] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 19.
[578] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 33.
[579] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 13.
[580] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 14.
[581] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 15.

- Influenza vaccination programs during February – May annually.[582] Casual employees are engaged specifically for this period to meet client needs. Ms Neill testified that there is no guarantee of hours for a casual employee during this period.[583]

- Pre-employment medical assessments for a large organisation when completing a bulk recruitment project.[584]

677. Ms Neill observes that many of CHG's employees have family caring responsibilities, are transitioning into retirement or are studying for a profession that the business recruits.[585] Casual employees are generally able to "roster themselves off" [586], providing them with an important flexibility during, for example, school holidays.

678. The operational requirements of CHG necessitate the engagement of employees on a casual basis and the ongoing retention of a "pool" of casual employees. As Ms Neill explains: (emphasis added)

> 20. Approximately 95% of our casual employees have had a relationship with CHG for greater than 6 months. I use the term 'relationship' because our casuals do not always work hours for us continuously but work when we have project or programs available.
>
> 21. Some of our casuals do work continuously for more than 6 months, but may still be on a series of client projects or programs that do not allow for continuous ongoing work.[587]

679. She states that the "business depends on having an adequate 'pool' of casual employees who work for [it] non-continuously on various projects".[588] She expressly states that the "business cannot always guarantee the same hours

[582] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 17.
[583] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 22.
[584] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 16.
[585] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 28.
[586] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 29.
[587] Witness statement of Kay Neill, dated 24 February 2016 at paragraphs 20 – 21.
[588] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 27.

and ongoing employment for casual employees, including those who have been with [it] for more than 6 months".[589]

680. During cross-examination, Ms Neill was asked a series of questions regarding the reasons for which the business' workforce was structured such that the majority of its nurses are engaged on a casual basis. Her responses further demonstrate the fluctuations that CHG faces for its services and accordingly, the need to maintain a casual workforce: (emphasis added)

> That is that you have adopted this model on the basis that it maximises your commercial advantage?---In that it allows us to respond to our clients' needs when they want us as opposed to when we have staff available.
>
> You don't suggest that it would be unviable in any way to have a fixed core of permanent nurses and then a group of casuals dealing with the fluctuations in the baseline level of work?---We do have a fixed core of full-time nurses so within each clinic there is full-time nurses within the clinic but the numbers are relatively small, because that is the only part of the work that is guaranteed.
>
> It might not be guaranteed, but you know that you're going to have a certain number of hours of work for nurses each month, don't you?---No.
>
> …
>
> Aside guarantees, let's just talk about observations of actual work flows. You are not suggesting that your nursing work drops to zero in some months, do you?---Yes.
>
> It does?---Well, the casual work can. We still have nurses in the clinic, as I just said. We do have permanent staff within our clinic, however, our other work can drop to zero. For example, flu vaccinations: we employ casuals to work on that program for a period of months and when it's not flu season there is no work.
>
> You have identified flu vaccinations today and in your statement. What other areas fall into this category?---So, other examples would be we attend worksites to undertake health monitoring for hazardous substances which is a one-off service; we undertake hearing assessments for organisations which is a one-off service; we undertake health promotion initiatives which are one-off services. So, the majority of our work is transactional and it is often a single source, so we don't have contracts with employers that says "that for the next 12 months you'll provide these services"; we are engaged to provide a specific service.
>
> VICE PRESIDENT HATCHER: Are there any days when you have had no work for any nurse outside the clinic?---Given the size of the organisation, there would never be a day when we don't have any work at all around the country but there are days when our casual nurses wouldn't be working.[590]

[589] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 35.

[590] Transcript of proceedings on 16 March 2016 at PN913 – PN2921.

681. The operational requirements of CHG Defence were explained by Ms Neill in response to a question from the ANMF in the following way:

> Does that recruitment happen all year round, it's a regular undertaking at all times?---It happens all year round but there tends to be peaks and troughs. So, for example, in Christmas time the facilities close down for a period of time; there may be certain campaigns through the year, so they may be recruiting for a particular cohort of people, for example, school graduates, so we could be extremely busy from January to, say, April and then very quiet for a period of months. So, there are some activities that do occur all year round but there are certain activities that are driven by the client.[591]

682. The unpredictability of client demand for CHG's services, the specialist nature of the work performed by its employees and the non-ongoing nature of its contractual arrangements with clients provide an appropriate example of a business that for legitimate operational reasons requires access to a casual workforce. In addition to the obvious difficulty that the business may not in fact be able to usefully engage a converted employee due to the absence of any work to be performed by them, Ms Neill assessed the implications of the ACTU's proposed casual conversion provisions as follows:

- The business would "almost exclusively engage casual employees from an agency or look at formally terminating the employment of directly employed casuals prior to 6 months of continuous work".[592]

- CHG's employment costs and consequently, the cost of their services, would become "unaffordable". She explains that an employee may be required to work additional hours in a particular week due to any of the circumstances outline above. If that employee were converted to part-time employment, the Health Award requires the payment of overtime rates for work performed in addition to their agreed hours. This may ultimately also impact upon the business' ability to continue "to maintain the arrangement in the longer term as it becomes too expensive to do business".[593]

[591] Transcript of proceedings on 16 March 2016 at PN2928.

[592] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 37.

[593] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 36.

- Casual employees who are engaged on a regular basis for a limited duration (for instance, flu vaccinations) would be terminated at the end of each season in order to ameliorate the risks arising from an absolute right to convert to permanent employment.[594]

- The business would face an increased administrative burden.[595]

- Overall CHG would employ fewer people if it were required to convert all casual employees that made such a request.[596]

683. Ms Neill states that there are certain instances in which a casual employee may be required to work a shift of two hours duration. For instance, shifts rostered to cover lunch breaks or opening/closing procedures. Similarly, employees engaged at onsite services may be required to work a shift that is less than four hours duration based on the availability of the work to be performed. If the ACTU's claim to introduce four hour minimum engagement/payment periods were granted, it would require the payment of wages in the absence of work for the employee to undertake and thereby, the business would not be generating any revenue during that time.[597]

684. Ms Neill's statement also deals with the ACTU's claim to introduce a requirement to offer additional hours to existing part-time or casual employees before engaging new employees. Whilst the business follows such a practice in most instances, there are numerous circumstances in which a mandatory obligation would be costly and/or impracticable; for instance, where the pre-existing employee does not have the relevant skills for the tasks required to perform the additional hours of work.[598]

685. Ms Neill also notes that even if CHG were required to inform a casual employee of their "likely number of hours per week" at the time of

[594] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 38.
[595] Witness statement of Kay Neill, dated 24 February 2016 at paragraphs 39 – 40.
[596] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 41.
[597] Witness statement of Kay Neill, dated 24 February 2016 at paragraphs 46 – 47.
[598] Witness statement of Kay Neill, dated 24 February 2016 at paragraphs 42 – 43.

engagement, the business would "still find [itself] having to adjust and change those hours through [its] monthly rosters"[599].

Kerry Allday

686. Kerry Allday has been the Managing Director of Data Response Pty Ltd (**Data Response**) for 26 years.[600] Data Response provides third party contract call centre and logistics services to other businesses.[601] Ms Allday was not cross examined by any interested party.

687. Of its 34 employees, 26 are employed on a casual basis and 3 are employed on a part-time basis.[602] Approximately 60% of these casual employees have been engaged for more than six months.[603] All casual and part-time employees are covered by the *Contract Call Centre Industry Award 2010* (**Contract Call Centre Award**) or the Clerks Award.[604]

688. Ms Allday describes the significant fluctuations in demand for Data Response's services in her statement.[605] The business utilises casual labour in order to meet the extreme "peaks and slumps" that it faces.[606]

689. Whilst 80% of Data Response's casual employees perform work on a regular basis, this is on a "month to month basis" and there is little if any guarantee of that work continuing[607]:

> Due to the volatile and changing nature of the services we provide to meet changing and unplanned customer needs, we are unable to forecast workload for casual employees more than a month in advance. Sometimes it is less than one month. Sometimes, clients advise that they require our services for several months; but

[599] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 49.
[600] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 1.
[601] Witness statement of Kerry Allday, dated 19 February 2016 at paragraphs 4 – 5.
[602] Witness statement of Kerry Allday, dated 19 February 2016 at paragraphs 18 and 20.
[603] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 39.
[604] Witness statement of Kerry Allday, dated 19 February 2016 at paragraphs 21 – 22.
[605] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 14.
[606] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 23 – 24.
[607] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 30.

revise this due to unforeseen external factors such as a change of government protocol or a change in senior management or a change in market conditions.[608]

690. Approximately 40% of Data Response's casual workforce is 20 – 30 years of age. Of those, many are undertaking tertiary education and "balance their working hours with their studies and contact hours at university".[609] She also speaks of the employment opportunities that a business like hers provides to its employees:

> Staff members who are striving for full time permanent work continue to search for this work whilst in our employ. We understand this and support their aspirations. The type of work they do for us is usually not what they want to do long term, however, our company is able to offer them constructive interim employment which ultimately suits both the employee and us, the employer. …[610]

691. Ms Allday's uncontested evidence as to the impact that the ACTU's claim would have on her business can be summarised as follows:

- The fixed costs (such as leave and notice on termination of employment) associated with permanent employment could not be accommodated in the variable income received from clients.[611]
- The unpredictable nature of the workflow would create operational difficulties if the business were forced to rely primarily on a permanent workforce.[612]
- Ultimately, the "only way to survive in an environment like this" would be to "convert all staff to contractors" or "off shore or nearshore the work".[613]

[608] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 30.
[609] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 33.
[610] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 53.
[611] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 48.
[612] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 49.
[613] Witness statement of Kerry Allday, dated 19 February 2016 at paragraph 51.

22. CLAIMS TO INSERT NEW CASUAL CONVERSION CLAUSES

22.1 THE UNIONS' CLAIMS

692. There are essentially two types of casual conversion clauses being pursued by the unions in the context of these proceedings.

693. The proposed clause sought in the context of most awards (102) is a clause that enables certain casual employees to 'elect' to covert to permanent employment after a specified period (**Election Proposal**). There is no capacity for the employer to refuse the conversion.

694. In a small number of awards certain unions are proposing clauses intended to have the effect of "deeming" certain casuals to be permanent employees, without the need for such employees to have actually indicated that they want this to occur (**Deeming Proposal**). That is, the conversion would occur by force of law and without any active steps being taken by either the employer or employee. There are essentially two materially different versions of deeming proposals being advanced. The primary proponents of deeming proposals are the AMWU and AMWU Vehicle Division.

695. 11 modern awards are not the subject of any proposal to insert a casual conversion provision. No explanation is provided by the unions for this.

The Election Proposal

696. In the majority of awards which are the subject of the ACTU claim, the inclusion of a casual conversion provision that affords an employee a right to *elect* to become a permanent employee is sought. Subject to differences in cross referencing the proposed clause is in the following terms:

10.5 Casual Conversion

a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment 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.

b) An irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

c) An employee who has worked on a full-time basis throughout the period of casual employment has the right to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment has the right to convert to part-time employment, on the basis of the same number of hours and times of work as previously worked.

d) The employer must give the employee notice in writing of the provisions of this clause within four weeks of the employee having attained the six month period.

e) An employee who has attained the six month period, may elect to convert to full-time or part-time employment by providing four weeks' notice in writing to their employer, and within four weeks of receiving such notice the employer must consent.

f) If a casual employee elects to convert to full-time or part-time employment, the employer and employee must discuss and document:

i. whether the employee will become a full time or part-time employee;

ii. if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, in accordance with clause 10.3— Part-time employment.

g) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in this clause.

h) A casual employee who converts to full-time or part-time employment may only revert to casual employment by written agreement with their employer.

i) A casual employee who converts to full-time or part-time employment shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

j) Nothing in this clause obliges a casual employee to convert to full-time or part-time employment, nor does it permit an employer to require a casual employee to convert if the employee does not wish to do so.

k) Casual employees (including irregular casuals) must be given written notice of the provisions of this clause by their employer within four weeks of commencing employment.

l) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause.

m) Any disputes about the application or operation of this clause shall be dealt with under the procedures set out in clause 9 - Dispute resolution.

The Deeming Proposal

697. In a small number of awards the unions have advanced a proposed clause that would provide for employees to be *deemed* to be permanent employees.

698. The Deeming Proposal is being pursued with respect to the following awards:

- Graphic Arts Award;
- Higher Education General Staff Award;
- Manufacturing Award;
- Timber Award and
- Vehicle Award.

699. With the exception of the Higher Education General Staff Award, each of the aforementioned awards currently contain casual conversion provisions. The unions are advocating for a change to the existing, longstanding award provisions.

700. There are differences between the deeming proposals for particular awards.

701. Relevantly, the claim advanced by the ACTU and AMWU in the context of the Manufacturing Award is as follows:

14.4 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

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

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee

who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 14.4 if the employer fails to comply with clause 14.4(d).

(e) An employee who would otherwise be deemed a full-time or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under 14.4(d) or after the expiry of the time for giving such notice.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss and document:

i. whether the employee will become a full-time or part-time employee; and

ii. if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment.

(g) A casual employee who is deemed to be employed on a full-time or part-time basis may only revert to casual employment by written agreement with the employer at any time.

(h) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 14.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 14.4(a).

(i) A casual employee who is deemed to be employed on a full-time or part-time basis shall have their service prior to conversion recognized and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual employee.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full-time or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause.

702. A comparable clause is proposed by the unions for the Graphic Arts Award and the Vehicle Award.

703. The ACTU has advanced a different deeming proposal for the Timber Award and the High Education General Staff Award. The clause proposed for these instruments is set out below, with the relevant differences to the Manufacturing Award proposal underlined:

12.3 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to be employed on a permanent full-time or part-time basis unless the employee elects to remain employed as a casual employee.

(b) An irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert 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 to by to the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period.

(e) An employee who would otherwise become a permanent employee may elect to remain a casual employee by providing notice in writing to their employer.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss, and document:

(i) whether the employee will become a full time or part-time employee; and

(ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in subclause 10.2—Part-time employment.

(g) A casual employee's conversion to full-time or part-time employment is not affected if the employer fails to comply with the notice requirements in this clause.

(h) A casual employee who is deemed to be employed on a permanent basis may only revert to casual employment:

(i) by providing written notice within 7 days of the deeming occurring; or

(ii) by written agreement with the employer at any time.

(i) A casual employee who is deemed to be employed on a permanent basis shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a permanent basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) Casual employees (including irregular casuals) must be given written notice of the provisions of this clause by their employer within four weeks of commencing employment.

(l) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause.

(m) Any disputes about the application or operation of this clause shall be dealt with under the procedures set out in clause 9 - Dispute Resolution.

704. The key difference between the proposed clauses relates to an employee's capacity to revert to casual employment.

705. Although paragraphs (k) and (m) are not contained within the AMWU's Deeming Proposal, comparable provisions are either already contained in the relevant awards or comparable amendments are being proposed to other provisions in the award.

22.2 THE HISTORY OF CASUAL CONVERSION PROVISIONS

706. Casual conversion provisions can be traced back to the decision of Stevens DP of the South Australian Industrial Relations Commission (**SAIRC**) in the *SA Clerks Case*.[614] Even though the clause devised by Stevens DP was modified substantially on appeal, his Honour's decision influenced the outcome in the *Metal Industry Casual Employment Case*.[615]

707. Ultimately, the outcome in the federal metal industry case also had a significant influence on the South Australian case, because the appeal against

[614] [2000] SAIRCOMM 41, 20 July 2000.

[615] Print T4991.

Stevens DP's decision was determined after the AIRC Full Bench had handed down its decision. The Full Bench in the South Australian appeal case adopted the 'employer right of reasonable refusal' determined by the AIRC Full Bench in the metal industry case.

708. In the *SA Clerks Case*, at first instance Stevens DP rejected the ASU's claim to redefine a casual as one engaged to work "on a sporadic or irregular basis with no expectation of ongoing employment", and its claim for all other employees to be deemed to be engaged on a full-time or part-time basis. Instead, Stevens DP decided to give employees covered by the SA Clerks Award a right to access full-time or part-time employment after 12 months of ongoing and regular employment.

709. In his decision DP Stevens relevantly said:

> I also acknowledge that some, perhaps many, casual employees have a preference for casual employment and a 20 per cent casual loading.[616]

710. In deciding to include a casual conversion clause in the Metals Award 1998, the AIRC Full Bench in the *Metal Industry Casual Employment Case*[617] was significantly influenced by the following matters:

- The evidence that "casual employment in the metals and manufacturing industry, in practice, is only infrequently by engagement that is a true hiring by the hour" and that "(i)t seems casual employment is often a continuing employment, until the need arises to interrupt or terminate it".[618]

- The AMWU's survey evidence which showed that 75% of casual workers in the manufacturing industry were engaged for more than three months and 50% were engaged for 12 months or more.[619]

[616] [2000] SAIRCOMM 41 at para 196(5).

[617] Print T4991.

[618] Print T4991 at para [58].

[619] Print T4991 at para [104].

- "The not inconsiderable body of evidence indicating that for some employees the casual employment and loaded rate regime is not unsatisfactory to their needs".[620]

- The inappropriateness of a maximum period of engagement for casuals.[621]

- The inappropriateness of a provision deeming a casual to be a permanent employee after a specified period.[622]

- The need to "promote employee and employer understanding of whatever mutual problems may exist in accommodating an election".[623]

- The need for an approach "which builds time and an opportunity to consider and discuss into the conversion process".[624]

- The decision of Stevens DP in the *SA Clerks Case.*[625]

711. A major difference between the clause devised by Stevens DP and the clause devised by the Full Bench in the *Metal Industry Casual Employment Case* is the following wording in the Metals Award 1998 clause (emphasis added):

> 4.2.3(b)(iv) Any employer may at any time after the period referred to in subparagraph (iii) give four weeks' notice in writing to the employer that he or she seeks to elect to convert his or her ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer shall consent to or refuse the election but shall not unreasonably so refuse. Any dispute about a refusal of an election to convert an ongoing contract of employment shall be dealt with as far as practicable with expedition through the dispute settlement procedure.

712. The absence of an employer right of reasonable refusal of a conversion request was a key reason why the decision of Stevens DP was overturned by

[620] Print T4991 at para [102].
[621] Print T4991 at paras [108] and [115].
[622] Print T4991 at paras [108] and [109].
[623] Print T4991 at para [115].
[624] Print T4991 at para [116].
[625] Print T4991 at paras [108], [111] and [114].

a Full Bench of the SAIRC. The Full Bench held that to give an employee an absolute right to convert would be unjust (emphasis added):

> That granting a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without granting the employer any right to object, no matter what its circumstances are, is unjust.[626]

713. By the time that the Full Bench of the SAIRC had handed down its appeal decision in the *SA Clerks Case*, the AIRC Full Bench had handed down its decision in the *Metal Industry Casual Employment Case*.

714. In overturning Steven DP's decision, the SAIRC made the following comments about the AIRC's decision (emphasis added):

> 105 Finally we acknowledge that the Australian Industrial Relations Commission in the Metal, Engineering and Associated Industries Award opted to vary that Award by creating a right to elect to convert ongoing casual employment to full-time or part-time employment, albeit subject to a caveat that the learned Deputy President did not ultimately entertain, namely that the employer could refuse the request and the matter thereafter could be referred for resolution by the Commission. There are however a number of matters that need to be said in respect of this case. First, the case was decided on its own facts and upon the detailed and extensive evidence that was presented. Secondly, it dealt with a very different industry than the one under consideration here. Thirdly, the Federal Commission may not have thought it necessary to reflect at length upon the potential adverse consequences of its proposed change because, as it noted, there were a significant number of manufacturing and related award precedents for a maximum limit to casual employment and moreover, its variation was much less dramatic than that which was ordered here, because it did not involve granting an employee the unilateral right to change his or her status without any regard whatsoever to the views or the circumstances of the employer.

715. The final casual employment clause determined by the Full Bench of the SAIRC included the wording developed by the AIRC Full Bench in the *Metal Industry Casual Employment Case* regarding the employer right of reasonable refusal.

716. In February 2006, a Full Bench of the Industrial Relations Commission of New South Wales (**NSWIRC**) in the *Secure Employment Test Case*[627] decided that most New South Wales state awards would be varied to give casuals who had

[626] *Clerks (SA) Award Casual Provisions Appeal Case* [2001] SAIRComm 7 at p.2.

[627] [2006] NSWIRComm 38, 28 February 2006.

worked on a regular and systematic basis for a specified period the right to elect to convert to full-time or part-time employment. The relevant award provisions included the following employer right of reasonable refusal:

> "… Where an employer refuses an election to convert, the reasons for doing so shall be fully stated and discussed with the employee concerned and a genuine attempt made to reach agreement. Any dispute about a refusal of an election to convert to an ongoing contract of employment shall be dealt with as far as practicable and with expedition through the dispute settlement procedure."

717. The decision of the NSWIRC was reflected in some (but by no means all) state awards when the Work Choices legislation took effect in March 2006, i.e. the month after the decision was handed down.

718. Under the Work Choices legislation casual conversion provisions in federal awards were non-allowable award matters and deemed to have no effect.[628]

719. In its *Decision re making of priority modern awards,* [629] the Award Modernisation Full Bench determined the following regarding casual conversion provisions in modern awards (emphasis added):

> [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. 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 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.

[628] Sections 515 and 525 of the *Workplace Relations Act 1996*

[629] [2008] AIRCFB 1000

720. The unions' claims in the current proceedings directly conflict with central elements and principles in the various cases referred to above, including the importance of employers maintaining the right of reasonable refusal of a conversion request.

22.3 PRINCIPLES THAT THE COMMISSION SHOULD APPLY WHEN DEALING WITH THE UNIONS' CASUAL CONVERSION CLAIMS

721. As discussed in section 22.2 above and in various other sections of this submission, the unions' casual conversion claims directly conflict with the principles in the key authorities relating to casual conversion provisions and those in the Commission's *Preliminary Jurisdictional Issues Decision*.[630]

722. The Full Bench should apply the following principles where dealing with the unions' casual conversion claims.

723. **Firstly**, casual employment (including casual conversion provisions) is an award-specific issue and model award provisions are not appropriate on this topic. There are major differences in the patterns of casual employment across different industries. (See chapter 4 of this submission).

724. **Secondly,** in addition to all other statutory requirements and merit considerations, any claims to extend casual conversion provisions to any other industry must be justified on the basis that "exceptional circumstances" apply to that industry. In its *Decision re making of priority modern awards,*[631] the Award Modernisation Full Bench decided that casual conversion provisions:

- Should generally only be included in an award if there is an 'industry standard' for such provisions in that industry;[632] and
- Should only be extended to another industry if 'exceptional circumstances' apply to that industry.[633]

[630] [2014] FWCFB 1788.

[631] [2008] AIRCFB 1000.

[632] [2008] AIRCFB 1000 at para [51].

725. The unions have failed to establish that exceptional circumstances apply to any industry. While the unions have provided some (inadequate) industry-specific evidence for a few industries, they have not provided industry-specific evidence in support of their claims in most industries.

726. **Thirdly,** for an award which already contains casual conversion provisions, the Commission should proceed on the assumption that the existing provisions meet the modern awards objective and that the Full Bench decision which led to the making of the award must not be departed from unless there are cogent reasons to do so.

727. **Fourthly,** under the FW Act each award must be reviewed 'in its own right' (s.156(5)). Therefore, the unions' casual conversion claims need to be assessed in the specific context of each award and on the basis of any evidence filed justifying the variation sought to that award.

728. **Fifthly,** the Commission should not depart from the principles in the *Preliminary Jurisdictional Issues Decision* (See chapter 3 of this submission).

729. **Sixthly,** in all of the major casual conversion cases (as discussed in section 22.2 above) the relevant Full Bench has emphasised the importance of an employer having the right to refuse an employee's election to convert if refusal is reasonable in the circumstances. It is vital that the Commission not depart from this central principle.

22.4 THE UNIONS' CLAIM TO REMOVE AN EMPLOYER'S RIGHT TO REASONABLY REFUSE A CONVERSION REQUEST

730. The casual conversion clauses contained within modern awards give the employer the right to refuse an employee's request to convert to permanent employment, typically with the proviso that the refusal must be reasonable in the circumstances.

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[633] [2008] AIRCFB 1000 at para [51].

731. For example, subclause 14.4(d) in the Manufacturing Award states:

> (d) Any casual employee who has a right to elect under clause 14.4(a), on receiving notice under clause 14.4(b) or after the expiry of the time for giving such notice, may give four weeks notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.

732. To depart from the longstanding and very sensible principle that an employer has the right to reasonably refuse a request from an employee to convert to permanent employment would be 'unjust', as held by the Full Bench of the SAIRC in the *SA Clerks Case* (see section 22.2 above).[634]

733. Without doubt, the injustice would apply to employers and employees.

734. The injustice to employers would include increased costs, reduced efficiency, lower productivity, reduced flexibility, and reduced competitiveness.

735. The injustice to employees would be particularly harsh. If the right to reasonable refusal was removed by the Commission, the entirely predictable result would be the termination of employment of tens of thousands of casual employees who work regular hours. The date of termination of these thousands of employees would very likely fall between the date of the Commission's decision and the date when the award variations become operative.

736. Employers typically engage casuals because they operate in an uncertain environment, with intense competitive pressures. Just because a casual has been engaged on a regular and systematic basis for six or 12 months does not mean that there is no uncertainty at the present time, or that the employer, if faced with being forced to convert, would not decide that the best course of action would be to engage a different casual rather than converting an existing one, or to downsize, or move offshore.

[634] *Clerks (SA) Award Casual Provisions Appeal Case* [2001] SAIRComm 7 at p.2.

737. The Full Bench in the *Metal Industry Casual Employment Case* was very aware of the potential adverse consequences for thousands of casual employees if employers were forced to convert. The right of reasonable refusal was the subject of intense debate between Ai Group and the AMWU in the proceedings, particularly during the 'settlement of orders' process which followed the December 2000 decision. The Full Bench ultimately accepted Ai Group's arguments and evidence about the likely consequences, and rejected the AMWU's. In the final orders issued in February 2001, the Full Bench included an employer right of reasonable refusal.

738. In its decision, the Full Bench provided the following sound rationale for giving employers the right of reasonable refusal:

> [115] … It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.

739. The Full Bench of the SAIRC, In its decision overturning Stevens DP's decision in the *SA Clerks Case*, described the absence of an employer right of reasonable refusal as 'unjust' and identified a series of adverse consequences that could flow from giving employees a unilateral right to convert (emphasis added):

> HELD: Appeal allowed.
>
> …
>
> 3. THAT granting a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without granting the employer any right to object, no matter what its circumstances are, is unjust.
>
> 4. THAT the learned Deputy President's apparent rejection of the notion that the existing dispute resolution process or something like it could deal with such disputes and disputes about the alleged wrongful categorisation of permanent clerks as casual clerks is not explained. His failure to deal with the evidence regarding the potential adverse affects of the proposed variation left the position where it does not know whether he rejected it, gave it little weight, or failed to take it into account. Some of the criteria upon which the right to elect is based are either unworkable or may lead to unnecessary disputation. All of these matters fall within the range of circumstances identified in Clerks (SA) Award-Trade Union Training Leave (Appeal Case) as warranting the Commissions' interference.

…

102 Bearing this in mind, and given the evidence from Mr Eblen that the Award variation is likely to create some administrative difficulties for small business; the evidence from Mr McArthur that it might seriously compromise labour hire companies and force them to consider operating outside of the State; and the evidence from Prof Wooden indicating that the variation to the Award might discourage some small businesses from engaging casual labour, thereby increasing the unemployment rate; unless all of this evidence was rejected, any proposed variation directed towards changing employment practices in respect of the use of casual clerks had to be approached with caution and a detailed consideration of the evidence of the potential adverse consequences of the variation had to be undertaken and disclosed. The learned Deputy President's failure to do this was, with respect, an error.

103 The variation proposed by the learned Deputy President provides no opportunity for an employer to resist an election by an employee who has satisfied the qualifying criteria. There may be cases where it is simply unreasonable to require an employer to afford an employee permanent status no matter how long the employee has been performing work for the employer. In our opinion, even if the learned Deputy President was justified in concluding that the Award needed to be changed, to give a casual clerk the right to elect to become a permanent employee upon meeting certain criteria, there was, with respect, no justification for denying an employer the right to object and for the parties to thereafter access the grievance procedure that is already contained within the Award or something like it to resolve their differences.

…

105 Finally we acknowledge that the Australian Industrial Relations Commission in the Metal, Engineering and Associated Industries Award opted to vary that Award by creating a right to elect to convert ongoing casual employment to full-time or part-time employment, albeit subject to a caveat that the learned Deputy President did not ultimately entertain, namely that the employer could refuse the request and the matter thereafter could be referred for resolution by the Commission. There are however a number of matters that need to be said in respect of this case. First, the case was decided on its own facts and upon the detailed and extensive evidence that was presented. Secondly, it dealt with a very different industry than the one under consideration here. Thirdly, the Federal Commission may not have thought it necessary to reflect at length upon the potential adverse consequences of its proposed change because, as it noted, there were a significant number of manufacturing and related award precedents for a maximum limit to casual employment and moreover, its variation was much less dramatic than that which was ordered here, because it did not involve granting an employee the unilateral right to change his or her status without any regard whatsoever to the views or the circumstances of the employer.

106 In summary, we accept that there was sufficient evidence placed before the Commission to indicate that the extensive and increasing use of casual employment in the clerical industry was an issue worthy of the Commission's consideration that might have led it to conclude that the Award needed changing. However, the variation that grants a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without

granting the employer any right to object, no matter what its circumstances are, is in our view, unjust. The learned Deputy President's apparent rejection of the notion that the existing dispute resolution process or something like it could deal with such disputes and disputes about the alleged wrongful categorisation of permanent clerks as casual clerks is not explained. His failure to deal with the evidence regarding the potential adverse affects of the proposed variation leaves us in the position where we do not know whether he rejected it, gave it little weight, or failed to take it into account. Some of the criteria upon which the right to elect is based are either unworkable or may lead to unnecessary disputation. All of these matters fall within the range of circumstances identified at the outset of these reasons in our citation of the Clerks (SA) Award-Trade Union Training Leave (Appeal Case) as warranting our interference.[635]

740. The NSWIRC Full Bench in the *Secure Employment Test Case Decision* made the following comments about the right of reasonable refusal (emphasis added):

> 26. We have considered all of the evidence touching upon the application before us and we have done so noting that the proposed variation now under consideration has dealt with a number of the concerns cited by the Full Commission. In particular, the concept of a unilateral right for the casual employee to elect to convert their employment to weekly hired employment, has been replaced with a process whereby such an election is to be subject to the right of the employer to resist that outcome. This change does not mean that the Commission does not need to consider the raft of negative consequences as alleged by the employers, but rather, sets the context for such to now be assessed.
>
> …
>
> 102 Since the *Metal Industries Award* decision, casual conversion provisions have been inserted in 44 awards of the AIRC, detailed by Unions NSW in exhibit 241, which was not challenged.
>
> 103 Mr *Hatcher* submitted that the *Clerks (SA) Award* and the *Metal Industries Award* decisions carefully balance the interest of employers and employees, and that the evidence in these proceedings justifies a similar conclusion."[636]

741. The inherent logic which underpins the employers' right of reasonable refusal in casual conversion clauses is similar to the logic that underpins the right of an employer to refuse an employee's request for flexible work arrangements on 'reasonable business grounds' under s.65(5) of the FW Act.

[635] *Clerks (SA) Award Casual Provisions Appeal Case* [2001] SAIRComm 7.

[636] *Secure Employment Test Case* [2006] NSWIRComm 38 (30 March 2006).

742. As the Explanatory Memorandum for the *Fair Work Bill 2008* relevantly states (emphasis added):

> 258. Division 4 establishes a right to request flexible working arrangements in certain circumstances. The intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements.

743. Further clarity about the rationale for the right of reasonable refusal under s.65(5) of the FW Act was provided in the NES Discussion Paper released by the Labor Government during the development of the FW Act (emphasis added):

> **Can Fair Work Australia impose a flexible working arrangement on an employer?**
>
> No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.[637]

744. When the FW Act was first implemented, it did not define 'reasonable business grounds' for the purposes of s.65(5) although the Explanatory Memorandum for the *Fair Work Bill 2008* stated (emphasis added):

> 266. Subclause 65(5) provides that the employer may only refuse the request on reasonable business grounds.
>
> 267. The Bill does not identify what may, or may not, comprise reasonable business grounds for the refusal of a request. Rather, the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:
>
> - the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
> - the inability to organise work among existing staff; and

[637] Department of Education, Employment and Workplace Relations, 'Discussion Paper - National Employment Standards Exposure Draft', 2008, http://www.workplace.gov.au/NR/rdonlyres/42FEBED0-4F5D-49C2-8826-39FA72C48BAF/0/NES_DiscussionPaperNESExposureDraft_Finalforweb_2_.pdf.

- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

745. The FW Act was amended, through the *Fair Work Amendment Bill 2013*, to add the following s.65(5A) to clarify the meaning of 'reasonable business grounds':

> (5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:
>
> (a) that the new working arrangements requested by the employee would be too costly for the employer;
>
> (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
>
> (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
>
> (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
>
> (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

746. It appears that the employer's right of reasonable refusal, as contained within the casual conversion provisions and s.65 of the FW Act, stemmed from the August 2005 decision of a Full Bench of the AIRC in the *Family Provision's Case*.[638] In its decision, the Full Bench (Giudice P, Ross VP, Cartwright SDP, Ives DP and Cribb C) rejected the ACTU's claim for employees to have an absolute right to extended parental leave entitlements and access to part-time work and decided that employees would be granted the right to request with employers having the right of reasonable refusal. The test case clause was worded as follows (emphasis added):

[638] PR082005

Right to Request

1. An employee entitled to parental leave pursuant to the provisions of clause X may request the employer to allow the employee:

    1.1 to extend the period of simultaneous unpaid parental leave provided for in clause X up to a maximum of eight weeks;

    1.2 to extend the period of unpaid parental leave provided for in clause X by a further continuous period of leave not exceeding 12 months;

    1.3 to return from a period of parental leave on a part-time basis until the child reaches school age;

    to assist the employee in reconciling work and parental responsibilities.

2. The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact upon customer service.

747. The Full Bench gave the following reasons for deciding upon the above clause (emphasis added):

> [395] Our third conclusion concerns the manner in which flexibility should be introduced. Neither the ACTU model, nor the model supported by the employers should be wholly accepted. The ACTU claim that these conditions should constitute an employee entitlement is not one we are prepared to grant. We agree with the employers that an unconditional right to additional parental leave benefits is inappropriate. It would have the potential to increase costs, reduce efficiency and create disharmony in the workplace. The employers' proposal, one which is based purely on agreement, has some merit. To take an example, an award might provide that an employer and an employee may agree that an employee could return from parental leave on a part-time basis until the child commences school. Such a provision might have some value in that it would recognise and encourage agreement about that matter. On the other hand it is equally true that there is nothing to stop the employer and the employee reaching such an agreement now. Despite that fact, and consistent with our earlier conclusion that some positive step is required, we think it is necessary to go beyond simply providing for agreement between the parties. The provision we have decided to adopt is based to a large extent on the proposals of the States and Territories. Those proposals, as we have already noted, draw on the approach contained in ss.80F and 80G of the *Employment Rights Act 1996* (UK). That approach creates an employee right to request a change in working conditions and imposes a duty upon the employer not to unreasonably refuse the employee's request. We have adopted the employee right to request in the form suggested by the States and Territories but modified the

employer's obligation so that the employer may only refuse the request on reasonable grounds.[639]

748. Consistent with the above comments of the AIRC Full Bench, the absence of a right of reasonable refusal would lead to increased costs, reduced efficiency and increased disharmony in the workplace.

749. If the existing right of reasonable refusal in casual conversion clauses was not working, as the unions allege, there would surely be evidence of numerous disputes arising about the issue. Over the past 15 years, since the AIRC handed down its decision in the *Metal Industry Casual Employment Case* and casual conversion provisions were inserted into numerous awards, there have been virtually no disputes about the refusal of employee requests to convert, as the Commission's own records would no doubt confirm.

750. The lack of disputation over the issue highlights that there is no case for removing the right to reasonable refusal.

751. In the *Metal Industry Casual Employment Case*, the Full Bench highlighted the fact that since at least 1937 the Metals Award had catered for employers' interests and preferences for free access to casual employment, and that *"It is far too late to reverse that acceptance'.*[640] Similarly, it is far too late to entertain the removal of an employer's right to refuse a conversion request. Such a course of action would be very damaging for employers, employees and the community.

752. The unions claims to remove the right of reasonable refusal are clearly not 'necessary' and hence offend s.138 of the FW Act.

[639] PR082005 at para [395].

[640] Print T4991 at para [10]

753. In addition, the unions' claims are inconsistent with the modern awards objective in s.134 of the Act because the claims conflict with:

- The requirement for awards to provide a *'fair'* safety net (s.134(1));

  The absence of a right of reasonable refusal would be unjust, as identified by the Full Bench of the SAIRC in the *SA Clerks Case*;

- The *'need to encourage collective bargaining* (s.134(1)(b)):

  As things now stand, the unions are free to pursue more generous conversion rights in enterprise agreements. The space for bargaining would be reduced if the claim was granted;

- The *'need to promote social inclusion through increased workforce participation'* (s.134(1)(c)):

  If accepted, the unions' claim would lead to the loss of thousands of casual jobs with a consequent substantial negative impact on workforce participation;

- The *'need to promote flexible modern work practices and the efficient and productive performance of work'* (s.134(1)(d)), and the *'likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'* (s.134(1)(e):

  As identified in the various major Tribunal decisions relating to the employer right of reasonable refusal, the absence of this right would impose inefficiencies on employers and increase costs;

- The *'likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'* (s.134(1)(h)):

  Acceptance of the unions' claims would most likely lead to the loss of thousands of jobs with a consequent decrease in employment and economic growth.

754. Accordingly, the unions' claims to remove the right of reasonable refusal must be rejected.

22.5 THE AMWU AND AMWU – VEHICLE DIVISION 'DEEMING' PROPOSAL

755. The heart of the alternate deeming proposal advanced by the AMWU, AMWU – Vehicle Division and the ACTU is that a casual employee will be deemed to convert to permanent employment after a specified period, unless he or she actively elects to opt out. That is, the conversion will occur without any need for it to be initiated by the employee. Instead the employee is required to take active steps to avoid conversion.

756. The absence of an employer right to refuse casual conversion is also a feature of the deeming proposal, but is primarily addressed in sections 22.2, 22.3 and 22.4 of these submissions.

757. Ai Group strongly opposes the deeming proposals advanced. We contend that the proposals lack merit and that a proper case for varying each of the awards the subject of the claims to insert such provisions has not been made out. Cogent reasons for departing from the existing standards in relevant awards have not been established.

758. The prosecution of a case in support of a deeming provision has been largely advanced by the AMWU and the AMWU – Vehicle Division.

759. In addressing the AMWU submissions we note, as a preliminary matter, that the AMWU suggest that the parties address the following questions:

- Firstly, whether the current conversion provisions operate to effectively fulfil the purpose for which they were established; and
- Secondly, if the answer to the question above is 'no' then what form should casual conversion to permanent engagement provisions take in order to provide an effective safety net?

760. The Full Bench should not be misdirected by this invitation. It represents an approach to the Review that is not consistent with that articulated in the *Preliminary Jurisdictional Issues Decision*.[641]

761. Although the historical context in which the current award clauses were established is a relevant consideration, the claim must be assessed against the current statutory framework and, in particular, considered through the prism of the modern awards objective.[642] Importantly, the Full Bench should remain conscious of the obligation on the relevant unions to establish that all of the terms of their proposed variations are necessary to meet the modern awards objective. As identified in the *Preliminary Jurisdictional Issues Decision*:

> 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.[643]

762. A key AMWU argument in support of the deeming proposal appears to be, in effect, a contention that employees may be reluctant to request conversion because of fear of negative consequences flowing from the making of such a request.

763. It should not be accepted on the material before the Commission that there is a widespread problem of employees being reluctant to access casual conversion under existing provisions.

764. In any event, and contrary to the union submissions, the Act provides strong protections and avenues to address any adverse action that an employee may face in response to accessing a right to request casual conversion.[644] Casual employees are not excluded from such protections and the contention

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[641] {2014] FWCFB 1788

[642] Section 134 of the Act

[643] Preliminary Issues Decision

[644] See AMWU submissions of 13 October 2015 at paragraphs 7 to 11.

that the avenues are practically inaccessible should be disregarded. In many respects, casual employees have far greater protection from such outcomes than they did at the time that when the casual conversion provisions were first introduced.

765. To a large extent, the AMWU contends, in effect, that the deeming proposal is warranted because of deficiencies in the current dispute resolution powers of the Commission or other available mechanisms for enforcement of modern awards. The union laments the greater access to compulsory arbitration under previous workplace relations systems, although there is no evidence of the AMWU accessing compulsory arbitration for any disputes about casual conversion in the metal industry since the AIRC Full Bench handed down its decision in 2000. The reason for this is that virtually no disputes have arisen about casual conversion over the past 16 years.

766. It should not be accepted that the current system of dispute resolution administered by the Commission is ineffective or an inadequate mechanism for assisting employees to secure, in a practical sense, the benefit of casual conversion provisions within awards. All awards contain detailed dispute resolution procedures that enable the Commission to settle disputes. This includes settlement by way of consent arbitration. Members of the Commission are of course highly skilled and experienced in assisting to resolve disputes. Although the Commission's dispute resolution powers may not precisely mirror those available under previous legislative regimes, they are underpinned by other avenues for employees to see enforcement of an individual's rights or employer compliance with award obligations. Also, these days the Commission has a much greater focus on assisting individual employees with disputes and grievances than was the case in 2000 when the AIRC was primarily focussed on collective matters.

767. There are numerous mechanisms and safeguards in place which operate to provide employees with an adequate form of redress or remedy if they are the subject of adverse action as result of seeking to access workplace rights, such as the right to request casual conversion.

768. It should not be accepted, on the material before the Commission, that there is a widespread phenomenon of employees covered by awards the subject of the deeming proposal not making a request to convert because of concerns over negative consequences. We submit that this is not the case. Nonetheless, even if this was the case it is unclear why, if the deeming model was adopted, such perceptions would not similarly manifest themselves in such employees feeling compelled to 'opt out' of conversion. Put bluntly, if the root cause of employees not converting is employee concern over an employer's response to them requesting to covert, simply changing the mechanism for delivering such conversion would not remedy the alleged fundamental problem.

769. The AMWU also alleges, in effect, that many employers breach existing award provisions by unreasonably refusing employee requests for conversion.[645] In support of their claim they infer that current award provisions are deficient because they require application to a court to be effective or to enable the 'testing' of the reasonableness of an employer refusal. It would of course be naïve to assume that every employer and every employee always complies with every award term. Nonetheless, there is, insufficient evidence before the Commission to establish that there is significant or widespread non-compliance with current award derived obligations requiring casual conversion.

770. In relation to AMWU submissions about the need to make a relevant application to test a decision to refuse conversion, we note that the same observations could be made about the application of almost any contested award term. Such submissions neglect to acknowledge less formal means of employees seeking enforcement of their award rights and the deterrent effect that potential exposure to significant financial penalties have on employers seeking to deliberately breach award terms. We note that there is evidence in the current proceedings to suggest that union officials are able to rely on

[645] AMWU submissions of 13 October at paragraph 7.

current award provisions to resolve concerns over casual conversion before even getting to the stage of commencing formal proceedings.

771. The AMWU submissions also ignore the role of unions and the Fair Work Ombudsman (**FWO**) in enforcing modern awards. The AMWU has not advanced any evidence to suggest that it is incapable or generally unwilling to represent its members in proceedings regarding the enforcement of their rights under current casual conversion clauses.

772. Similarly, no union has established in an evidentiary sense that the FWO is unwilling or unable to prosecute employers that fail to comply with existing casual conversion clauses, or that the FWO is otherwise unable to assist employees to secure conversion where they are entitled to it.

773. Ultimately, neither perceived nor actual non-compliance is a proper basis for the Commission to accede to union calls for further or different regulation. Non-compliance with the safety net does not establish that the safety net is itself inadequate. The possible non-compliance of some should not be accepted as a valid basis for concluding that it is necessary to impose a less flexible regime on all employers and employees, as contemplated by s.138.

774. If it is established that some employers are not properly complying with the current regime the solution lies in better education about, and enforcement of, existing award and legislative provisions, not the adoption of new award provisions.

775. The AMWU relies heavily upon both its own survey and that conducted by the ACTU in support of its claims.

776. The AMWU submissions also identify a range of statistics concerning the prevalence of casual employment in the manufacturing industry.[646] This does not substantiate a case for implementing a deeming provision rather than a mechanism that operates at an employee's election. The factors contributing to such statistics are multifaceted as dealt with in the statement of Julie Toth

[646] See for example paragraph 7 of the AMWU submissions of 13 October 2015.

and in other sections of this submission. They include the desire of many casual employees to remain casual. It cannot be accepted that they are a product of deficiencies in the current safety net.

777. Putting aside the factors associated with such statistical outcomes, we also reject any contention that discouraging casual employment is a valid consideration in the context of the exercise of modern award powers. It is not an objective that is consistent with the application of the modern awards objective. Far from s.134(1) stating that there is a need to discourage casual employment, s.134(1) emphasises the need for workplace flexibility and enhanced workforce participation, for which casual employment is a vital enabler.

778. At paragraph 56 of its submission, the AMWU states that 88% of respondents to the AMWU survey indicated that they had completed an application to convert to permanent employment and were rejected.[647] It asserts that this is '…*evidence that the deeming clause has work to do.*'[648] Apart from the serious deficiencies in the methodology for the AMWU's survey, contrary to the union's submissions the results do not establish that a deeming provision would be more beneficial than a casual conversion mechanism. It at best demonstrates the operation of exiting provisions enabling an employer to not accept conversion if it would be unreasonable. Of course, the statistic could also demonstrate that there are common circumstances where accepting employee conversion would be unreasonable. Regardless, the validity of any inference drawn from the survey is of little weight given the serious deficiencies in the material.

779. At paragraph 70, the AMWU submits that the difference between the deeming provision sought by the AMWU and the provision sought by the ACTU (we assume this is a reference to the ACTU's election proposal) is supported by, amongst other things, the nature of work performed under the Manufacturing,

[647] AMWU submission of 13 October 2015.

[648] ibid at paragraph 30.

Graphic Arts and the FBT Awards.[649] However no real explanation for this submission is provided.

780. Ai Group does not preclude the possibility of a different approach to the treatment of casual conversion provisions being adopted in different awards. Indeed any determination of whether a casual conversion provision is at all warranted, and if so, what form it should take necessitates that a proper industry-specific case is mounted by the proponent of the proposal. However, differences in approach should not simply be a product of the desired approach of a union with an interest in a particular set of awards.

781. In the *Preliminary Jurisdictional Issues Decision* the Full Bench held (emphasis added):

> 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.[650]

782. The union bodies which are advocating deeming proposals have not mounted any serious case to establish contextual considerations associated with the characteristics or employers and employees covered by the awards the subject of the deeming proposal, to warrant a departure from the 'election and reasonable refusal approach' currently contained within these awards, and many other awards.

783. The need to ensure a stable award system, as well as numerous other elements of the modern awards objective, weighs heavily against the granting of the union deeming proposals.

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[649] ibid.

[650] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788..

Employee Election and an Employer Right of Reasonable Refusal – the Better Approach

784. The deeming proposal is an overly paternalistic and retrograde approach that is not only unjustified, but would potentially give rise to serious negative consequences and practical difficulties for both employers and employees.

785. The deeming proposal is particularly unwarranted given, on any reasonable view of the material before the Commission, it can be accepted that a very significant proportion of employees have no desire to convert. As the AMWU frankly identifies in the opening comments of its submission (emphasis added):

> It is a truth universally acknowledged that for some employees, casual employment suits stage of life requirements. The AMWU's case is not about these workers. Our case does not disturb the preferences of casuals electing to be casuals. Our case recognises there is a role for irregular and regular casual employment in meeting the needs of casual engagement in meeting the needs of both business and employee.[651]

786. The proposal would impose a burden on employees who will need to actively elect, in writing, to remain a casual employee in order to prevent an unwanted change in the fundamental nature of their engagement and to their remuneration and other terms of employment.

787. The operation of the deeming proposal will risk imposing negative consequences on employees who may not appreciate the significance of not electing to remain casual. This could include both a loss of flexibility that may well suit such employee's circumstances and a very significant reduction in their income through the forfeiture of the 25% casual loading. Employees should not have such outcomes unilaterally imposed upon them when they have not actively sought conversion.

788. The deeming proposal does not necessitate any level of discussion, consultation or agreement before a casual employee is converted to permanent employment. It does not necessitate any advanced ventilation of

[651] AMWU submissions of 13 October 2015 at paragraph 1.

the possible practical problems or issues associated with an individual's conversion. It is not in the interests of either party for a casual employee to covert to permanent employment in circumstances where the precise terms of such engagement are not mutually understood or where the outcome is plainly unworkable and will simply result in the termination of the individual's employment.

789. The deeming proposal is inconsistent with the approach determined in the *Metal Industry Casual Employment Case.*[652] In support of a clause based upon employee election, with the employer having the right of reasonable refusal, the Full Bench there held:

> We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend towards 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 exit in accommodating an election.[653]

790. These comments were made in the context of an alternate proposal to set a maximum limit on casual engagements. However the logic would provide equal justification for the rejection of the deeming proposals now advanced.

791. The Full Bench in the *Metal Industry Casual Employment Case* discussed the award simplification proceedings before Marsh SDP that had taken place between 1997 and 1999 regarding a deeming provision that was in the Graphic Arts – General – Interim Award 1995 (**Graphic Arts Award 1995**). Ai Group played a leading role in representing graphic arts industry employers during the lengthy and hard-fought award simplification proceedings. The relevant clause in that award was referred to in Marsh SDP's decision (emphasis added):[654]

[652] Print T4991.

[653] Ibid at 115.

[654] Print R7898 at para [98], 5 August 1999.

[98] The union seek the retention of the existing award clause [4.1.5]:

"4.1.4(b) An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual. A casual employee, after two weeks continuous employment as a casual employee, must become a weekly employee."

792. The clause, in effect, deemed employees to be permanent after two weeks of employment, or at least this was the way that the AMWU interpreted the clause at the time given the inclusion of the phrase *"become a weekly employee".*

793. Ai Group strongly opposed the retention of the Graphic Arts Award 'deeming' provision. In her decision, Marsh SDP rejected the AMWU's claim to retain the deeming provision and relevantly stated:

> [102] I have formed the view that on all the material presented a case has been made out to delete the deeming provision. At present casuals must be made permanent after two weeks regardless of operational requirements. It is demonstrated in the material that this restricts or hinders productivity [Item 51(6)(c)] or that it is a restrictive work procedure [Item 51(6)(b)]. The restrictive nature of the current clause is demonstrated by the widespread attempts made to circumvent its intent.[655]

794. Marsh SDP decided to insert a 12 week limit on continuous casual employment, with the ability to extend this for a further 12 week period by agreement. The clause was not a deeming provision. No wording was inserted into the Award to suggest that at the expiry of the 12 week period, the employee was '*deemed'* to be, or must *'become'* a permanent employee.

795. While nowadays the 12 week limit looks extremely inappropriate and retrograde, it needs to be recognised that the decision was made nearly 20 years ago, in circumstances where the printing / graphic arts industry was very different and significant industrial disputes were not uncommon.

796. A deeming proposal is contrary to the elements of the object of the Act that speak to the provision of a balanced framework for *cooperative* workplace

[655] Print R7898 at para [98].

relations and to the provision of workplace laws that are flexible for business.[656]

797. From a practical perspective, there would undoubtedly be significant difficulties associated with determining precisely how the deeming provisions would interact with existing clauses regulating the various types of employment available under the award. For example, there is substantial scope for disagreement over what a deemed permanent part-time employee's hours of work, or more specifically ordinary hours of work, would be under the application of the proposed clause. The specific proposals advanced do not adequately deal with such matters. In the context of the current Manufacturing Award, these difficulties are moderated by a requirement that there ultimately be agreement in relation to such matters and that casual conversion is not actually enacted until this occurs.

798. Ai Group contends that it is not unreasonable to require that an employee play an active role in initiating casual conversion. The safety net, and the award system in particular, contains numerous employee entitlements that can only be accessed where actively sought by an employee. That is, at their election. For example, this is commonly adopted mechanism in the context of facilitative provisions in modern awards, e.g. those relating to time off in lieu of overtime.

799. A deeming provision would be 'unjust'. (See the decision of the Full Bench of the SAIRC in the *SA Clerks Case*, as discussed in sections 15.2, 15.3 and 15.4 above).

800. For all of the abovementioned reasons the Full Bench should reject the proposed claims to insert deeming provisions in modern awards.

[656] s.3 of the Act.

22.6 A CASUAL EMPLOYEE'S ELIGIBILITY TO CONVERT

801. The circumstances in which an employee will qualify for conversion to permanent employment under both the ACTU and AMWU proposals would give rise to practical difficulties, uncertainty and likely disputation.

802. The relevant paragraphs dealing with the ability to convert under the proposals are as follows:

> XX.X Casual Conversion
>
> (a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.
>
> (b) For the purpose of this clause, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.
>
> (c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

803. Although the proposals borrow heavily from regimes in place under certain modern awards, it is important to appreciate that the application of the provisions in the context of the unions' new claims will serve a very different purpose.

804. In the context of the current awards the provisions typically trigger an entitlement to covert which can be reasonably refused. They are, in effect, a catalyst for the parties to engage in a process of consultation concerning an employee's request to convert to permanent employment.

805. In contrast, the proposed provisions would operate as a mechanism for conversion with no capacity for employer refusal. In the context of the deeming proposals it potentially operates without involvement from the parties. As such, the proposals operate on the assumption that an employee

who is not an 'irregular casual' will meet the definition of either a full-time or part-time employee under every award which is the subject of the claim.

806. Under the unions' clause, an 'irregular casual employee' is defined as '…*one who has been engaged to perform work on an occasional or non-systematic or irregular basis*.' The proposal is vague and ambiguous. At the very least it is open to subjective interpretation. The reference in the proposals to qualification through a 'sequence of periods' of engagement potentially amplifies these difficulties.

807. It is entirely feasible that an employee may be engaged on a systematic or regular basis but not in a pattern of work that will conform to the definition of either full-time or part-time work under the particular awards or with patterns of work in the industry, occupation or enterprise covered by the award. For example, there are some industries that necessarily adopt very flexible patterns of work. In some cases there is no certainty of the precise hours of work that employees will undertake. The Full Bench should consider, for example, employees covered by the *Road Transport (Long Distance Operations) Award 2010* (**Road Transport Long Distance Award**) or the Stevedoring Award. It is difficult to see how the proposed clause could be sensibly applied in the context of the industries.

808. Just because certain wording appears in a minority of awards, does not mean that it should be regarded as uncontentious or workable in other awards. Most awards do not contain casual conversion provisions.

809. If the unions contend that the proposed wording is workable in the context of each award that is the subject of their claim, they need to establish this by reference to relevant award provisions in each award and through evidence of actual patterns of work of employees who are the subject of each award. As held by the Commission in its *Preliminary Jurisdictional Issues Decision*, the onus rests with the unions in this respect. They have clearly failed to make out a case for the sweeping variations to awards they have proposed.

810. The interactions between the casual conversion clauses, the existing award terms, and industry-specific circumstances, reinforce the imperative for the Full Bench to resist adopting a 'one size fits all approach' to considering the unions' claims.

22.7 A CASUAL EMPLOYEE'S SERVICE PRIOR TO CONVERSION

811. The union claims seek to require that service as a casual employee counts for the purposes of determining various specified entitlements under the Act or the award. The wording of the proposals advanced by the unions is identical.

812. More specifically, the proposals require that service as a casual for an employee who is converted to permanent employment is to be counted for the purposes of the following provisions of the Act:

- Unfair dismissal;
- Parental leave under the NES;
- The right to request flexible working arrangements under the NES;
- Notice of termination under the NES; and
- Redundancy under the NES and awards.

813. This obligation is subject to the caveat that it does not include periods of service as an 'irregular casual', as defined for the purposes of the claim.

814. By way of example, the inclusion of the following clause is proposed for insertion in the Manufacturing Award:

> (h) a casual employee who is deemed to be employed on a full or part-time bases shall have their service prior to conversion recognised and counted for the purpose of unfair dismissal, as well as parental leave, right to request flexible work arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

815. Little is said by the unions in support of this element of the claim. The unions have not advanced a merits based case in support of the proposal. The

AMWU merely suggest that the proposed variation, *'…provides clarity regarding previous periods of services as regular period casual employees for the purposes of accessing NES and award entitlements based on periods of service.'* For this reason alone the clause should fail, particularly if the Full Bench determines that the proposal does not merely provide 'clarity' about how such prior service would currently be treated under the NES but, as Ai Group submits, would instead either extend or create new employee entitlements.

816. The proposals should be rejected in light of both jurisdictional and merit based considerations.

817. The proposed clause significantly alters the current safety net. It reflects an approach that is inconsistent with the treatment of casual service for relevant purposes, currently and historically, under relevant industrial legislation and awards.

818. The proposed clause would also result in unfair 'double dipping' as it would entitle converted employees to have their casual service included in the calculation of entitlements that are inherently associated with permanent employment and, for the absence of which, they have already been compensated through the current casual loading.

819. An appropriate starting point for consideration of this element of the unions' claims is the current legislative framework. This includes consideration of the extent to which prior service of a converted casual employee counts for the purpose of determining legislative entitlements in relation to:

- NES entitlements relating to notice of termination (s.117) and redundancy pay (s.119);
- The right to request flexible working arrangements (s.65); and
- Parental leave and related entitlements under the NES (as impacted by s.67).

Sections 117 and 119

820. Division 11 of the NES deals with notice of termination (or payment in lieu thereof) and redundancy pay.

821. It is uncontroversial that casuals are excluded from receiving the benefits of NES provisions related to notice of termination and redundancy pay. Section 117 prohibits an employer from terminating an employee unless they have either provided a specified period of notice or payment in lieu thereof. The period of notice is required to be calculated by reference to the employee's period of "continuous service" in accordance with a scale set out at s.117(3).

822. Section 119 sets out an employee's entitlement to redundancy pay.

823. Relevant to the operation of both ss.117 and 119 is s.123(1)(c), which provides that division 11 does not apply to a casual employee:

> 123 Limits on scope of this Division
> Employees not covered by this Division
> (1) This Division does not apply to any of the following employees:
> …
> (c) a casual employee; …

824. Any reference to continuous service in ss.117 and 119 must be read in the context of the division of the Act in which such provision sits and must be considered in light of the purpose of these provisions. This includes, in particular, the exemption of casual employees from the application of the entire division. Adopting this approach, it is difficult to reconcile an interpretation of the reference to "period of continuous service" in these sections with an extension of these entitlements by reference to a period of casual employment. That is, the reference to an employee's *"period of continuous service with the employer*" adopted within the tables contained within ss.117(3) and 119(2) should only be read as referring to the period of continuous service during which the employee was not otherwise excluded from the application of the division on the basis of them being a casual employee.

825. Alternatively, s.123 has the direct effect of excluding service during a prior period of casual employment from the calculation of entitlements under s.117 and 119 of an employee who is subsequently engaged in full-time or part-time employment.

Consideration of other provisions of the Act

826. To form part of an employee's "continuous service" for the purposes of the Act a period must also constitute "service".

827. Section 12 – the Dictionary, contains a reference to "continuous service" but does not define "continuous service", other than to provide that the term has a meaning affected by s.22. Accordingly, the term must be construed, subject to the operation of s.22, in the context of the FW Act as a whole and with the purposive approach mandated by s.15AA of the *Acts Interpretation Act 2001*.

828. Sections 22(1), 22(2) and 22(3) address the general meaning of "service" and "continuous service" within the Act. They provide as follows (emphasis added):

> General meaning
>
> (1) A period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an ***excluded period***) that does not count as service because of subsection (2).
>
> (2) The following periods do not count as service:
>
> (a) any period of unauthorised absence;
>
> (b) any period of unpaid leave or unpaid authorised absence, other than:
>
> (i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
>
> (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
>
> (iii) a period of leave or absence of a kind prescribed by the regulations;
>
> (c) any other period of a kind prescribed by the regulations.

(3) An excluded period does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service.

(3A) Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which subsection (4) applies). If they do so, subsection (3) applies accordingly.

829. Section 22(4) deals with the meaning of "service" and "continuous service" for relevant purposes including requests for flexible working arrangements, parental leave, and related entitlements, and, most relevantly, notice of termination or payment in lieu thereof (as provided for under s.117). It provides: (emphasis added)

(4) For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2:

(a) a period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or

(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

830. As can be seen, the relevant definition of "service" in the Act does not specifically include or exclude a period or periods of casual employment. Nor does the Act specify whether a period of service as a casual employee, or the inherent breaks or absence between engagements should be treated for the purpose of calculating a period of continuous service.

831. A reading of a reference to "continuous service" in the NES as not including casual service is consistent with an ordinary reading of s.22 and is supported by a consideration of the context of the provisions in which it used and the broader purpose of the Act.

832. Interpretation of references to "continuous service" in ss.117 and 119 of Act as excluding casual service is also consistent with the ordinary meaning of the term "continuous service" as adopted in broader industrial parlance and the historical exclusion of casual employees from entitlements to redundancy pay and notice of termination entitlement. This issue is developed further below.

833. As observed by the Full Bench in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*:

> [23] The FW Act did not commence in a vacuum. It replaced the WR Act and inherited a Federal award system and an award modernisation process that was undertaken in anticipation of the central place of modern awards in the FW Act system.[657]

834. A similar point was made by Justice Jessup in *Anglican Care v NSW Nurses and Midwives' Association*[658]. His Honour gave significant weight to the fact that there was no indication in the Explanatory Memorandum or other Parliamentary materials that there was an intention to change a particular entitlement in the *Workplace Relations Act 1996* when the FW Act was introduced. Jessup J made the point that in such circumstances, the Court is *"justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations"* (emphasis added):

> **13** It was in this state of things that the WR Act was repealed and replaced by the FW Act. Section 130 undoubtedly dealt with the matter that had previously been the concern of s 237 of the WR Act, but it did so in different terms. Whereas s 237 had been based upon inconsistency with a law that would prevent or restrict the taking or accruing of leave, s 130(1) disentitled the relevant employee whenever he or she was absent from work on account of an illness or injury for which he or she was receiving compensation payments, and then subs (2) excepted from that disentitling rule any situation in which the taking or accruing of leave was permitted by the law in

[657] [2013] FWCFB 2434.

[658] [2015] FCAFC 81.

question. It is not apparent why the legislature made this change: the Explanatory Memorandum for the Bill which became the FW Act is not helpful in this regard. The change was, it seems, wholly responsible for the present litigation: the appellant accepts that, under s 237 of the WR Act, Ms Copas was entitled to accrue annual leave entitlements during the period when she was absent and in receipt of compensation payments under the WC Act.

14 It is tempting to suppose that the change from s 237 of the WR Act to s 130 of the FW Act was a change of a kind referred to in s 15AC of the *Acts Interpretation Act 1901* (Cth), but I cannot form the view the new wording was adopted "for the purpose of using a clearer style": regrettably, if anything, the contrary is the case.

15 Nonetheless, there is nothing to suggest that a change in substance was intended with the enactment of s 130 of the FW Act. That does not mean that we should construe this section as though it was in the same terms as s 237 of the WR Act. It was and is in its own terms, and effect must be given to them as they stand in the statute. But it does mean that we are justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations arising under the section. On the case of the appellant, there was such an alteration, and it was, moreover, one which cut back the entitlements which employees previously had under the WR Act. I would not, however, impute to the legislature an intention to give effect to such an alteration, at least without some appropriate indication in the Explanatory Memorandum or other Parliamentary materials.

835. The Act was implemented in the context of a long history of exclusion of casual employees from severance pay. Relevantly, Parliament's consciousness of such matters is partly demonstrated by the fact that the scale of redundancy pay entitlements provided by s.119 reflects the federal award standard.

836. The Act was also established against a back drop of the historical inclusion of casual conversion provisions in many awards as a product of arbitrated proceedings and a widely adopted 25% casual loading which was a product of prominent arbitrated outcomes and expressly determined as including appropriate compensation for the absence of entitlements akin to those now provided under the NES to employees other than casuals.

837. If the legislature had intended that prior service as a casual employee who had converted to permanent employment should be counted for the purpose of the NES then surely this would have been expressly dealt with.

838. It would be a particularly unfair outcome if employees were to be able to take advantage of the NES for a period when they were in receipt of a casual

loading that compensates them for the absence of entitlements equivalent to those provided under the NES, such as redundancy pay. It would mean that employees are "double dipping". This would not be consistent with a fair and relevant safety net of minimum terms and conditions.[659]

839. A number of provisions of the Act provide support for a contention that "continuous service" as referred to in ss.117 and 119 does not include periods of casual service. This includes the provisions dealing with:

- The right to request flexible working arrangement
- Access to unpaid parental leave, and
- Unfair dismissal protections.

840. We address these provisions in the section below.

The Right to Request Flexible Working Arrangements

841. In order to have a right to request flexible working arrangements pursuant to the NES or to have an entitlement to parental leave, a casual employee must, at the relevant time be a *"long term casual employee."*

842. This term is defined in s.12 of the Act:

> **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.

843. Significantly, there is no requirement that an employee have a period of "continuous service" in order to qualify as a long term casual employee.

[659] As contemplated by s.3(c) and s.134(1).

844. Section 65 of the Act affords certain employees the right to request flexible working arrangements. Subsection 65(2) states:

> (2) The employee is not entitled to make the request unless:
>
> > (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
> >
> > (b) for a casual employee—the employee:
> >
> > > (i) is a long term casual employee of the employer immediately before making the request; and
> > >
> > > (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

845. The above provision provides two different bases upon which an employee may qualify for the right to make a relevant request. One is applicable to permanent employees and the other is applicable to casual employees. The provisions draw upon the definition of long term casual. Again, there is no requirement that the casual employee have a period of continuous service.

Parental Leave

846. Division 5 of the legislative provisions containing the NES governs employee entitlements related to parental leave. Sections 67(1) and 67(2) establish the limited circumstances in which an employee would receive leave (other than unpaid pre-adoption leave or unpaid no safe leave) under the division:

> Employees other than casual employees
>
> 67(1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).
>
> Casual employees
>
> 67(2) A casual employee, is not entitled to leave (other than unpaid pre adoption leave or unpaid no safe job leave) under this Division unless:
>
> > (a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and

(b) but for:

(i) the birth or expected birth of the child; or

(ii) the placement or the expected placement of the child; or

(iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)--the taking of the leave;

the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

847. Again, this section sets out different criteria governing when permanent employees and casual employees qualify for a parental leave related entitlement. The Act does not make any reference to a period of "continuous service" in setting out the criteria applicable to casuals.

848. An analysis of the above cited provisions of the Act demonstrates that there has been no indication in their text to suggest that the notion of continuous service in any way captures a period of service as a casual employee. Instead, the term is only used in reference to employees other than casual employees. It appears that Parliament has not deemed the use of the term continuous service appropriate in the context of casual employment.

Unfair Dismissal Protections

849. The Act provides different tests or prerequisites for determining when a casual employee receives protection from unfair dismissal compared to when they will receive the benefit of the NES entitlements in relation to notice of termination and redundancy pay. The relevant legislative provisions pertaining to unfair dismissal protection were considered in *Shortland v Smiths Snackfood Company* (**Shortland**) (emphasis added):[660]

[8] A person is not protected from unfair dismissal unless the requirement in s.382 is met. The requirement in s.382(a) is:

"(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period"

[9] Section 383 defines the meaning of "minimum employment period" which, uncontroversial in Mr Shortland 's case, is 6 months. Section 384 relevantly

[660] [2010] FWAFB 5709.

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; …"

[10] As a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. 4 In this sense no casual employee has a continuous period of employment beyond any single engagement. Moreover, it is common for a casual employee to transition between a period in which their engagements with a particular employer are intermittent and a period in which their engagements are regular and systematic and vice versa. It is against that background that s.384 must be construed.

[11] The criteria in s.384(2)(a) make it clear that s.384 does not proceed on the basis that a casual employee's period of employment for the purposes of the unfair dismissal remedy starts and ends with each engagement as understood in the common law of employment.

[12] Moreover, it is more than tolerably clear that s.384 is concerned with how an employee's period of employment is calculated for the purposes of s.382(a). Section 384(2) draws a distinction between a period of service and a period of employment. It also draws a distinction between a period of continuous service and a period of service: a period of continuous service can be made up of a series of periods of service, some of which count towards the period of continuous service (ie. where the conditions in s.384(2)(a)(i) and (ii) are met) and some of which do not (ie. where one of the conditions in s.384(2)(a)(i) or (ii) is not met). It is clear from the language of s.384(2) that an employee may have series of contiguous periods of service with an employer that may count towards a single period of employment with that employer. Any given period of service in such a contiguous series of periods of service will count towards the employee's period of employment only if the requirements in s.384(2)(a)(i) and (ii) are met. Section 384(2) is concerned only with determining which periods of service in such a contiguous series count toward the employee's period of employment with the employer for the purposes of s.382(a).

[13] Continuous service by a casual employee who has an established sequence of engagements with an employer is broken only when the employer or the employee make it clear to the other party, by words or actions that there will be no further engagements. The gaps between individual engagements in a sequence of engagements should not be seen as interrupting the employee's period of continuous employment within the meaning of s.384. In particular, a period of continuous service within the meaning of s.384(1) is not to be seen as broken by a period of 'leave' or an

absence due to illness or injury.[661]

850. To the extent that it may be held that the phrase "continuous service" adopted within s.384 requires period of casual employment to be construed as "continuous service", we contend that this is a product of the textual and broader context applicable to this provision and does not necessitate that the same conclusion must be reached in relation to meaning of the phrase in all other divisions. The framework of the Act suggests that different circumstances may be said to satisfy the definition of "continuous service" as contemplated within different divisions. In support of this we note:

- Section 12 of the Act does not comprehensively define the term "continuous service" but merely provides that it "…has a meaning affected by s.22."
- Section 22 merely identifies periods that do not break or count towards a period of "continuous service" rather than identifying what constitutes continuous service.
- Sections 22 contains separate subsections that affect the meaning of continuous service in a different manner depending on which division or subdivision of the Act the phrase is used in.
- Sections 22(3A) and (4A) expressly enable regulations to be made for the purpose of prescribing different kinds of periods that may not count as service or be taken to not break a period or count towards a period of continuous service.

851. If the legislature had intended that periods of casual service would be captured by references to continuous service adopted elsewhere in the Act it could have included comparable provisions dealing with circumstances when casual employment may be captured by a reference. The absence of such provisions suggests that this was not the purpose of the legislation.

[661] [2010] FWAFB 5709.

852. The ordinary meaning of the phrase "continuous service" in industrial relations parlance does not capture periods of casual service. As identified in *NTEU v La Trobe University*:

> In my view, the ordinary meaning of "continuous service" excludes periods of casual employment because such employment is characterized by a series of contracts or engagement which would not normally be considered as continuous employment or continuous service.[662]

853. Further, the complete absence in the Explanatory Memorandum of any acknowledgement of the radical departure from this longstanding position and well accepted principal supports the proposition that such an outcome was not an intended purpose of the Act.

Distinction between ongoing casual employment and commencement of another type of employment

854. Even if the Full Bench accepts that a period of casual service can amount to "continuous service" as referred to in the Act, we content that this does not mean that a period of service in casual employment, followed by a period of service in full-time or part-time employment, similarly constitutes continuous service.

855. It has long been recognised that a casual employment contract and full-time employment contact are separate and distinct.[663]

856. The cessation of a period of casual engagement would similarly bring about the ending of "*…the period during which the employee is employed by the employer*" for the purpose of s.22(1) and s.22(2), even if there was subsequent period of employment entered into. That is, there is no relevant linkage between this period of employment and any subsequent period of employment as a permanent employee. Accordingly, the respective separate periods of employment with the employer cannot be added together to count as "continuous service".

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[662] [2009] AIRC 572.

[663] See *Wilkonson v Skipper Aviation* [PR0903635], *Cooling v Tanker Repairs Australia* [PR051400].

857. If the notion of 'employment' adopted within the statute was not taken to be broken or brought to an end by the cessation of engagement in one type of employment this could not only result in a radical reassessment of the traditionally accepted notion that periods of casual service do not qualify for the purpose of determining statutory entitlements akin to those provided by ss.117 and 119 but would also result in perverse outcomes where an employee may transition from permanent employment to casual employment.

858. For example, s.90(2) requires that:

> If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken the period of leave.

859. If the notion of 'employment' adopted with the legislation does not end in circumstance where an employee ceases full-time employment but subsequently (and immediately) commences casual employment with the same employer there would be no obligation to pay the employee their annual leave entitlement at this time. Indeed, the employee would simply lose their entitlement to annual leave given that s.86 of the Act provides, in effect, that the Division of the NES dealing with annual only applies to employees, other than casual employees.

860. Given the above contentions, the phrase "period of continuous service" adopted in ss.117(3) and 119(2) must be understood to be referring to the period of service of the employee in their "employment" as contemplated by either section 117 or 119.

861. To be clear, Ai Group contends that the reference to "an employee's employment" referred to in s.117 and 119 does not capture a period of prior casual employment by a converted employee. Such a period of casual employment represents a separate employment relationship to that which exists following conversion. The prior relationship is clearly not intended to be captured by s.117 and s.119 given, pursuant to section 123(1), the division does not apply to a casual employee.

862. The above contentions are supported by the broader context if the Act, including the historical context in which the term "continuous service" has been used with Australian workplace relations regulation and the text of other provisions of the Act.

Traditional interpretation of "continuous service", exclusion of casuals from notice and redundancy entitlement and recognition of the need to avoid double dipping

863. An interpretation of continuous service as excluding service by casual employees would also be consistent with the longstanding and often articulated reluctance of the AIRC and other relevant tribunals to afford severance pay entitlements to casual employees. This broader context is relevant to the interpretation of the Act given the provisions of s.119 clearly heavily from the federal standards flowing from the relevant TCR Decisions.

864. The Federal Commission's 1984 TCR Decision excluded casuals from severance pay, stating that:

> Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also inconsistent with the general severance pay prescription being granted where termination is as a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work.[664]

865. A key decision referred to by the Commission in arriving at this decision was the *Milk Processing and Cheese Manufacturing Etc (Appeal)* Case 20, (1978) 45 SAIR 902.[665] In that context a Full Bench of the South Australian Industrial Relations Commission did not grant severance pay to seasonal or casual employees, stating that:[666]

> We unreservedly agree with the Commissioner's original conclusion that, insofar as the claim sought redundancy prescription for seasonal or casual employees, it was totally ill-founded. Having regard to the essential basis of the 20 per cent casual loading paid to such employees, it is a contradiction in terms, and would constitute

[664] *Termination, Change and Redundancy Case – Decision*, 8 IR 34, para 75. Print F6230

[665] Print F6230

[666] *Milk Processing and Cheese Manufacturing Etc (Appeal)* Case 20, (1978) 45 SAIR 902, para 934.

double counting of the most flagrant nature, to confer additional benefits upon them. To suggest that a casual employee could reasonably have an expectation of lifelong employment with the one employer is, to say the least, incongruous.

866. Relevantly, a detailed consideration of the casual loading prescribed by the Metals Award was made in the *Metals Industry Casual Employment Case*.[667] At paragraph [181] of its decision the Full Bench stated that it considered, *"that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgement of the adequacy of the casual rate loading."*

867. In the *Metals Casual Case*, it is clear that unions sought an increase in the level of the casual loading to compensate, in part, for foregone notice of termination and severance pay benefits. Indeed, the Full Bench decision records that the unions (in particular, the AMWU) argued that, "*compensation for distress and hardship associated with uncertainty of tenure and the consequent financial difficulties facing casual workers, both of which incorporate the TCR redundancy and notice requirements*" ought to be properly included as a component of the casual rate loading.[668]

868. The Full Bench of the Commission granted an increase in the casual loading from 20% to 25% under the Award. The Bench observed that, since the loading was last varied from 15% to 20% in 1974, full-time and part-time employees have gained additional benefits such as extended periods of notice, severance pay, carer's leave and parental leave. Moreover, the Bench ruled that a contemporary casual loading rate should include the foregone benefits of severance pay and notice of termination (emphasis added):[669]

> …the Commission's decisions in the Termination, Change and Redundancy Case (the TCR Case), the Family Leave Case, the Parental Leave Case, and the Personal Carer's Leave Case have significantly increased effective access by eligible full-time and part -time employees to accruing personal leave entitlements. Those entitlements are not available in any paid form to casual employees. We accept that they are appropriately to be evaluated as a component in the assessment of the appropriate level of the casual rate loading.

[667] Print T4991.

[668] Print T4991, para 139.

[669] Print T4991, para 165.

869. The Bench further stated:[670]

> We consider that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgment of the adequacy of the casual rate loading. The differences, together with the employment by the hour distinction, are fundamental to the respective types of employment.

870. In the 2004 *Redundancy Case*, the AIRC Full Bench said:[671]

> We have reached the conclusion that it would be inappropriate to award severance pay for casuals. Such an approach would, in the case of the metal industry at least, be "double dipping" and likely to be so in other industries. Although there are other cogent arguments for and against this part of the ACTU application, this issue is decisive. It follows that we reject this aspect of the application.

871. In *Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media - Newcastle Newspapers (Herald)*[672] it was the opinion of the FWC that when calculating the amount of redundancy pay to be paid to an employee who has periods of earlier casual employment and later periods of permanent employment, the periods of earlier casual employment do not count when the enterprise agreement only provides redundancy for permanent employees. At paragraph 4 the FWC noted (emphasis added):

> While I can well understand why the employees feel aggrieved that their long periods of unbroken casual service, are not included for the purposes of calculating redundancy, the fact is that throughout this time they had received a 20% casual loading on their base rates of pay. Casual loadings are intended to compensate a casual employee for the benefits and entitlements otherwise available to permanent part time and full time employees; such as annual leave, sick leave and redundancy payments. This has been a long-held and well known principle under workplace law. The fact that long service leave was payable to the employees according to State legislative provisions and that certain shift allowances, penalty rates and overtime may be paid, does not alter the strict legal position.

872. In *AMWU v Waycon Services & Ors* [673] Senior Deputy President Polites rejected a claim by the AMWU for certain long-term labour hire casuals to be awarded severance payments. The AMWU had made application to the Commission for an order requiring a number of labour hire companies

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[670] Print T4991, para 183.

[671] *Redundancy Case*, Decision, PR032004, Giudice J, Ross VP, Smith C and Deegan C, para. 316.

[672] [2014] FWC 5631.

[673] PR922384, 11 September 2002

engaged on the ADI Minehunter project in Newcastle to pay a $50.00 per week severance allowance for their casual employees into the union's Manusafe Trust Fund (or NEST).

873. In refusing the claim, Senior Deputy President Polites accepted Ai Group's arguments that the labour hire employees were already receiving compensation for foregone severance pay benefits, via receipt of the 25% casual loading prescribed under the Metals Award:[674]

> I am fortified in this conclusion by the evidence in this case as to the payment of the casual loading. The evidence was to the effect that employees were receiving the casual loading prescribed in the Federal Metal Industry Award . . . The casual loading in the Metal Industry Award was considered in the Casuals case quite recently. In adjusting the casual loading in that case specific reference was made to the fact that casual employees were not entitled to the severance payment and the loading increased in part on this account.

874. The Commission also noted that, in these circumstances, the current exclusion of casual employees from severance pay entitlements under national law and practice was "*perfectly understandable*".[675]

875. There are also a number of cases that support the proposition that the ordinary meaning of "continuous service" would exclude periods of service as a casual. In *TWU v Q Catering Limited*,[676] Commissioner Hampton held:

> [48] In National Tertiary Education Industry Union v La Trobe University [2009] AIRC 576 Whelan C held that in the absence of an express intention to include periods of casual employment for the purposes of the redundancy pay provisions of the relevant agreement, the Commission was not satisfied that any periods of casual employment should be taken into account in calculating an employee's entitlements to redundancy pay under the agreement. The Commission did so in the following manner:
>
> > "[62] Madgwick J in Kucks v CSR Limited stated that in interpreting an award "ordinary or well understood words are in general to be accorded their ordinary or usual meaning". He also suggested that awards (and I would suggest that this is even more likely to be the case with agreements) may have been expressed in ways likely to have been understood in the industry. An expression such as continuous service is used frequently in industrial instruments. In the absence of any definition expressing a contrary intention, the context in which the Agreement was made would suggest that the terms

[674] *AMWU v Waycon Services & Ors* 493 (PR922384, 11 September 2002), para. 36.

[675] Ibid.

[676] *TWU v Q Catering Limited* [2014] FWC 6160.

should be given its ordinary meaning.

[63] In my view, the ordinary meaning of continuous service excludes periods of casual employment because such employment is characterised by a series of contracts or engagements which would not normally be considered as continuous employment or continuous service.

[64] In the absence of an expressed intention to include periods of casual employment as service for the purposes of clause 41, I am not satisfied that any periods of casual employment can be taken into account in calculating an employee's entitlement under that section."

[49] In Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media – Newcastle Newspapers (Herald) [2014] FWC 5631, Sams DP, was dealing with a dispute as to whether a particular redundancy provision applied only to "permanent" employees, and stated:

"...the fact is that throughout (the relevant) time (the casual employees) had received a 20% casual loading on their base rates of pay. Casual loadings are intended to compensate a casual employee for the benefits and entitlements otherwise available to permanent part time and full time employees such as annual leave, sick leave and redundancy payments. This has been a long held and well known principle under workplace law."

[50] Some instruments do expressly provide that casual, or similar service, may be included for the purposes of redundancy payments. As relied upon by the TWU, in "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Safries Pty Ltd [2014] FWC 2352, O'Callaghan SDP was dealing with an enterprise agreement which stated (in Appendix 1) that "periods of short term employment will accumulate from year to year included for the purpose of calculating length of service under this agreement. Provided that the break between periods of short term or casual employment does not exceed six months." The issue to be resolved was whether the redundancy provision applied to casual employees.

[51] After reviewing the history of casual loadings and the nature of the relevant modern award referred to in the enterprise agreement, the SDP observed:

"[38] Consequently, in terms of the Agreement, unless Appendix 1 can be read as establishing an entitlement for redundancy pay, I do not consider that any such right can be inferred. ..

…

[40] I think that Appendix 1 must be read as establishing an entitlement to redundancy payments for weekly employees on the basis that these payments recognise periods of short-term or casual employment within the limitations established by clause 14. Those periods of short-term or casual employment entitle the weekly hire employee to receive redundancy payments calculated at a lesser rate of accrual for that period. There is no specific entitlement to redundancy pay for employees who, at the time of the redundancy, were not weekly hire employees."

[52] It is evident in this analysis that in the absence of this specific provision, such casual service would not have figured in the calculation of the length of service for redundancy entitlement under that agreement.

[53] In a matter more on foot with the earlier cases, the Industrial Relations Court of South Australia in Schuman v Pace Trading Pty Ltd (2007) 169 IR 101, held that the employee's prior casual service should not be recognised as continuous service for the purposes of calculating severance pay entitlements. Hardy IM found:

> "[57] I am also of the view that if the applicant is to be considered to be a casual employee during the first period of her employment and I certainly consider that to be the case, there would have been no question that she would not have qualified for a redundancy payment had her employment been terminated during that period of casual employment. The applicant's submissions depend in part upon the fact that she was terminated as a permanent employee so that the previous casual service can be included but I do not agree. If the casual service did not qualify her for a redundancy during the currency of that service it makes no sense to me that it would do so at a later juncture after some permanent service."

[54] These cases demonstrate that the conventional approach is that in the absence of an express provision, prior service as a casual does not count for the purposes of redundancy entitlements. However, the particular terms of each instrument need to be considered.

876. The issue of whether or not prior service by a converted employee is counted for redundancy and notice of termination purposes was recently considered by the Commission in the context of a dispute concerning the interpretation of an enterprise agreement. In his decision, Commissioner Riordan decided that prior service as a casual did not count. The Commissioner saliently observed:

[35] The argument in relation to "double dipping" was not extensively argued at the hearing, however, the argument does have merit. It would not seem to be fair or logical for an employee who has been paid a loading, which I have found to contain compensation for notice and redundancy pay, to then be able to use that same period of service in the calculation of notice and redundancy pay as a permanent employee. As an example, if two employees had started with Forgacs on the same day – employee A as a permanent employee, employee B as a casual. For 6 months, employee B receives the same rate as A, plus a 25% casual loading. After 6 months, B becomes a permanent employee in accordance with section 14 of the Agreement. If 2 years and 9 months later both A and B get made redundant, the AMWU believe that both employees have 3 years and three months continuous service for the purposes of their notice and redundancy entitlements. This would mean that both A and B would receive the same notice and redundancy pay. I cannot see how such an outcome is possibly fair to employee A. Employee B received a 25% loading for 6 months, which contained compensation for the lack of notice and redundancy pay entitlement in B's initial period of employment.

[36] I agree with the sentiments of Industrial Magistrate Hardy, Deputy President Sams and Commissioner Hampton that the legal principal against "double dipping" in this regard is a logical, well known and universally accepted industrial practice.

> [37] I accept the argument that if the legislature had wanted prior casual service to count towards a permanent employees period of service then it would have been expressly stated in the Act in a manner similar to the way section 384 has provided for access for casual employees into the unfair dismissal provisions of the Act.[677]

877. An AMWU appeal against the abovementioned decision of Commissioner Riordan has been heard and the decision of the Full Bench is reserved. Ai Group represented the employer in the proceedings at first instance and in the appeal.

The role of awards and the modern awards objective

878. It is clear that Parliament did not intend for casual employees, within the meaning of the Act, to receive the benefits of NES entitlements relating to notice of termination or redundancy pay. Moreover, the Legislature only intended that casuals would receive the benefit of parental leave or the right to request flexible work or the ability to bring an unfair dismissal claim, in specific and limited circumstances. There is legislative acceptance of the differential treatment of employees engaged on a casual basis.

879. It can be assumed that the Act itself represents a reflection of community expectations in relation to such matters. The relevant provisions in the Act represent Parliament's acknowledgement that the exclusion of such benefits in the context of casual employment represents a legitimate component of a fair and relevant minimum safety net of terms and conditions of employment, as contemplated by s.134(1).

880. The exclusion of casual employees from NES entitlements to redundancy pay and notice of termination is comprehensive. The Act does not establish a different regime of entitlements for award free or award covered employees, as occurs in the context of annual leave.

881. It is also significant that the NES does not expressly permit awards to include terms dealing with redundancy pay or notice of termination entitlements for

[677] *AMWU v Forgacs*, [2016] FWC 638.

casual employees. This can be contrasted with the NES's treatment of matters such as the taking of annual leave.[678]

882. The granting of this element of the unions' claim would represent a major change in the general approach of the Commission to the treatment of such matters. To date, the Commission has typically not developed provisions in modern awards that establish or reflect the statutory right to request flexible work arrangements or access to parental leave. There has also been only very limited supplementation of employee rights in relation to redundancy pay, and in this regard the Commission has mainly confined its willingness to regulate such matters to transitional arrangements and a small number of industry-specific redundancy schemes. Such matters have been left to the NES. The union proposals would represent a significant and unjustified departure from this approach. No cogent reasons for such a course of action have been advanced.

883. To the extent that the proposal expands entitlements to notice of termination or redundancy pay, it would have inevitable cost implications for employers.

884. Increasing the circumstances where the right to request flexible work arrangements applies, would also have cost implications in some circumstances.

885. The proposed clause would plainly represent an increase in the regulatory burden on business. It would be contrary to considerations arising under s.134(1)(f) of the Act.

886. At the macro level, such outcomes could be expected to have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the Australian economy (s.134(1)(h)).

887. The unions have not advanced any evidence addressing the potential cost of this element of their claims. This is inconsistent with the approach said to be

[678] See s.95.

required in this Review by the Full Bench reviewing the Security Industry Award:

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change.[679]

888. Consequently the Full Bench is not in a position to properly take into account the abovementioned mandatory considerations in determining whether the proposed clause warrants inclusion in the safety net. For this reason alone, the Commission should decline to grant the proposed variation.

889. The imposition of the proposed obligation, and its 'double dipping' nature, would create an incentive for employers to seek to ensure that casuals do not qualify for conversion, either through the selective management of the frequency or regularity of their engagement or by ensuring that casuals are not engaged outside of the relevant six monthly period.

890. The unions' claim has no merit and should be rejected.

22.8 THE INTERACTION WITH PRE-EXISTING PART-TIME EMPLOYMENT CLAUSES

891. The unions' claims, with one exception, encompass a requirement that a part-time casual employee be converted to part-time employment.

892. It cannot lightly be assumed, in the context of all the individual industries and awards the subject of the unions' claims, that the engagement of employees on a part-time basis would be a workable substitute for the engagement of part-time casual employees.

[679] [2015] FWCFB 620.

893. Many awards contain highly restrictive part-time provisions. Such provisions have either evolved or at least operated against a backdrop of a largely unfettered employer capacity to engage casual employees.

894. Although there are common elements to many modern award clauses dealing with part-time employment, there are also significant deviations between awards. To properly appreciate the level of flexibility associated with the use of part-time employment often requires consideration of numerous award clauses. For example, where an award requires that specific hours for part-time employees be agreed, it is not always apparent whether additional hours of work are required to be paid at overtime rates, without reviewing the applicable overtime clause in the award. In some awards the entitlement to various allowances will also be impacted by the type of employment that an individual is engaged under.

895. Often award clauses dealing with part-time employment require that part-time employees work set ordinary hours, including sometimes requiring specification of the number of hours to be worked and the days and times at which ordinary hours will be performed. It is not uncommon for the clause regulating part-time employment under an award to provide, in effect, that hours worked outside of such arrangements are overtime and paid at overtime rates.

896. The differences in the manner in which awards which are the subject of the unions' claims regulate part-time employment can be demonstrated through a cursory glance at the part-time provisions in such instruments. For example, the Manufacturing Award contains the following provisions in relation to part-time employment:

> 13.1 An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 ordinary hours per week.
>
> 13.2 A part-time employee must be engaged for a minimum of three consecutive hours a shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for less than the minimum of three hours.

13.3 Before commencing part-time employment, the employee and employer must agree in writing:

(a) on the hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times for the work; and

(b) on the classification applying to the work to be performed in accordance with Schedule B.

13.4 The terms of the agreement in clause 13.3 may be varied by consent in writing.

13.5 The agreement under clause 13.3 or any variation to it under clause 13.4 must be retained by the employer and a copy of the agreement and any variation to it must be provided to the employee by the employer.

13.6 Except as otherwise provided in this award, a part-time employee must be paid for the hours agreed on in accordance with clauses 13.3 and 13.4.

13.7 The terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38.

13.8 A part-time employee who is required by the employer to work in excess of the hours agreed under clauses 13.3 and 13.4 must be paid overtime in accordance with clause 40—Overtime.

897. In contrast, other awards provide for much greater flexibility in relation to the engagement of part-time employees. The *Business Equipment Award 2010* (**Business Equipment Award**) provides as follows:

12. Part-time employment

An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 hours per week. An employee so engaged will be paid, per hour, 1/38th of the weekly rate prescribed by clause 20 of this award for the work performed.

898. The *Telecommunications Industry Award 2010* (**Telecommunications Award**) provides:

11.2 Part-time employment

(a) An employee may be engaged to work on a part-time basis involving a regular pattern of hours which will average less than 38 hours per week. An employee so engaged will be paid per hour 1/38th of the weekly rate prescribed by clause 14—Classifications and minimum wage rates, of this award for the work performed.

(b) Overtime will be payable to part-time employees for time worked in excess of the hours fixed in accordance with the pattern of hours applicable to the employee. However, a part-time employee is not entitled to be paid overtime penalties on a day until they have worked at least an equivalent number of hours that day to an

equivalent full-time employee in the relevant section of the enterprise, provided that a part-time employee will not work more than 38 hours in any week at ordinary rates.

(c) The terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38 hours.

(d) Public holidays

Where the part-time employee's normal paid hours fall on a public holiday prescribed in the NES and work is not performed by the employee, such employee will not lose pay for the day. Where the employee works on the holiday, such employee will be paid in accordance with clause 26—Public holidays of this award.

899. The *Journalists Published Media Award 2010* provides:

10.2 Part-time employment

(a) A part-time employee is an employee who is employed on a continuing basis but is engaged to work an average of less than 38 ordinary hours per week.

(b) An employer is required to roster a part-time employee for a minimum of four consecutive hours on any day or shift.

(c) A part-time employee will receive pro rata rates of pay and pro rata conditions of employment.

(d) The weekly hours of employment, including starting and finishing times, will be as agreed between the employee and the employer. However, the employer may change the hours of work by providing seven days' notice in writing, provided that there is no change to the total agreed number of ordinary hours of work.

(e) An employer may ask a part-time employee to work at times other than those agreed in case of an emergency or a shortage of staff through sickness or other causes which cannot reasonably be foreseen. In this case the employer must give the employee as much notice as possible and will, within the same or the succeeding week, grant to such an employee time off duty to compensate for the additional time worked.

(f) All time worked in excess of the agreed hours (except as provided for in clause 10.2(e) or as varied in accordance with clause 10.2(d)) will be overtime and must be paid at the rate of time and a half for the first three hours and double time thereafter.

900. The Higher Education General Staff Award includes the following clause:

10.2 Part-time employment means employment for less than the normal weekly ordinary hours specified for a full-time employee, for which all award entitlements are paid on a pro rata basis calculated by reference to the time worked. Part-time employment may contain a reasonable probationary period that is directly related to the nature of the work to be carried out under the contract. As a condition incidental to employment on probation, an employee must be advised of, and given an opportunity to make response to, any adverse material about the employee which the employer intends to take into

account in a decision to terminate the employment upon or before the expiry of the period of probation.

901. The *Hydrocarbons Field Geologists Award 2010* (**Hydrocarbons Field Geologists Award**) regulates types of employment in the following way:

> 10. Types of employment
>
> 10.1 Employment may be full-time, part-time or casual.
>
> 10.2 A casual employee will be paid a loading of 25% of the annual retainer and daily rig allowance for the classification in clause 14.2 that a full-time employee would receive if that employee was performing the duties.
>
> 10.3 Casual employees must be provided with a minimum period of three hours employment on each engagement or be paid for a minimum of three hours at the appropriate casual rate.
>
> 10.4 Notwithstanding anything to the contrary appearing elsewhere in this award, the services of a casual employee may be terminated by one hour's notice by either party or by payment or forfeiture of one hour's salary as the case may be.
>
> 10.5 Unless specifically provided for, a casual employee will not be entitled to any of the allowances provided by this award, other than those prescribed in this clause.

902. In contrast to the divergent regulation of part-time employment outlined above, the unions' claims seek to provide a largely uniform mechanism for transitioning of 'part-time casuals' to permanent part-time work.

903. The unions' claims will be extremely costly and disruptive. However, the effects will differ markedly from award to award depending on the level of flexibility available under the awards. The effects will also differ depending upon the extent to which particular industries (or employers) rely on casual employees to overcome the inflexibilities associated with employing part-time employees under the provisions of the relevant award.

904. In the context of the current proceedings, the Full Bench should consider it incumbent upon the relevant unions to establish that the proposed casual conversion clause would operate appropriately in the context of each award. More specifically, such matters should be considered in the context of the differing treatment of the regulation of other types of employment beyond casual employment.

905. Relevantly, the granting of the unions' claims necessitates a careful assessment by the Full Bench of the specific provisions in each modern award relating to part-time employment and the needs of employers and employees covered by such awards. Where an award provides for high level of regulation of the engagement of part-time employees, such as in the context of the Manufacturing Award, the Full Bench should be even more cautious about limiting access to the engagement of casuals.

906. There are a myriad of award-specific and industry-specific considerations that need to be taken into account in considering the interaction of the proposed conversion provisions and the existing regulation of part-time employment. This is a product of the industry-specific nature of award provisions regulating different types of employment.

907. It is essential that the Full Bench does not adopt a 'one size fits all approach' to assessing the unions' claims. It should not entertain the ACTU's blatant attempt to rectify the deficiencies in its case, constituted by its failure to lead evidence or make submissions relevant to each award the subject of its claim, by suggesting that, '…*if there is a compelling case for a general right of conversion…it should only refrain from extending these rights to a particular modern award if there is a compelling evidence preventing it from doing so*'. The blatant attempt by the unions to shift the onus to employers or the Commission to address the numerous, major industry-specific issues that arise from their claims needs to be roundly rejected.

908. The differing levels of flexibility in current award provisions relating to part-time employment reinforces the need for an award-specific approach to be taken in the current proceedings.

909. Contrary to the ACTU's submissions, the Commission cannot simply proceed to vary an award absent a problem being raised. An absence of objection is not enough to ground a claim. Given the nature of the current proceedings, there is no onus on any party to respond to another's proposed claims. The Commission is required to undertaken a review pursuant to a statutory

obligation and it is statutorily required to take into account the matters identified in s.134(1) in the exercise of its powers regardless of the material that is put before it.

910. The subject matter of the unions' claims does not lend itself to the establishment of a general right being extended in the terms proposed. This is highlighted by the variable treatment of award clauses dealing with part-time employment.

911. Absent a compelling evidentiary case properly addressing each of the industries covered by the proposed clause the Full Bench should reject the unions' claims outright. Any such case would need to address whether the other 'types of employment' regulated by each award, and particularly the part-time employment provisions, would meet the needs of those covered by the instrument if the claims were granted, having regard to the matters identified in s.134(1)(a) and other relevant considerations.

912. Importantly, the Full Bench should not regard the interaction of the proposed casual conversion provisions and the existing regulation of part-time employment (or other types of employment) as a minor matter capable of being addressed through a mere drafting exercise that can be attended to at a later stage or through a settlement of orders process. The level of flexibility available to employers in the context of each modern award, absent the current right to engage casual employees, must be a central consideration in weighing the merits of the unions' claims.

913. If the unions have not, in the context of each particular award, satisfied the Commission that such provisions, absent the existing right to engage casual employees, would meet the needs of participants in the industry, the Commission cannot be satisfied that the award would constitute a fair and relevant minimum safety net.

914. The unions have made virtually no attempt to explain or indeed even acknowledge the interaction of a mandatory right of conversion with the award provisions regulating the use of part-time employment.

Superannuation Entitlements

915. The unions have pointed to a concern over retirement savings of casual employees. This issue, and in particular the flawed basis for their concerns, is addressed in Section 22.9 of these submissions.

916. Nonetheless, it is important to appreciate that under many awards any additional hours worked by a part-time employee beyond their 'agreed ordinary hours' of work will be overtime. Consequently any amounts such employees receive will not constitute 'ordinary time earnings' attracting superannuation contributions. Accordingly the operation of the proposed mandatary conversion clause could, in practical terms, significantly reduce the superannuation contributions that an employer is required to make to such employees.

917. Putting aside the potentially contentious and likely award-specific issue of whether additional hours worked by a part-time employee are strictly overtime hours or whether they are ordinary hours of work paid at overtime rates, the likelihood of employers being less willing to offer additional hours to employees who convert to part-time employment as a consequence of the application of overtime penalty rates would operate to restrict superannuation accruals for employees if the unions' claims are granted.

918. Any reduction is superannuation entitlements of those employees who convert to permanent employment will be exacerbated by the removal of the relevant casual loading (typically 25%).

919. In assessing the claim the Commission must be mindful that the conversion of casual employees may result in significant and potentially unforeseen reductions in the likely earnings and retirement savings of relevant casual employees. Any argument that such risks are overcome by the proposed conversion only being triggered at an employee's election (or in the context of the deeming proposals, the decision to elect not to convert) is negated by the prospect that such employees may not fully consider or understand the consequences of conversion.

Hours Afforded to Part-Time Casuals

920. The unions have, in effect, sought to argue that casual employees do not receive as many hours of work as they would like. At paragraph 32 of their submissions[680], the AMWU relies on a recent AWRS report in order to submit that:

> Nearly half (46%) of casual employees want more hours, compared to 27% of permanent employees. Only 2% want fewer hours.

921. As outlined above, many awards require that overtime rates be paid to part-time employees who work beyond their agreed hours of work. Often there is a requirement that the parties undertake the administratively arduous task of formally varying the individual's agreed hours in writing and this typically results in an ongoing variation to the individual's hours.

922. The application of common part-time award provisions would make it less likely that a converted employee would be offered any additional hours, given they would attract additional penalty rates. Accordingly the proposed conversion clause would likely only operate to intensify employee dissatisfaction with the number of hours they are given.

923. It cannot be assumed that casual employee will consider or even be able to foresee such potential consequences of their conversion.

22.9 OTHER ISSUES RELATING TO THE UNIONS' CLAIMS

Casual Earnings

924. In support of its claims, the ACTU points to union analysis suggesting one of the disadvantages of casual employment is lower earnings compared to those of permanent workers. In support of its claim the ACTU sets out comparative examples of the overall mean, median and average weekly earnings of casual and permanent employees.

[680] Submissions of the AMWU dated 13 October 2015.

925. Similarly, at paragraphs 132 to 138 of their submissions dated 13 October 2015, the AMWU seeks to highlight the purported disparity between the earnings of casual and permanent employees. This analysis is not confined to an examination of award-reliant employees.

926. It is not clear whether the data relied upon by the AMWU in these sections has been derived from an assessment of employees working different hours. Nor does it appear that the analysis is confined to the incomes of employees performing comparable work or to employees with similar skills or qualifications. Accordingly it does not assist in demonstrating that the purported lower earnings are actually a product of the employee having been engaged as a casual employee. It does not establish a causal connection between lower wages and casual employment. Accordingly the AMWU's assertion that a deeming provision will improve the living standards of the relevant casual employees or increase the likelihood of having their needs met should not be accepted.

927. Regardless, the union's concern over comparative wage levels between permanent and casual employees should be disregarded to the extent that the earning include (or potentially include) over-award payments. Affording employees a greater capacity to obtain over-award payments is not an objective that would be consistent with the Commission's task of ensuring that awards constitute a 'fair and relevant minimum safety net'. As identified by the Full Bench in the context of the 4 Yearly Review proceedings relating to the proposed removal of the standard absorption clause in modern awards:

> [72]…As we have mentioned, the modern awards objective is to ensure that modern awards, together with the NES, provide 'a fair and relevant *minimum safety net* of terms and conditions'. The safety net nature of modern awards was emphasised in the *July 2015 decision*, as follows:
>
> > Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory…[681]

[681] [2015] FWCFB 6656

928. In the context of the abovementioned proceedings the Full Bench displayed a clear unwillingness to interfere with over-award arrangements. By logical extension, the Commission should be similarly unmoved by any argument that a variation to the safety net is warranted in order to assist casual employees to secure higher over-award rates of pay.

929. The AMWU's submission seeking to establish that casual employees are overrepresented amongst award-reliant employees should similarly not move the Full Bench to grant their claim.[682] It is not the role of the safety not to provide a pathway off the safety net.

930. The AMWU's reference to casual employees purportedly being excluded from a profit share scheme operated by Blackmores under an enterprise agreement does nothing to advance its case. It is an irrelevant consideration.

Superannuation Entitlements

931. The ACTU and AMWU point to alleged lower levels of accrued superannuation entitlements amongst casual employees in support of the proposed claims. The ACTU does this, in part, by reference to an academic article from 2006 seeking to compare the policy benchmark of a male on average/median earnings, contributing for 40 years, against estimated accrued entitlements of certain categories of casual employees (i.e. male/female and full-time/part-time casuals). Such considerations are of limited, if any, relevance in the context of the current proceedings.

932. It could not be considered necessary to the establishment of a safety net of *minimum* terms and conditions to mandate a mechanism for compulsory conversion in order to enable such employees to obtain comparable retirement savings to that of an employee receiving *average* earnings.

933. Interestingly, the ACTU submission suggests that casual full-time males receive 98% of the entitlements of the selected benchmark, while the accrued entitlements for full-time females as well as both part-time males and females

[682] AMWU submissions of 13 October at paragraphs 29 to 31

are comparatively lower. At least superficially, this suggests that any deviation in accrued superannuation is not necessarily discreetly attributable to the type of employment in which they are engaged, but may instead be associated with;

- Gender related matters; or
- The amount of work undertaken by the employee.

934. The content of award clauses addressing superannuation was the subject of consideration in the context of the Part 10A Award Modernisation process. The relevant reasoning of the Full Bench in relation to the development of the model superannuation clause was as follows:

> [89] The model superannuation provision included in the exposure drafts was the subject of a large number of submissions and comments. While some suggestions were made that there should be no superannuation provision in awards at all, we think that it is appropriate to deal with the subject in the limited terms proposed in the draft but with some modifications.
>
> …
>
> [92] The superannuation provision in some of the exposure drafts included an additional paragraph dealing with superannuation contributions during periods of paid leave or while an employee was absent from work due to injury or work-related illness. It is not our intention that the additional paragraph should be part of the standard clause. It may be appropriate, however, where it is necessary to maintain the pre-existing safety net.
>
> [93] We have included superannuation provisions in most awards. Where we have not the issue is dealt with below in relation to the award concerned.[683]

935. The 'model' clause included in most awards largely leaves the determination of the quantum of an employee's entitlement to be determined by relevant superannuation legislation. Although the Full Bench did include slightly different provisions in some modern awards, this typically reflected the pre-existing standard in the applicable predecessor instruments.

936. The Full Bench did not deem it necessary to include any differential superannuation obligations for casual employees.

[683] *Award Modernisation* [2008] AIRCFB 1000.

937. The Commission should not deviate from the approach of primarily leaving the setting of appropriate superannuation obligations to superannuation legislation. The unions should raise any deficiencies that they allege exist in the 'adequacy of the Superannuation Guarantee' with the Government or other members of Parliament. This is issue is not appropriately dealt with through restricting an employer's capacity to engage casuals.

938. Given that the Commission has, appropriately, not sought to afford casual employees additional superannuation entitlements beyond those in the Superannuation Guarantee, it should similarly not accept that any alleged disparity in accrued superannuation warrants limiting the capacity of employers to engage employees in this type of employment.

939. Also, the Commission should not be moved to alter the safety net because of ACTU assertions about:

- Employees being purportedly less likely to make additional employee contributions; or
- Employees joining retail superannuation funds.

The Anti-Avoidance Provision

940. Each of the proposed union claims includes a paragraph in the following terms:

> An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause.

941. This clause is presumably intended to operate as an anti-avoidance provision. However, the provision is likely to be both problematic and ineffective.

942. As a threshold point, we note that the proposed provision inappropriately operates on the assumption that a casual employee will have standard hours which an employer can 'reduce' or 'vary'. Awards do not generally (if ever) require that casuals be engaged for set hours. Consequently, it will be difficult

to identify precisely when an employer could be said to be in breach of this provision.

943. The clause appears to require identification of an employer's motives in determining the hours of work to be afforded to a particular casual employee. In practical terms, it is difficult to see how it could be effectively enforced. Further, if unions (such as the AMWU) view enforcement of the current casual conversion provisions as inadequate, it is difficult to envisage how such an inherently difficult clause to enforce could be viewed as being likely to be effective.

944. The Joint Employer Survey reveals strong opposition to the proposed mandatory conversion of regular casual employees to permanent employment. This is unsurprising as there will undoubtedly be many circumstances where it is neither feasible nor reasonable for an employer to accommodate a conversion request. The right of reasonable refusal under current casual conversion clauses in modern awards reflects this.

945. This proposed clause is highly unlikely to overcome the possibility of some employers undertaking such action as is necessary in order to avoid the problematic or unreasonable operation of a mandatory casual conversion provision.

946. The imposition of onerous and inflexible award obligations mandating casual conversion in a manner that is out of step with the needs of employers and employees would increase the likelihood of employers and employees breaching awards. The imposition of a difficult to enforce anti-avoidance mechanism would not prevent this reality.

947. Even if employers complied with the provision in implementing rostering arrangements, they may simply seek to avoid the problematic operation of a mandatory conversion clause by ensuring that casual employees are not engaged for more than six months. There is no capacity to include an award provision to address such a risk. Such a situation is not in the interests of the employer or employee.

948. The proposed clause also has the potential to give rise to unnecessary disputation in circumstances where an employee or his or her representative inaccurately perceives, or alleges, that an employer has made a decision regarding the rostering of a casual employee.

949. An employer that engages a casual employee should not lightly be put to the task of justifying decisions that it makes regarding the allocation of work or hours to a casual employee who may have been engaged for a relatively short period of time.

950. Rather than implementing the proposed clause, a better approach would be to ensure that awards do not operate in a restrictive and unreasonable manner.

951. A provision that affords an employer a limited right to refuse conversion in circumstances where it would be reasonable to do so is far more likely to operate in an effective and enforceable manner than the proposed anti-avoidance provision. It would remove much of the incentive or perceived necessity to actively prevent casual employees from qualifying in circumstances where the employer has formed a view that there is genuinely no capacity to accommodate conversion.

Classification Issues

952. There are particular difficulties associated with how the classification provisions in the particular award may apply to a casual employee converted to permanent employment in circumstances where they may have been working under different classifications during the sequence of periods in which they were regularly engaged. This is because a casual employee may, under some awards, potentially be separately engaged to perform work under different classifications on different days.

953. The difficulties with applying existing classification systems to casuals who may work under more than one classification during the period under which they qualify for conversion are amplified in the context of a deeming proposal, as there is no necessity for such matters to be resolve prior to the deeming

occurring. These are matters that, in the interest of all parties, should be worked through if a casual employee is to convert to permanent employment.

Union Representation

954. The ACTU and AMWU both point to lower levels of unionisation amongst casual workers as a justification for their proposed limitations on this type of employment.[684] The AMWU identifies that only 6% of casual employees in the manufacturing industry are union members. It characterises this as a further disadvantage associated with casual employment. [685] Such submissions should not be accepted as justifying the claims.

955. While low levels of union membership amongst Australia's casual workforce does call into question the extent to which the views of unions can validly be viewed as representative of casual employees, it does not justify amendments to the safety net.

956. The promotion of union membership is not a relevant consideration for the Full Bench in the context of this Review. Nor should it be assumed that an absence of union membership in any way represents a disadvantage warranting amendment to the safety net. A union contention that it does is obviously self-servicing.

957. No element of the modern awards objective is directed towards the promotion of union membership. A cornerstone of the Act is its recognition of freedom of association. Section 3 provides that the object of the Act is, in part, to be achieved by:

> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and dispute and providing effective compliance mechanisms…

[684] ACTU submissions, 19 October, paragraph 77(s).

[685] AMWU submissions, 13 October, paragraph 19.

958. The concept of freedom of association encompasses not only the right to join a union but also the right to not join a union. Moreover, the Act's reference to the right to be represented does not imply that the representation of an employee needs to be by a union; other representatives are recognised in the Act.

959. The identification of a statistical correlation between low levels of unionisation and casual employment does not establish a causal relationship. While it might reasonably be suggested that such a phenomenon partially explains the unions' campaigns and claims to restrict such types of employment, it does not mean that casual employees choose not to join a union *because* of their casual employment status.

960. The reasons why casuals are less likely to join unions are likely to be multi-faceted. An examination of such matters in the context of the current proceedings would be an unwarranted distraction.

961. The validity of union assertions that casual employees are inherently vulnerable so as to necessitate new casual conversion rights not historically present in awards is undermined by the reality that the Act includes a raft of significant protections for casual workers, particularly for 'long term casual employees'. This includes the right to seek an unfair dismissal remedy, rights under the NES, rights under the general protections, and the capacity to bring a dispute before the Commission. Such protections are reinforced by the special rights afforded to unions under the workplace relations system, and through the FWO's operations.

962. Casual employees are provided no less protection under the Act than permanent employees in terms of their right to either collectively bargain or obtain union representation or assistance.

963. In their submissions the unions make bold assertions in relation to purported discrimination and negative safety outcomes experienced by casual employees. Such matters are addressed in further detail elsewhere in these submissions. Nonetheless, it should be noted that casual employees receive

the same protection under anti-discrimination laws as permanent employees. They also receive the same level of protection under work health and safety laws.

964. Ultimately, it is beyond the proper role of an award safety net of minimum terms and conditions to address all such issues.

22.10 SECTION 138 AND THE MODERN AWARDS OBJECTIVE

965. The unions' casual conversion claims are inconsistent with the modern awards objective in s.134 and inconsistent with s.138 of the Act.

Relative living standards and the needs of the low paid (s.134(1)(a))

966. The Joint Employer Survey reveals that a significant number of employers signalled business decisions that would not be in the interests of casual employees if the unions' casual conversion claims were granted. Such responses included a change in hiring and firing practices, including shorter periods of work for casual employees with no opportunity for further casual work periods let alone permanent work. Many businesses reported job losses or operating with fewer employees, or even, alarmingly, business closures.

967. To the extent that some casual employees are low paid, their living standards would undoubtedly be influenced by their overall job opportunities. The conversion claims would diminish such opportunities markedly.

968. The Joint Employer Survey shows that even where casual employees currently have the right to request permanent work, less than 10% actually do so. The survey suggests that when it comes to a casual worker's assessment of their own living standards, a loaded casual rate is probably preferred than a lower permanent rate.

The need to encourage collective bargaining (s.134(1)(b))

969. In support of its claim, the AMWU has filed a sample of enterprise agreement clauses underpinned by the Manufacturing Award. It has also filed casual conversion clauses in various enterprise agreements in the printing industry**.**

970. The material advanced demonstrates that there is already capacity for unions and employees to secure casual conversion provisions through collective bargaining.

971. It is uncontroversial to suggest that casual conversion provisions are primarily pursued at the initiative of unions and/or employees. They reflect common union claims.

972. Granting the union claims will reduce the incentive for employees to engage in collective bargaining by delivering a commonly pursued bargaining claim through awards.

973. The AMWU asserts that casual employees are less likely to be covered by an enterprise agreement and that, '…by corollary' assisting employees to move into permanent employment will encourage enterprise bargaining.[686] Such submissions rest upon a general assumption that it is the type of employment that is the determinative factor in an employee's capacity or desire to engage in collective bargaining. The submissions and material before the Commission does not substantiate such a sweeping factual assertion.

974. It is one thing to suggest that casual employees are statistically less likely to be engaged in collective bargaining but quite another to suggest that they do not engage in collective bargaining *because* they are engaged on a casual basis. A relevant causal connection between such matters has not been properly established by the unions.

[686] AMWU submissions dated13 October 2015 at paragraph 148.

975. In its consideration of the relevance of s.134(1)(b) the AMWU argues that the proposed deeming provisions will, *'…provide casuals with increased bargaining power.'* The union then goes on to suggest that:

> As there appears to be much opposition from employer groups to casuals being able to become permanent, members of the employer organisations objecting to the proposed variation if granted, may wish to buy out the provision, extend the period prior to conversion being triggered or revert to casual conversion by election with employer veto with appropriate compensation to casual employees agreeing to forgo the entitlement.[687]

976. The submissions are not directed at a proper interpretation of s.134(1)(b). The mandatory consideration arising from this section is the need to '…*encourage collective bargaining*'. The provision is not directed at giving any particular party an advantage at the bargaining table.

977. The AMWU's submission reveals a somewhat disingenuous element to its claim. A significant proportion of the AMWU material appears directed at establishing that there are various non-monetary related disadvantages associated with engagement as a casual. This reaches a high point when the union suggests at paragraph 46 of its submission that casual employees' loss of access to award and NES entitlements, *'…cannot be "equalised" or reduced solely to a monetary value.*' It is hard to reconcile such submissions with their subsequent suggestion that employers 'buy out' certain elements of the proposed clause or either '…*extend the period prior to conversion being triggered or revert to casual conversion by election with employer veto with appropriate compensation to casual employees agreeing to forgo the entitlement*.'[688]

978. At the very least, the obvious tension in the AMWU's submissions undermines the weight that can be attributed to the union's expressed concern over long term casual employment.

979. At paragraph 156 of its submission, the AMWU argues that the deeming provision will encourage contractual arrangements between a labour hire

[687] AMWU submissions dated 13 October at 155.

[688] AMWU submissions dated 13 October.

company and a host company regarding the transfer of labour hire employees' employment to a host employer. This is not an outcome that the Full Bench should view as either desirable or warranting amendment to the safety net. It would potentially have significant negative consequences for the labour hire sector and, consequently, negative flow on effects for the many employers and employees that rely upon such organisations. The important and beneficial role of the labour hire sector is addressed in section 8 of these submissions.

980. Theoretically, it can be argued (as the AMWU has) that granting the claim could create an impetus for employers to bargain. The same submission could be made in relation to any impractical and unreasonable proposed award variation that the unions may advance. Regardless, any determination that granting the unions' conversion claims would be consistent with s.134(1)(b) would be outweighed by other elements of the modern awards objective as discussed below.

981. The extent to which employers may agree to engage in bargaining in response to the proposed variation should not be overstated. The responses of employers who participated in the Joint Employer Survey suggest that a more common response to the unions' claim, if it were granted, would be to either terminate or limit the engagement of casual employees or close the business.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

982. As referred to in chapter 7 of this submission, increased workforce participation is an extremely important policy objective. Societal demographics have changed. Permanent full-time employment models are not attractive to many people aspiring to enter the workforce who may have other commitments in their lives that necessitates a more flexible way of working.

983. The unions' casual conversion claims would be catastrophic for current levels of workforce participation and would impose barriers upon employers offering

more work to a greater number of people. The social inclusion benefits of being employed would be lessened.

984. The unions' claims for conversion would impose disincentives for employers to employ by limiting the availability of flexible work options that are necessary to enable businesses to cope with uncertain markets.

985. The unions' casual conversion claims would impose major restrictions on an employer's ability to determine the best staffing mix to operate its business efficiently and productively. The claims would seriously impede employers in providing and maintaining employment.

986. The Joint Employer Survey results described in chapter 20 overwhelmingly demonstrate that conversion claims would have negative effects upon businesses and employees. Many responses reported job losses, operating with fewer positions and possible closure of their businesses.

987. A significant number of responses reported that giving casuals an absolute right to convert would be an incentive to change hiring and firing practices. Such hiring and firing practices included:

- Early termination of employment for casual employees, or
- Rostering so that casuals would not be regular.

988. The witness evidence from CHG and Data Response also demonstrates that the conversion claims would result in fewer jobs.

989. The Commission should place significant weight on the negative impacts upon employment when assessing the unions' claims against the various elements of the modern awards objective.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

990. The unions' casual conversion claims would be a hindrance to flexible modern work practices and the efficient and productive performance of work. Businesses need flexible modern work practices in order to be agile, efficient and responsive to changes in customer demand.

991. Flexible modern work practices are also appealing and necessary for employees. Many employees prefer casual work to full-time employment.

992. The statement of Julie Toth (para [45]) refers to the multiple ways in which flexibility within firms can be measure in contrast to the undue emphasis placed on functional flexibility by the ACTU's Professor Markey. Importantly, casual employment is a form of engagement that enables greater flexibility in terms of:

- The number of employees employed:

  Employers can more readily align staffing levels with operational needs if casual employees are engaged;

- The number of hours worked:

  Employers can more easily and quickly adjust the number of hours required of casual employees to meet operational or customer needs, unlike the fixed hours of permanent employees;

- Temporal work hours;

- Location of work, (particularly for labour hire businesses); and

- Wage and cost flexibility:

  Casual employment does not carry with it the associated fixed costs and liabilities of permanent employment when revenue is variable or unpredictable.

993. These numeric forms of flexibility are critical for businesses to enable them to respond to consumer demand and intense global market competition. While other forms of flexibility are important, to focus on 'functional' forms of flexibility in isolation is not in any way consistent with productive or efficient performance of work.

The need to provide additional remuneration for hours that are overtime, irregular or unpredictable, unsocial, on weekends or public holidays and shifts (s.134(1)(da))

994. This is a neutral element, when the Commission is weighing up the unions' claims against elements of the modern awards objective.

The principle of equal remuneration for work for equal or comparable value (s.134(1)(e))

995. This is a neutral element, when the Commission is weighing up the unions' claims against elements of the modern awards objective.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

996. The unions' conversion claims would impact negatively on productivity as highlighted by Julie Toth's witness statement.

997. Also, the Joint Employer Survey reveals the detrimental impact that the unions' claims would have on business, including possible business closures, increased employment costs, and loss of flexibility. The regulatory burden for many businesses, particularly those who employ a large number of casual employees would also be detrimental (see evidence of Krista Limbrey of McDonald's).

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

998. As discussed above, the unions' claims include various uncertain and problematic elements that are inconsistent with this objective.

The likely impact of any exercise in modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

999. If the Commission were to grant the unions' conversion claims, there would be a substantial, detrimental impact on employment growth and the national economy. The claims would not only inhibit job growth, but result in lower employment.

1000. Modern awards should foster employment growth and business sustainability. The conversion claims would severely inhibit this.

1001. Julie Toth's statement refers to established meanings of productivity and the views expressed by institutions such as the PC. The various types of 'numeric' flexibility referred above improve economic outcomes and reduce unemployment.

1002. The statement of Ms Kerry Allday refers to the international competition that her business struggles to cope with given that the global market provides cheaper services than what can be offered domestically. The further labour restrictions that the unions are seeking would impose higher employment costs and reduced efficiencies, making it very difficult for businesses like hers to compete and survive.

Section 138 of the Act

1003. The unions have failed to adequately establish why their conversion claims are necessary to achieve the modern awards objective.

1004. The conversion claims are inconsistent with, and detrimental to, many of the elements of s.134(1). A fair and relevant minimum safety net of terms and conditions does not come in a form which severely erodes an employer's ability to operate efficiently and to employ people.

1005. The unions' assertions that their claims are in the interests of workers and the community are fanciful.

23. CLAIMS TO INCREASE MINIMUM ENGAGEMENT PERIODS

1006. In this part of our submission, we deal with claims made by the ACTU and certain affiliate unions regarding minimum engagement and/or payment provisions applying to part-time and casual employees. We have also given consideration to the relevant questions posed by the Commission in its Issues Paper.

23.1 THE CLAIMS

1007. Many modern awards presently contain provisions that require that each time a part-time or casual employee is required to work, that employee is entitled to a minimum *engagement* for a certain number of hours. Other awards stipulate that each time a part-time or casual employee is required to work, they are entitled to a minimum *payment* equivalent to a certain number of hours of work. The requisite number of hours varies from award to award. Indeed some awards contain different minimum engagements/payments for different categories of part-time or casual employees covered by that award, or that apply in different circumstances. Other awards contain facilitative provisions that enable an employer and an employee to reach agreement to vary the stipulated minimum engagement/payment. This divergence in current award provisions is reflected in the table at **Attachment 4A**, which summarises the specific provisions found in each of the 122 modern awards.

1008. The ACTU, AMWU and AMWU – Vehicle Division are seeking to change minimum engagement/payment provisions applying to part-time employees in some 73 modern awards.[689] Their claim regarding casual minimum engagement/payment provisions captures 69 modern awards.[690] In essence:

[689] *Aged Care Award 2010; Airport Employees Award 2010; Alpine Resorts Award 2010; Aluminium Industry Award 2010; Amusement, Events and Recreation Award 2010; Animal Care and Veterinary Services Award 2010; Aquaculture Industry Award 2010; Architects Award 2010; Asphalt Industry Award 2010; Banking, Finance and Insurance Award 2010; Business Equipment Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Cemetery Industry Award 2010; Children's Services Award 2010; Cleaning Services Award 2010; Clerks-Private Sector Award 2010; Concrete Products Award 2010; Contract Call Centres Award 2010; Corrections and Detention (Private Sector) Award 2010; Cotton Ginning Award 2010; Dry Cleaning and Laundry Industry Award 2010; Electrical*

- The ACTU is seeking a minimum engagement/payment of 4 hours in respect of each of the awards that are the subject of its claim. In some instances, the deletion of[691] an existing facilitative provision is also

Power Industry Award 2010; Electrical, Electronic and Communications Contracting Award 2010; Fast Food Industry Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Gardening and Landscaping Services Award 2010; General Retail Industry Award 2010; Hair and Beauty Industry Award 2010; Health Professionals and Support Services Award 2010; Horse and Greyhound Training Award 2010; Horticulture Award 2010; Hospitality Industry (General) Award 2010; Hydrocarbons Field Geologists Award 2010; Labour Market Assistance Industry Award 2010; Legal Services Award 2010; Local Government Industry Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Medical Practitioners Award 2010; Mining Industry Award 2010; Miscellaneous Award 2010; Nursery Award 2010; Nurses Award 2010; Oil Refining and Manufacturing Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Pharmaceutical Industry Award 2010; Pharmacy Industry Award 2010; Plumbing and Fire Sprinklers Award 2010; Poultry Processing Award 2010; Premixed Concrete Award 2010; Professional Employees Award 2010; Quarrying Award 2010; Racing Clubs Events Award 2010; Racing Industry Ground Maintenance Award 2010; Rail Industry Award 2010; Registered and Licensed Clubs Award 2010; Restaurant Industry Award 2010; Salt Industry Award 2010; Seafood Processing Award 2010; Silviculture Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Storage Services and Wholesale Award 2010; Sugar Industry Award 2010; Supported Employment Services Award 2010; Telecommunications Services Award 2010; Timber Industry Award 2010; Transport (Cash in Transit) Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010; Water Industry Award 2010; Wine Industry Award 2010 and *Wool Storage, Sampling and Testing Award 2010*.

[690] *Aboriginal Community Controlled Health Services Award 2010; Aged Care Award 2010; Airport Employees Award 2010; Alpine Resorts Award 2010; Aluminium Industry Award 2010; Ambulance and Patient Transport Industry Award 2010; Amusement, Events and Recreation Award 2010; Aquaculture Industry Award 2010; Architects Award 2010; Banking, Finance and Insurance Award 2010; Business Equipment Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Cemetery Industry Award 2010; Children's Services Award 2010; Cleaning Services Award 2010; Clerks-Private Sector Award 2010; Contract Call Centres Award 2010; Corrections and Detention (Private Sector) Award 2010; Cotton Ginning Award 2010; Dredging Industry Award 2010; Dry Cleaning and Laundry Industry Award 2010; Electrical Power Industry Award 2010; Electrical, Electronic and Communications Contracting Award 2010; Fast Food Industry Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Gardening and Landscaping Services Award 2010; Gas Industry Award 2010; General Retail Industry Award 2010; Hair and Beauty Industry Award 2010; Health Professionals and Support Services Award 2010; Higher Education Industry—General Staff—Award 2010; Horse and Greyhound Training Award 2010; Horticulture Award 2010; Hospitality Industry (General) Award 2010; Hydrocarbons Field Geologists Award 2010; Labour Market Assistance Industry Award 2010; Local Government Industry Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Medical Practitioners Award 2010; Mining Industry Award 2010; Miscellaneous Award 2010; Nursery Award 2010; Nurses Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Pharmaceutical Industry Award 2010; Pharmacy Industry Award 2010; Plumbing and Fire Sprinklers Award 2010; Poultry Processing Award 2010; Premixed Concrete Award 2010; Professional Employees Award 2010; Quarrying Award 2010; Racing Clubs Events Award 2010; Rail Industry Award 2010; Registered and Licensed Clubs Award 2010; Restaurant Industry Award 2010; Seafood Processing Award 2010; Silviculture Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Sugar Industry Award 2010; Supported Employment Services Award 2010; Telecommunications Services Award 2010; Timber Industry Award 2010; Transport (Cash in Transit) Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010; Water Industry Award 2010; Wine Industry Award 2010* and *Wool Storage, Sampling and Testing Award 2010.*

[691] *Alpine Resorts Award 2010; Aluminium Industry Award 2010; Ambulance and Patient Transport Industry Award 2010; Amusement, Events and Recreation Award 2010* and *Seafood Processing Award 2010*.

proposed by the ACTU. In others, where an award presently prescribes a minimum engagement period, the variation proposed seeks to alter this to a minimum payment (or vice versa), or to require that the employee be entitled to a 'minimum engagement or payment' of four hours.[692] The ACTU's claim would also have the effect of removing specific minimum engagements/payments that apply to particular categories of part-time or casual employees covered by an award, or that apply in specific circumstances.[693]

- The AMWU is seeking to increase the minimum engagement period applying to part-time employees in the FBT Award from three hours to four hours.

- The AMWU is also seeking to confine the operation of facilitative provisions that allow a reduction to the current minimum engagement/payment provisions applying to part-time and casual employees in the Manufacturing Award and the FBT Award.

- The AMWU – Vehicle Division is seeking the insertion of a minimum engagement period of four hours applying to all part-time employees covered by the Vehicle Award, with a facilitative provision that would, in some circumstances, enable an employer and employee to reach agreement for a three hour minimum engagement.

- The AMWU – Vehicle Division is also seeking the insertion of a minimum payment of four hours for casual employees.

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[692] *Alpine Resorts Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Cemetery Industry Award 2010; Children's Services Award 2010; Clerks-Private Sector Award 2010; Corrections and Detention (Private Sector) Award 2010; Labour Market Assistance Industry Award 2010; Nursery Award 2010; Passenger Vehicle Transportation Award 2010; Racing Clubs Events Award 2010; Registered and Licensed Clubs Award 2010;* and *Seafood Processing Award 2010.*

[693] *Cleaning Services Award 2010; General Retail Industry Award 2010; Health Professionals and Support Services Award 2010; Higher Education Industry—General Staff—Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Racing Clubs Events Award 2010; Registered and Licensed Clubs Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010* and *Sugar Industry Award 2010.*

1009. A summary of the claims made can be found at **Attachment 23A**. The table there contained provides a snapshot of the unions' claims alongside existing award provisions. As can be seen, the degree of change sought and therefore the potential impact of the claim varies from award to award. This is a product of the nuances present in current award clauses in this regard.

23.2 INDUSTRY SPECIFIC MINIMUM ENGAGEMENTS/PAYMENTS

1010. The Commission's Issues Paper poses the following question:

> Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?

1011. For the reasons that follow, it is our submission that the implementation of a one-size-fits-all minimum engagement/payment period in all or most awards is not appropriate.

1012. There is great diversity in minimum engagement periods/payments presently contained in modern awards. As we have earlier set out, an examination of **Attachment 4A** reveals a broad spectrum of arrangements applying to part-time and casual employees across the 122 modern awards. Of those:

- 44 modern awards do not contain a minimum engagement/payment for any part-time employees covered by it;
- 30 modern awards do not contain a minimum engagement/payment for any casual employees covered by it;
- 1 modern award contains a one hour minimum engagement/payment for all part-time employees covered by it;
- 6 modern awards contain a two hour minimum engagement/payment for all part-time employees covered by it;
- 8 modern awards contain a two hour minimum engagement/payment for all casual employees covered by it;

- 39 modern awards contain a three hour minimum engagement/payment for all part-time employees covered by it;
- 29 modern awards contain a three hour minimum engagement/payment for all casual employees covered by it;
- 5 modern awards contain a minimum engagement/payment of less than four hours with a facilitative provision that enables agreement to be reached for a shorter minimum engagement/payment for all part-time employees covered by it;
- 7 modern awards contain a minimum engagement/payment of four hours or less with a facilitative provision that enables agreement to be reached for a shorter minimum engagement/payment for all casual employees covered by it;
- 7 modern awards contain more than one minimum engagement periods/payments that apply to some or all part-time employees covered by it;
- 19 modern awards contain more than one minimum engagement periods/payments that apply to some or all casual employees covered by it;
- **Only 14 modern awards contain a four hour minimum engagement/payment for all part-time employees covered by it;**
- **Only 19 modern awards contain a four hour minimum engagement/payment for all casual employees covered by it;** and
- 5 modern awards contain a minimum engagement/payment of more than four hours for all casual employees covered by it.

1013. Minimum engagement periods have, over time, been the subject of consideration by the Commission and its predecessors. This has generally occurred in the context of a particular award where a party has sought a

specific variation and in some instances, during the Part 10A Award Modernisation process. In such cases, consideration has been given to the circumstances of the industry, the demographic profile of employees engaged in it and the relevant pre-modern award terms.

1014. The ACTU's claim invites the Commission to undermine the industry specific factors reflected in these provisions; to undo the consideration that has previously been given by industrial parties, the Commission and its predecessors as to the appropriate balance to be struck in determining whether an award should prescribe a minimum engagement/payment and if so, what that should be; and to take a broad-brushed approach in introducing a one-size-fits-all entitlement without regard for vital industry-specific considerations.

1015. We refer to chapter 4 of our submissions, where we contend that the matters here before the Commission are award specific issues. The position we have there put is particularly pertinent to this element of the ACTU's claim.

1016. The current relevant award terms exhibit diversity that is both necessary and appropriate. It reflects the significant differences in the needs and characteristics of employers operating in each industry. It is also indicative of the provisions that applied in these industries prior to the modernisation of the awards system. By way of example, we have analysed the pre-modern awards that underpin the following instruments and set out the casual minimum engagement/payment periods contained in those awards at **Attachment 23B**:

- Aged Care Award;
- Cleaning Award;
- Health Award;
- Horticulture Award;
- SACS Award; and

- Vehicle Award.

1017. The analysis demonstrates that in many cases, the minimum engagement/payment provisions in modern awards have prevailed for decades. They represent an established minimum safety net that has regulated the operation of businesses in those industries for an extended period of time. The implementation of the unions' proposals represents a marked departure from this and will cause significant disruption to current arrangements.

1018. The ACTU's sweeping assertion that 'a minimum 4 hours' work per engagement is a necessary standard across all industries'[694] ignores the unique characteristics of particular industries and the operational requirements of employers covered by those awards. As the evidence will establish, the adoption of the ACTU's claim across the board would have serious operational and financial implications for thousands of employers. Unsurprisingly, those employers are covered by the very awards that presently do not require that employees be engaged/paid for a minimum number of hours or in the alternative, contain a minimum engagement/payment provision that is shorter in duration than that proposed by the ACTU.

1019. A minimum engagement period has a clear bearing on how and when an employer requires part-time and casual employees to work. It effectively creates a limitation on the extent to which an employer has access to labour that it can direct to work for short periods of time in order to meet its operational needs. This is particularly pertinent in industries where, for instance, an employer requires an employee to undertake home visits to clients to perform work that necessarily only takes one hour to complete. Another example arises in agricultural industries where work is performed outdoors and is subject to inclement weather. Minimum engagement periods in such circumstances may prevent an employer from being able to direct its employees to cease performing work, without an obligation to remunerate

[694] See ACTU's submissions dated 19 October 2015 at paragraph 94.

them for the remaining period of the minimum engagement. Restaurants and fast food outlets also face fluctuations in demand for labour through the course of the day which is met by employing part-time or casual employees for limited periods of time. For instance, a fast food outlet experiences particularly high customer demand during meal times. Also, a high proportion of employees in the fast food industry are students and they are not available or do not wish to work for four hours.[695]

1020. To grant the ACTU's claim would be to turn a blind eye to industry specific considerations such as those set out above. It would result in an outcome that undermines the premise of developing a tailored set of terms and conditions that are appropriate to employers and employees in each industry. It would be at odds with the Commission's own observations that (emphasis added):

> [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.[696]

1021. The grant of the ACTU's claim in the absence of evidence that satisfies the relevant statutory provisions in respect of each individual modern award would also be contrary to the AIRC's observations in the *Metal Industry Casual Employment Case*, in which it adopted a three hour minimum engagement for part-time employees and a four hour minimum engagement for casual employees: (emphasis added)

> [134] In determining an appropriate minimum engagement for this award we wish to make it plain we are not setting any general standard beyond the award. As noted above we have been influenced in determining the four hour minimum by the existing position in manufacturing industry awards. There should be no expectation that the four hour period is an appropriate minimum in other sectors of employment where the factual circumstances are different and the needs and aspirations of both employees and employers are different.[697]

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[695] Ai Group's submissions in support of proposed variations dated 14 October 2015 and Ai Group's final written submissions dated 13 June 2016.

[696] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [34].

[697] Re *Metal, Engineering and Associated Industries Award, 1998 - Part I* (Print T4991 at [134]).

1022. The adoption of a minimum engagement/payment of at least four hours across the modern awards system is certainly not necessary to meet the modern awards objective.

1023. In determining the ACTU's claim, consideration must be given to each of the factors listed at s.134(1) and in light of them, an assessment must be made as to whether the provision proposed is necessary in order to ensure that the award provides a fair and relevant minimum safety net of terms and conditions.[698] Section 156(5) dictates that in this Review, each award must be reviewed in its own right. Therefore, the requisite analysis must be undertaken on an award-by-award basis. That these claims have been referred to one Full Bench as part of 'common issues' proceedings does not alter the Commission's task, nor does it circumvent the need to satisfy the legislative preconditions that must be overcome in order for the unions to establish that the proposed provisions are in fact *necessary* in the context of each of the awards that form part of the ACTU's claim.

23.3 'WORKING TIME INSECURITY'

1024. The ACTU relies on the notion of 'working time insecurity' in support of its proposition that a minimum standard of four hours minimum engagement/payment should be rolled out across the modern awards system. It describes 'working time insecurity' as a 'key component of insecure employment.'[699]

1025. The concept of 'working time insecurity' is borrowed from the Lives on Hold Report, which we have earlier dealt with in general terms. The report states that it can take the form of too few hours, irregular hours, fragmented hours and a lack of predictability.[700]

[698] See s.138 of the Act.

[699] ACTU's submissions dated 19 October 2015 at paragraph 94.

[700] Lives on Hold Report at page 16.

The Extent of 'Working Time Insecurity'

1026. The ACTU relies on its survey in order to establish that casual and part-time employees are indeed subject to working time insecurity. Our attention is drawn by the ACTU to figure 10.2 contained in the Supplementary Expert Report. The chart there contained sets out 'the proportion of workers who had worked a minimum shift of 3 hours or less in the past 3 months, by industry'.

1027. We assume that the data underpinning that chart has been taken from responses to question 15 of the ACTU's survey: '*In the past 3 months, what is the minimum number of hours you have worked in a single shift?*'. We refer the Commission to chapter 15 of these submissions, where we have dealt with the survey conducted by the ACTU at length, including the manner in which the survey questions have been drafted. This includes question 15. We need not reiterate those concerns here.

1028. Figure 2.10 is described as depicting the proportion of workers who had worked a minimum shift of 3 hours or less in the past 3 months, by industry. At paragraph 18 of the Supplementary Expert Report, the authors state:

> 18. … Figure 2.10 in this Supplementary Report indicates the proportions of workers, by industry, who worked a shift of 3 hours or less in the last 3 months. Operationally similar industry sectors were combined where the number of respondents in an industry was < 10. Figure 2.10 shows that between one third and one half of the sampled casuals had worked such a shift in a number of industries, and just under two thirds in 'Other Services'. Overall, 37 per cent of the mainly part-time sample of casuals had worked short shifts of 3 hours or-less.[701]

1029. As can be seen, the above passage variously describes the data as relating to workers generally and then to the sampled casuals. At page 4 of the Expert Report, the authors refer to 'data from a survey of 838 casuals and 43 labour hire workers conducted by the ACTU".[702] At page 10 of the same report, the authors state that the ACTU's survey included 215 permanent workers however they have 'largely excluded comparison with permanent workers in

[701] The Supplementary Expert Report at page 18.

[702] The Expert Report at page 4.

[their] analysis of the data, due to the low relative proportion of workers surveyed, and have treated the survey as primarily one of casual workers'.[703]

1030. The short point is that it is unclear whether the data in figure 2.10 relates only to casual employees or whether it is also based on survey responses from full-time and part-time employees.

1031. If the data relates only to casual employees, it cannot be relied upon in support of any proposition that is put by the ACTU in support of its claim regarding part-time minimum engagement/payment clauses. We also note the observations made in the Expert Report[704] and the Supplementary Expert Report[705] that the sample of casuals was made up predominantly (98%) by part-time casual employees. There is a likely correlation between this over-representation of part-time casual employees and the survey responses, in the sense that part-time casual employees are more likely to have worked a minimum shift of three hours or less in the past three months than those that work 'full-time' hours.

1032. If the data is based on responses from casual and permanent employees, this necessarily includes full-time employees. The extent to which such employees have worked a minimum shift of three hours or less in the past three months is not relevant to the ACTU's claims. Their inclusion distorts data that is here being relied upon in support of the ACTU's arguments regarding 'working time insecurity' of casual and part-time employees.

1033. The additional difficulty arising from figure 2.10 is the 'industries' by which the data has been sorted. It is not clear how various modern awards have been categorised. The aggregation of 'industries' rather than an award by award analysis results in data that is not sufficiently transparent as it does not allow for analysis of the extent to which employees covered by the awards that the ACTU seeks to vary have worked a minimum shift of three hours or less in the past three months.

[703] The Expert Report at page 10.

[704] The Expert Report at page 10.

[705] The Supplementary Expert Report at page 20.

1034. For instance, having regard to the ANZSIC classification titles and codes, 'transport, postal and warehousing' potentially includes:

- road freight transport;
- road passenger transport;
- rail transport;
- water transport;
- air and space transport;
- services provided to any or all of the above forms of transport;
- storage services; and
- postal services.

1035. These industries may be covered by a number of modern awards, some of which (for instance the RTD Award and the Road Transport Long Distance Award) are not subject to the ACTU's claim. Therefore, even if the Commission finds that the flaws we have identified in the conduct of the ACTU's survey, the drafting of the relevant survey question and that the potential sample of respondents does not undermine the data found at figure 2.10, the manner in which it has been presented very significantly limits in utility.

1036. The quantum identified at figure 2.10 in respect of each 'industry' should be disregarded for all the reasons we have here stated. The data is not reliable and does not establish the ACTU's proposition that its casual and part-time constituents covered by the relevant modern awards are suffering from an epidemic of 'short shifts'.

1037. Observations are also made by the ACTU, with reference to the Expert Report and Supplementary Expert Report regarding the age groups within which 'short shifts' are most prevalent as well as the disparity between genders.[706]

1038. To these issues we simply say this; without accepting the veracity of the data found at tables 2.1 and 2.2 of the Supplementary Expert Report[707] given the numerous flaws we have identified with the ACTU's survey so far, the analysis presented goes no further than to establish the distribution of minimum shift lengths amongst the demographics of the sample of survey respondents (querying again whether it includes permanent employees or is limited to those engaged on a casual basis). It does not attempt to address whether there is a causal connection between the characteristics of a part-time or casual employment and the minimum shift length they have worked and if so, what that connection is.

1039. For instance, a higher incidence of shorter shifts having been worked by younger workers (18 – 20 years; 21 – 24 years) may readily be explained by the fact that a significant proportion of them have study commitments which limits their availability. The incidence of shorter shifts amongst the senior age groups may be attributable to such employees *seeking* to work such shifts, depending upon the nature of the work and their capacity. A higher incidence of shorter shifts performed by women could be explained, at least in part, by employee preference to work such hours due to caring responsibilities. The analysis of this data ignores the *reason* why employees might be working shorter shifts and erroneously assumes that it must be as a result of the employer's prerogative.

[706] See ACTU's submissions dated 19 October 2015 at paragraphs 94 and 96

[707] The Supplementary Expert Report at page 22

The Effects of 'Working Time Insecurity' – Low Income Earners

1040. The ACTU asserts that:

> 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.[708]

1041. This is a factual proposition; that already disadvantaged employees, being a reference to low income earners, are 'severely impacted' by a reduction in the expected length of a daily engagement. Further, that this impact is felt 'most heavily' by intermittent casual workers.

1042. The ACTU has not produced probative evidence in support of this submission. It should be put to the task of pointing to the relevant elements of its evidentiary case (if any) that in fact demonstrate the facts that it here seeks to rely upon.

The Effects of 'Working Time Insecurity' – 'Disruption'

1043. The ACTU and its witnesses complain of the alleged inability to make 'reliable plans' for additional jobs or non-work related commitments. For instance, the ACTU cites[709] the evidence of Ms Linda Rackstraw, where she identified the following as a consequence of her casual employment:

> 14. Due to having little control over my shift times and days of work, I found it difficult to plan my life and to spend time with my family. For example, I couldn't say to my daughter, 'let's go for a coffee (on a particular day) next week' because I wouldn't know my shifts until the roster came out and I'd often have to cancel if there was a clash. I was always cancelling things with family. So I made less plans and enjoyed less social engagements than when I was working permanent-part time.[710]

1044. Such difficulties do not necessarily arise as a consequence of the absence of a minimum engagement period. In fact Ms Rackstraw has the benefit of a three hour minimum engagement by virtue of clause 15.4 of the *McDonald's Australia Enterprise Agreement 2013*. This does not preclude her employer

[708] ACTU's submissions dated 19 October 2015 at paragraph 98(c).

[709] ACTU's submissions dated 19 October 2015 at paragraph 98(g).

[710] Witness statement if Linda Rackstraw at paragraph 14.

from rostering her to perform work on different days and at different times. Ms Rackstraw's evidence establishes this very point; that a minimum engagement clause is not an appropriate or relevant remedy.

1045. To the extent that the ACTU relies on this assertion in respect of part-time employees, it must be seen in the context of provisions that appear in the majority of modern awards requiring agreement at the time of engagement (subject to variation thereafter) as to when a part-time employee will perform the ordinary hours of work. This necessarily provides a part-time employee with greater predictability and regularity.

1046. We also note that a casual employee cannot be compelled to attend work by their employer. If a casual employee is not available on a particular day or time due to other commitments, the nature of their employment provides that individual with the flexibility of advising of their unavailability, without needing to seek leave from their employer.

The Effects of 'Working Time Insecurity' – Employee Preferences

1047. To the extent that the ACTU seeks to rely on its survey as evidence that casual employees agree that workers such as themselves should theoretically have a longer minimum shift length, it is telling that the largest proportion of respondents (47%) selected the 'neutral' response. This indicates that it is not an issue of priority for them. Another 43% 'agreed' or 'strongly agreed'. A small proportion disagreed with the proposition put in the question. As we have earlier pointed out, the nature of the question and the way it is crafted necessarily lends itself to agreement with it. It is therefore unsurprising that only 11% disagreed.

1048. We again note that this data is not indicative of the preferences of part-time employees. Further, as indicated in the Expert Report [711] and the Supplementary Expert Report [712] attached to the statement of Professor Markey, the sample of casuals was made up predominantly (98%) by part-

[711] The Expert Report at page 10.

[712] The Supplementary Expert Report at page 20.

time casual employees. There is a likely correlation between this over-representation of part-time casual employees and the survey responses, in the sense that part-time casual employees are more likely to have expressed a preference for a longer minimum shift length than those who work 'full-time' hours. Therefore, the data is not representative of a balanced sample of casual employees.

1049. We make the same observations about table 5.3 in the Supplementary Expert Report[713] as we have earlier regarding the industry breakdown that there appears. The data is of limited utility as it does not allow the Commission to determine the extent to which longer minimum shift lengths are sought by employees covered by particular awards.

1050. Further, the ACTU has not articulated a connection between the preferences expressed by employees and the bearing that this should have on the Commission's discretion in this matter. The basis upon which they rely on the AWRS data and the ACTU survey is unclear.

23.4 EMPLOYMENT-RELATED COSTS

1051. The ACTU cites certain costs associated with attending work as a reason for why minimum engagement provisions are necessary. This includes child care, travel and other expenses.

1052. The Supplementary Expert Report states that approximately 10% of casual employees incur child care costs and just over 14% of part-time employees incur child care costs. We acknowledge that, in the case of some individual employees, there may be circumstances in which an engagement of less than four hours may not be ideal for reasons such as the cost of child care. However, the implementation of a minimum standard across the awards system in order to accommodate the needs of a small proportion of the workforce in certain circumstances cannot be justified.

[713] The Supplementary Expert Report at page 58.

1053. Shift lengths of a casual and part-time employee can vary. Thus, even if they are engaged to work a 'short shift' of less than four hours on a particular occasion, this may not be the case each time. In this way, their average shift length may in fact be in excess of four hours.

1054. Further, the ACTU has not dealt with the extent to which employees in particular industries are in fact faced with child care expenses. For example, we refer to the statement of Krista Limbrey, dated 19 October 2015.[714] Ms Limbrey is employed by McDonald's Ltd as HR Business Partner NSW/ACT. At paragraph 38 of her statement, she sets out the age profile of employees employed in McDonald's restaurants on a casual, part-time and full-time basis as at 19 May 2015. Of the 15,953 casual employees, 14,876 are aged 20 and under. That equates to 93%. Of the 59,982 casual employees employed by McDonald's franchisees, 86% are aged 20 and under.

1055. We do not contend that McDonald's workforce is representative of the entire fast food industry however as it is the largest employer in this industry, Ms Limbrey's evidence is indicative of the demographic profile of employees engaged in the industry. Nor do we contend that of the casual employees aged less than 20, none would incur child care costs. Nonetheless, the age profile of casual employees engaged in the fast food industry rather suggests that only a very small proportion of them would incur such costs. Therefore the ACTU's arguments have little significance to the fast food industry.

1056. The ACTU also cites travel costs. We note firstly that this makes up a relatively small proportion of an employee's earnings. Secondly, this issue too must be considered on an award by award basis. For instance, casual employees under the age of 20 engaged by a fast food operator within the area in which they go to school or live, are less likely to incur transport costs (or will incur less transport costs) than an employee engaged in, for example, the mining industry. Table 5.7 in the supplementary expert report attached to Professor Markey's statement demonstrates this, although again we note that it does not provide a breakdown of the data on an award by award basis.

[714] Attached to Ai Group's submissions of 14 October 2015.

1057. At paragraph 59 of its written submissions, the ACTU sets out the 'daily earnings v net gains' of an employee, having regard to travel costs, child care costs and other costs. It relies on this model in support of its argument that a four hour minimum engagement is necessary for the purposes of making it viable for an employee to attend work.

1058. This argument is not relevant for those employees who do not incur all three types of expenses, to the full monetary value nominated by the ACTU. There is no evidence before the Commission as to what proportion of the casual and part-time workforce this would in fact apply to or by what award they are covered.

1059. Ms Rackstraw's evidence establishes that she does not incur child care costs and spends less than $10 on petrol each week in order to travel to work.[715] Similarly, Mr Quinn speaks of the cost of petrol that he incurs as a result of a sequence of "short shifts" that he is required to perform.[716] However he is paid a "split shifts" payment that compensates him for the majority of the costs he incurs.[717] Indeed of the very few witnesses called by the ACTU in support of its claim, not one gives evidence that quantifies the costs that they incur.

1060. The adoption of a new minimum standard that has serious cost implications for employers in many industries and that potentially creates a barrier to accessing shorter shifts for those employees who would in fact prefer to work them due to their personal circumstances, cannot be justified by the model proposed by the ACTU, which is relevant to only a small unidentified portion of the casual and part-time workforce.

[715] Transcript of proceedings on 15 March 2016 at PN1467 – PN1468.

[716] Statement of Scott Quinn, dated 16 December 2015 at paragraphs 27 – 30.

[717] Statement of Scott Quinn, dated 16 December 2015 at paragraph 51.

23.5 PART-TIME EMPLOYEES

1061. Having dealt with the thrust of the unions' arguments in support of their claims, we here pause to observe that whilst it is our view that their contentions are unsustainable, this is particularly so when considered in the context of current award provisions applying to part-time employees.

1062. Of the awards in which the ACTU seeks to introduce a four hour minimum engagement period, the majority[718] presently require that agreement be reached between the employer and employee as to the hours of work. In many cases, this includes the days and times at which that work will be performed. Typically, work performed outside of that which had been agreed attracts overtime rates.

1063. Certain awards also define a part-time employee as one whose hours are 'reasonably predictable' or who is engaged to work 'a regular pattern' of hours. Such award provisions contemplate an ability to forecast an employee's hours of work and suggest that there will be some repetition or pattern as to how and when they are worked.

1064. As a consequence of such award provisions, part-time employment necessarily affords an employee greater certainty; both financially and in

[718] *Aboriginal Community Controlled Health Services Award 2010; Aged Care Award 2010; Airport Employees Award 2010; Alpine Resorts Award 2010; Aluminium Industry Award 2010; Ambulance and Patient Transport Industry Award 2010; Amusement, Events and Recreation Award 2010; Aquaculture Industry Award 2010; Architects Award 2010; Asphalt Industry Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Children's Services Award 2010; Cleaning Services Award 2010; Clerks-Private Sector Award 2010; Concrete Products Award 2010; Corrections and Detention (Private Sector) Award 2010; Dry Cleaning and Laundry Industry Award 2010; Electrical Power Industry Award 2010; Fast Food Industry Award 2010; Gardening and Landscaping Services Award 2010; General Retail Industry Award 2010; Hair and Beauty Industry Award 2010; Health Professionals and Support Services Award 2010; Hospitality Industry (General) Award 2010; Legal Services Award 2010; Local Government Industry Award 2010; Miscellaneous Award 2010; Nursery Award 2010; Nurses Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Pharmaceutical Industry Award 2010; Pharmacy Industry Award 2010; Plumbing and Fire Sprinklers Award 2010; Premixed Concrete Award 2010; Quarrying Award 2010; Racing Clubs Events Award 2010; Racing Industry Ground Maintenance Award 2010; Rail Industry Award 2010; Registered and Licensed Clubs Award 2010; Restaurant Industry Award 2010; Seafood Processing Award 2010; Silviculture Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Storage Services and Wholesale Award 2010; Sugar Industry Award 2010; Supported Employment Services Award 2010; Telecommunications Services Award 2010; Timber Industry Award 2010; Transport (Cash in Transit) Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010; Water Industry Award 2010* and *Wine Industry Award 2010.*

respect of the times at which the employee will be engaged in the performance of work. In each of the awards we have identified, a part-time employee also has greater influence over the hours that they work, because they must agree to them. Indeed it was this very consideration that led the AIRC to adopt a three hour minimum engagement (rather than the four hour minimum proposed by the AMWU) in the Metals Award 1998 (emphasis added):

> [133] … For part-time employees we will adopt a minimum of three hours, we also allow a similar dispensation to that which was applied by the Full Bench of the New South Wales Industrial Relations Commission in the *State Part-Time Work Case*. … In short part-time employment provides greater financial certainty and predictability of earnings. Accordingly there is less need for each engagement or attendance to meet a minimum level of payment. …[719]

1065. Arguments relating to the uncertainty associated with casual employment, the irregularity of hours, the lack of control as to how and when an employee is engaged and financial insecurity carry far less weight, if any at all, in the context of part-time employment.

1066. The ACTU has not provided any reasons, let alone ones that are compelling, that deal specifically with why a part-time employee should be afforded a minimum of four hours of engagement or payment. The ACTU's claim treats casual and part-time employment synonymously for the purposes of this claim and fails to address the distinction between these forms of engagement when advocating reasons why a minimum engagement/payment provision is necessary.

1067. The material before the Commission does not establish that the circumstances of casual and part-time employees are identical and that therefore they warrant the same result. In the absence of cogent reasons and probative evidence that allows the Commission to determine that the minimum engagement/payment provision proposed regarding *part-time employees* in each award is necessary to ensure that it provides a fair and relevant minimum safety net, the claims should not be granted. The grant of a four

[719] Re *Metal, Engineering and Associated Industries Award, 1998 - Part I* (Print T4991 at [133]).

hour minimum engagement/payment in respect of one type of employment does not in and of itself lead to a conclusion that the same is to be granted in respect of the other form of employment. Each must be considered in its own right in respect of each award.

23.6 THE UNIONS' EVIDENCE

1068. Whilst we do not propose to here deal comprehensively with the witness evidence filed by the ACTU in relation to these proceedings, we note that it has failed to call any witness evidence in respect of the following awards that are impacted by its claim:

- *Aboriginal Community Controlled Health Services Award 2010;*
- Aged Care Award*;*
- *Airport Employees Award 2010;*
- *Alpine Resorts Award 2010;*
- *Aluminium Industry Award 2010;*
- *Ambulance and Patient Transport Industry Award 2010* (**Ambulance Award**)*;*
- *Amusement, Events and Recreation Award 2010;*
- *Animal Care and Veterinary Services Award 2010;*
- *Aquaculture Industry Award 2010;*
- *Architects Award 2010;*
- *Asphalt Industry Award 2010;*
- Banking Award*;*
- *Car Parking Award 2010;*

- *Cement and Lime Award 2010;*
- *Cemetery Industry Award 2010;*
- Cleaning Award*;*
- Clerks Award*;*
- *Concrete Products Award 2010;*
- Contract Call Centres Award;
- *Corrections and Detention (Private Sector) Award 2010;*
- *Cotton Ginning Award 2010;*
- *Dredging Industry Award 2010;*
- *Dry Cleaning and Laundry Industry Award 2010;*
- Electrical Power Award
- Electrical Contracting Award;
- *Gardening and Landscaping Services Award 2010;*
- *Gas Industry Award 2010;*
- *Hair and Beauty Industry Award 2010;*
- Health Award*;*
- *Horse and Greyhound Training Award 2010* (**Horse and Greyhound Award**)*;*
- Horticulture Award;
- Hospitality Award;
- Hydrocarbons Field Geologists Award;

- *Labour Market Assistance Industry Award 2010;*
- *Legal Services Award 2010;*
- *Local Government Industry Award 2010;*
- Medical Practitioners Award;
- *Mining Industry Award 2010*;
- Miscellaneous Award;
- *Nursery Award 2010;*
- Oil Refining and Manufacturing Award;
- *Passenger Vehicle Transportation Award 2010;*
- *Pastoral Award 2010;*
- Pharmaceutical Award;
- *Pharmacy Industry Award 2010;*
- *Plumbing and Fire Sprinklers Award 2010;*
- *Poultry Processing Award 2010;*
- *Premixed Concrete Award 2010;*
- Professional Employees Award;
- *Quarrying Award 2010;*
- *Racing Clubs Events Award 2010;*
- *Racing Industry Ground Maintenance Award 2010;*
- Rail Award*;*

- *Registered and Licensed Clubs Award 2010;*
- Restaurant Award;
- *Salt Industry Award 2010;*
- *Seafood Processing Award 2010;*
- *Silviculture Award 2010;*
- Storage Award*;*
- Sugar Award;
- *Supported Employment Services Award 2010;*
- Telecommunications Award;
- Timber Award;
- *Transport (Cash in Transit) Award 2010;*
- *Water Industry Award 2010;*
- Wine Award*;* and
- *Wool Storage, Sampling and Testing Award 2010.*

1069. As can be seen, of the 73 modern awards that form part of the ACTU's claim, it has not called any evidence in respect of 68 of them. That is, in respect of all but five of the relevant awards, the ACTU has not even attempted to make good any of the factual assertions upon which it relies in respect of employees covered by the above awards. For reasons that we have earlier explained, the ACTU's survey does not achieve this purpose either.

1070. To the extent that the ACTU's lay witnesses give evidence that is relevant to this claim, we have dealt with such evidence in chapter 14 of this submission. For the reasons we have there set out, the evidence is of little probative value and fails to establish the factual propositions upon which the ACTU seeks to

rely. Importantly however, the evidence does provide an insight into the operational requirements that necessitate the performance of shifts that are less than four hours in duration.[720]

23.8 INDIVIDUAL FLEXIBILITY ARRANGEMENTS

1071. It is important to understand the extent to which the introduction of a four hour minimum engagement/payment would introduce a new inflexibility that cannot be circumvented, even in the event of agreement between the parties.

1072. Each modern award includes a model 'award flexibility' term. It provides that notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of the award to meet the genuine needs of the employer and the individual employee. The provision provides a mechanism by which an employer and employee can reach agreement to vary the application of award terms in order to accommodate their 'genuine needs'. Such an agreement is referred to as an 'individual flexibility agreement'.

1073. The operation of the clause, however, is limited to award terms concerning matters that are identified in the model clause. Those matters are:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

1074. It is self-evident that provisions mandating minimum engagements/payments are not award terms concerning overtime rates, penalty rates, allowances or leave loading.

[720] See evidence of Narelle Jenks, Jan Paulsen and Scott Quinn.

1075. A Full Bench (Justice Ross, Senior Deputy President Watson, Commissioner Gregory) considered the contention that minimum engagements/payments are terms concerning arrangements for when work is performed, during the 2 year review of modern awards. An application was made by the ARA to reword the relevant subclause of the model flexibility term as follows (emphasis added):

arrangements for when work is performed, <u>including minimum shift engagements</u>

1076. A similar variation was proposed by the NRA. In refusing to grant the claims, the Full Bench ruled that minimum engagement/payment terms do not fall within the meaning of the expression 'arrangements for when work is performed':

[112] VECCI, and others, contended that minimum engagement provisions in modern awards fall under the head of power in s.139(1)(c) and accordingly fall within the expression 'arrangements for when work is performed' and hence within the scope of the model flexibility term. Indeed, VECCI submitted that s.139(1)(c) was the only head of power which supported the inclusion of a minimum engagement term in a modern award and hence it must follow that such a term is within the scope of the model flexibility term.

[113] We do not accept VECCI's analysis, for two reasons.

[114] First, contrary to VECCI's submission, s.139(1)(c) is not the only source of power for minimum engagement periods in modern awards. Properly understood such provisions deal with minimum wages (s.139(1)(a)) or are incidental (within the meaning of s.142) to casual employment (s.139(1)(b)). This characterisation is apparent from a consideration of the minimum engagement term in the Clerks—Private Sector Award 2010, which is the award VECCI is seeking to vary. The relevant clause is clause 12.4 and appears under the heading, Casual Employment:

> "12.4 Casual employees are entitled to a <u>minimum payment</u> of three hours' work at the appropriate rate." [emphasis added]

[115] This provision is clearly dealing with minimum wages for casual employees, it is not dealing with arrangements for when work is performed.

[116] The second reason for rejecting VECCI's contention flows from a plain reading of the expression 'arrangements for when work is performed' [emphasis added]. A minimum engagement term says nothing about 'when work is performed', it simply prescribes the minimum payment to be made to casual employees for each engagement.[721]

[721] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [112] – [116].

1077. In addition to the aforementioned claims of the ARA and NRA, VECCI sought to vary the model term by inserting a separate and distinct reference to minimum shift lengths. This application was also refused. The Full Bench was not persuaded that it was appropriate to include minimum engagement periods within the scope of the model flexibility term. It determined that its inclusion within the scope of the model flexibility term would not be consistent with the modern awards objective.[722]

1078. The Commission's decision establishes that the model flexibility term does not permit an employer and an employee to reach agreement to vary the application of a minimum engagement/payment provision pursuant to it. As a result, absent a specific facilitative provision such as that found in the Manufacturing Award at clauses 13.2 and 14.2, the terms of an award do not provide a means by which an employer and employee can agree to apply a reduced minimum engagement/payment in any circumstances. That is, there does not appear to be any ability under an award to circumvent the operation of a minimum engagement/payment provision, irrespective of whether it is sought in order to meet the needs of the employer, the employee, or both.

23.7 FACILITATIVE PROVISIONS

The Unions' Claim

1079. As can be seen from **Attachment 23A,** several minimum engagement/payment provisions presently include a facilitative provision that enables an employer and employee to reach agreement to vary the length of the engagement/payment. In some awards, that ability in unqualified. In others, such agreement may be reached only in the circumstances prescribed by the clause.

[722] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [141] – [142].

1080. For instance, some awards subject to the ACTU's claim contain a facilitative provision in the following terms in respect of part-time[723] and casual[724] employees:

> In order to meet their personal circumstances, an employee may request and an employer may agree to a shorter minimum engagement.

1081. Such a facilitative provision was found in the Metals Award 1998 in respect of part-time employees at the time that the *Metal Industry Casual Employment Case* was heard. Having determined that the award would be varied to include a four hour minimum engagement for casual employees, the AIRC stated:

> [133] … We so (sic) no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances.[725]

1082. This provision is clearly crafted to include multiple safeguards. It applies only to meet the personal circumstances of an employee and only at an employee's request. The clause is not one that permits an employer, unilaterally or with an employee's agreement, to reduce a minimum engagement period to suit the business' needs. Rather, the clause is tailored to accommodate the personal circumstances of an employee and provide them with the relevant flexibility.

1083. Other facilitative provisions are framed in general terms. For instance, the Ambulance Award states at clause 10.5(b): (emphasis added)

> On each occasion a casual employee is required to attend work the employee will be paid for a minimum of three hours' work, <u>except by agreement between the employer and the employee.</u>[726]

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[723] *Aluminium Industry Award 2010* and *Seafood Processing Award 2010.*

[724] *Alpine Resorts Award 2010; Aluminium Industry Award 2010* and *Seafood Processing Award 2010*.

[725] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [133]).

[726] See also *Amusement, Events and Recreation Award 2010*.

1084. The effect of the ACTU's claim is to remove these important facilitative provisions. It seeks to do so absent any submissions or evidence in support of these proposals. There is no material before the Commission to suggest that such provisions have been the subject of abuse, or have been the cause of any adverse impact. Indeed there is no evidence before the Commission as to how minimum engagement/payment provisions in any of the industries here relevant are operating; those industries being:

- the aluminium industry;
- the seafood processing industry;
- the operation of alpine resorts;
- the ambulance and patient transport industry; and
- the amusements, events and recreation industry.

1085. The paternalistic approach taken by the ACTU in seeking the deletion of award provisions such as the first example we have provided, which have been drafted with the clear intent of accommodating the personal circumstances of their constituents, is baffling. It appears that their case has been mounted on the premise that the ACTU considers that employees should not be engaged for less than four hours each time they are required to work, even in circumstances where this does not meet the needs of the employees they represent.

1086. The complete absence of any material before the Commission in respect of this element of the ACTU's claim does not enable the Commission to make an assessment that the current clauses are failing to meet the legislative objective or that the provisions proposed in lieu are necessary in the sense contemplated by s.138. The ACTU's desire to remove this flexibility from the relevant awards without so much as an explanation as to why it is sought should not be fulfilled. There is an absence of any clear basis upon which the Commission could do so.

The Commission's Issues Paper

1087. At question 34 of the Issues Paper, the Full Bench inquires as follows:

> Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?

1088. As is evident from the preceding section of these submissions, it is our view that facilitative provisions, where they currently exist, should not be deleted as proposed by the ACTU. Further, we have advanced a claim to introduce a facilitative provision in respect of the casual minimum engagement in the Fast Food Award for the reasons set out in our submissions of 13 June 2016. The introduction of a facilitative clause in the terms there proposed in respect of *current* casual and part-time minimum engagement/payment periods would serve to increase the flexibility available to employers and employees covered by those modern awards and so we have not identified a concern arising from such an approach.

1089. It cannot be assumed, however, that the implementation of a facilitative provision would mitigate the difficulties that we have identified as arising from the grant of the ACTU and its affiliates' claims. That is, the impact that would be felt by businesses as a result of the introduction of a four hour minimum engagement as proposed cannot be circumvented by simply inserting a facilitative provision that enables agreement to deviate from it.

1090. We make this submission on the following bases. Firstly, a facilitative provision, by its very nature, operates by agreement between the employer and employee. Where such agreement is not forthcoming, the employer would be subject to the consequences we have here identified. There is no evidence before the Commission that might enable to it to make findings as to the projected utilisation of such facilitative provisions in the various awards that are sought to be varied by the ACTU and its affiliates. Accordingly, a considered assessment as to the extent to which it would alleviate the concerns we have raised in respect of the claims cannot be made.

1091. Secondly, the grant of the claims would disrupt existing working arrangements. That is, an employer may have engaged casual and part-time employees on the basis that they will be engaged to perform less than four hours of work on certain shifts. The imposition of a new award obligation to provide at least four hours of work/payment would disturb this arrangement. A facilitative provision cannot necessarily sidestep the consequences that would flow. This is because an employer's ability to maintain existing arrangements is entirely contingent upon an employee's consent to do so.

1092. Accordingly, whilst we do not oppose, in general terms, the notion of introducing facilitative provisions that enable an employer and employee to agree to a reduced minimum engagement/payment period, we do not consider that it would provide an appropriate remedy to the raft of concerns we have identified as arising from the unions' claims. It remains our position that the changes they seek should not be granted.

1093. Should the Commission determine that it is appropriate to introduce facilitative provisions of this nature, they should be inserted in the terms similar to that which we have proposed in respect of the Fast Food Award:

> An employer and employee may agree to an engagement for less than the minimum of [insert number] hours.

1094. It is our view that such a clause contains adequate protections and that the imposition of additional hurdles is not necessary. A case has not been made out for confining the operation of any such provision to circumstances in which, for instance, the clause operates only at the employee's election.

1095. Furthermore, as is demonstrated by the evidence, there are legitimate operational reasons that may motivate an employer to require the performance of work by a casual or part-time employee for a period of less than three hours. Such an employer should not be precluded from approaching its employees with an offer for a shorter shift.

1096. The Commission should not proceed on the basis that a facilitative provision of the nature proposed will be subject to abuse. The material advanced by the

proponents in these proceedings, who seek the deletion of existing facilitative clauses, does not establish such occurrences.

1097. Ultimately, if the Commission determines that facilitative provisions are to be inserted and that despite our submissions, additional safeguards are necessary, we respectfully submit that interested parties should be given an opportunity to consider and provide comment in this regard.

23.9 INTERACTION WITH OTHER AWARD PROVISIONS

1098. To properly understand the implications of the ACTU's claim, consideration must be given to other award provisions that relate to minimum engagement/payment clauses. The ACTU does not appear to have done so.

1099. Take for instance provisions that enable an employee to work a broken shift. The Cleaning Award and the Aged Care Award provide examples of awards that contain such clauses. We do not here propose to deal comprehensively with the proper construction of the relevant provisions in those awards (or any other instruments that facilitate broken shifts). We note our concern however, that the introduction of a minimum engagement/payment provision, subject to the precise manner in which it has been crafted, may give rise to the contention that the minima is applicable to each part of a broken shift. The issue is one that may well turn on the construction of the relevant provisions of the awards when read with the ACTU's proposals, which are not uniform in their terms. Needless to say, the application of a minimum engagement period to each component of a broken shift is a significant cost burden and in certain instances, virtually impossible to accommodate. It would effectively undermine the very purpose of implementing a broken shift. It is not clear whether this is a matter to which the ACTU has had any regard when developing its draft clauses.

1100. Similar considerations arise in respect of pre-existing minimum payment or engagements that apply to work performed during overtime or ordinary hours on a weekend. Take for instance the Electrical Power Award. Presently, the award requires that a casual employee be 'engaged for a minimum of three

hours' (clause 13.2). The award does not prescribe a minimum engagement/payment in respect of part-time employees.

1101. The ACTU seeks to replace the current clause 13.2 with the following:

> A casual employee must be engaged for a minimum of four hours per day or shift.

1102. It also seeks the insertion of a new clause 12.8:

> A part-time employee must be engaged for a minimum of four hours per day or shift.

1103. Clause 26.1(a) prescribes the rate payable for the performance of overtime on Monday – Saturday, Sunday or on a public holiday. Subclause (b) goes on to state that day workers who work overtime on a Saturday, a Sunday or a public holiday 'will receive a minimum payment of three hours on each occasion'.

1104. Similarly, clause 24.3 of the award deals with circumstances in which an employee is recalled to work overtime after leaving the employer's premises. In such cases, the employee 'will be engaged to work for a minimum of three hours or will be paid for a minimum of three hours' work in circumstances where the employee is engaged for a lesser period'.

1105. If the ACTU's claim were granted, it would not only impact upon the minimum engagement/payment to which a casual or part-time employee is entitled when performing work that attracts the minimum hourly rate of pay prescribed by the award, but it would also have implications for overtime performed on a weekend or public holiday, or where an employee is recalled to work overtime.

1106. The proposed clauses require that the employee (be they a casual or part-time employee) be 'engaged for a minimum of four hours per day or shift' (emphasis added). If a casual or part-time day worker performs work on a Saturday, and all such time constitutes overtime (noting that pursuant to clause 24.1(a), ordinary hours are to be worked on Monday – Friday), the terms of the minimum engagement clause would require that a casual or part-time employee be engaged for a minimum of four hours. This is because the

ACTU's proposed clauses require that for each *day*, a casual or part-time employee must be engaged for a minimum of four hours.

1107. It is curious that the protection presently afforded to all employees performing overtime in certain circumstances would automatically be more beneficial for casual and part-time employees than those engaged on a full-time basis. That is, casual and part-time employees would have the benefit of a longer minimum engagement provision absent any argument that might establish that the disability or inconvenience suffered by such employees is greater than those employed on a full-time basis. It is also apparent that to require a full-time employee to perform overtime would, in these circumstances, be more cost effective if the work to be performed is for three hours or less. This may result in preference being given to rostering full-time employees to work at such times.

1108. The Electrical Power Award provides only one example of a consequence that is likely to arise in several others.

1109. The remote service/support clauses in the Business Equipment Award, the Telecommunication Award and the Contract Call Centres Award (which provide for minimum engagement periods of between half an hour and one hour for work carried out from home via telephone or a computer) would similarly be seriously impacted.

1110. The ACTU has made no attempt to grapple with the subtleties surrounding these issues, to explain how the provisions they have proposed would interact with other award clauses and whether the resulting consequences are intended or inadvertent.

1111. If our interpretation of the aforementioned provisions is correct, considerations as to the cost implications of the ACTU's claim are magnified. The cost of introducing a four hour minimum engagement or payment provision is not limited the payment of the minimum hourly rate prescribed by the award for the performance of overtime, absent other penalties or loadings.

1112. Rather, if the introduction of a four hour minimum engagement or payment provision has the effect of extending any pre-existing minimum engagement/payment that applies to the performance of work for which a penalty or loading is prescribed by the award, or by introducing the requirement of a minimum engagement/payment to the performance of such work, this inflates the cost implications of the claim considerably. As previously stated, this may lead to employers avoiding the rostering of casual or part-time employees to work at such times.

23.10 THE AMWU'S CLAIMS

1113. The AMWU seeks to vary the minimum engagement/payment provisions in the Manufacturing Award. We deal with each in turn.

1114. Firstly, it proposes the following change to clause 13.2, which applies to part-time employees:

> A part-time employee must be engaged for a minimum of ~~three~~ not less than four consecutive hours per day or ~~a~~ shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for no less than ~~the minimum of~~ three consecutive hours per day or shift. The agreement reached must be recorded by the employer on the employee's time and wages record.

1115. The effect of the change would be to:

- increase the minimum engagement period from three hours to four hours;
- place a limitation on the extent to which the employee and employer could agree to reduce the minimum engagement period; and
- introduce a requirement that the agreement reached be recorded as a time and wages record.

1116. Clause 13.2, as presently drafted, was inserted pursuant to the AIRC's decision in the *Metal Industry Casual Employment Case*:

> [133] … For part-time employees we will adopt a minimum of three hours, we also allow a similar dispensation to that which was applied by the Full Bench of the New South Wales Industrial Relations Commission in the *State Part-Time Work Case*. … In short part-time employment provides greater financial certainty and predictability of earnings. Accordingly there is less need for each engagement or attendance to meet a minimum level of payment. We so (sic) no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances.[727]

1117. The AMWU has not established that there has been any change in circumstances that warrants a departure from the approach taken by the Full Bench in the above passage. To the extent that it relies on notions of 'working time insecurity' or employment related costs as identified by the ACTU, we refer to our submissions above in this regard. No explanation is provided by the union as to why the additional regulatory obligation is sought.

1118. Secondly, it seeks the following variation to clause 14.2 in relation to casual employees:

> On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement ~~for~~ of no less than ~~the minimum of four~~ three hours.

1119. The AMWU makes the following submission in this regard (emphasis added):

> There is no floor on the minimum daily hours to be requested. Given the limited bargaining power of casual employees, their level of award reliance and the ability of facilitative provisions to reduce the safety net without Commission oversight it is essential that a safety net be created for the "facilitative floor." The Union proposes that the facilitative floor be 3 hours consistent with the definition of facilitative provisions requiring a floor or range within which facilitation can occur.[728]

1120. We struggle to understand the AMWU's concern. It appears to us that the provision is drafted to apply only at the employee's election, in order to accommodate their personal circumstances. The provision does not permit an

[727] Re *Metal, Engineering and Associated Industries Award, 1998 - Part I* (Print T4991 at [133])

[728] See the AMWU's submission dated 19 October 2015 at paragraph 64.

employer to seek to reduce the minimum engagement period with the employee's consent or otherwise, in order to accommodate the business' needs, leave aside permitting a unilateral reduction to an employee's minimum engagement period. We cannot see the relevance of an employee's 'bargaining power', their award reliance or the need for Commission oversight in these circumstances.

1121. In addition, we refer to and rely upon the submissions we have earlier made regarding the ACTU's proposal to delete facilitative provisions such as these from a number of awards.

1122. The AMWU has sought identical variations to clauses 12.2 and 13.2 of the FBT Award. We have not identified any submissions or evidence in support of its claim.

1123. There is clearly no material before the Commission that would enable it to determine that the provisions proposed are necessary in the sense contemplated by s.138 of the Act. As is evident from our earlier analysis of the AMWU's lay witness evidence, not a skerrick of direct witness evidence has been called in support of the claims. The variations should not be granted.

23.11 THE AMWU – VEHICLE DIVISION'S CLAIMS

1124. The AMWU – Vehicle Division seeks the introduction of a new four hour minimum payment clause in respect of casual employees in the Vehicle Award, which does not currently contain such a provision. It is also proposing a new four hour minimum engagement clause in respect of part-time employees, with an ability to reach agreement to reduce that minimum engagement period to three hours in order to accommodate the personal circumstances of the employee.

1125. The AMWU – Vehicle Division seeks to rely upon the submissions of the ACTU and AMWU in respect of these claims. We have responded to each of those earlier in our submissions.

23.12 THE POTENTIAL IMPACT OF THE CLAIMS ON EMPLOYERS

1126. The variations sought by the ACTU in certain cases seek the introduction of a four hour minimum engagement. That is, the proposed clause would require that the employee be engaged for or rostered to perform work for at least four hours. In other instances, the ACTU seeks a provision that requires a minimum payment of four hours. This is a different proposition. The clauses proposed would mandate payment for at least four hours of work, irrespective of the duration of time that was in fact spent working by the employee.

1127. As we have earlier stated, the impact of the ACTU's claim will vary from industry to industry. This is in part due to the differing pre-existing minimum engagement/payment provisions in awards and due to the varying nature of the work performed under each of the relevant awards. It is for this very reason that the ACTU's claims must be considered on an award by award basis.

1128. The Joint Employer Survey provides a useful insight into the implications of granting the ACTU's claim. The survey asked the following relevant questions:

- What would be the effect on your organisation if all part-time employees were entitled to a four hour minimum engagement period per day/shift?
- What would be the effect on your organisation if all casual employees were entitled to a four hour minimum engagement period per day/shift?

1129. At **Attachments 20X – 20ZD** to these submissions, we have extracted responses provided to these questions by respondents that identified that they are covered by the following awards:

- **Attachment 20X:** Aged care Award;
- **Attachment 20Y:** Fast Food Award;
- **Attachment 20Z:** Health Award;
- **Attachment 20ZA:** Horticulture Award;
- **Attachment 20ZB:** Hospitality Award;
- **Attachment 20ZC:** Nurses Award; and
- **Attachment 20ZD:** SACS Award.

1130. We urge the Commission to review and have regard to these responses. They provide evidence of the serious consequences that will arise in each of the industries if the variations sought by the ACTU were made.

1131. We here propose to provide examples of specific industries in which the variations proposed would be particularly problematic. The adverse effects of the proposals, however, are by no means limited to these industries.

Aged Care Award 2010

1132. Clause 22.7(b) of the Aged Care Award presently requires that part-time and casual employees receive a minimum payment of two hours for each engagement. The ACTU seeks an increase of this minimum payment to four hours. **Attachment 20X** demonstrates the profound impact that the unions' claim would have in this industry.

1133. Many employers covered by this award provide in-home care. This involves an employee travelling to the clients' residence to provide them with a service. Often the assistance that the employee renders to the client involves only the performance of a particular task (such as preparing a meal or assisting a client to bathe or take medication) that may take less than one hour. In such circumstances, a minimum payment of four hours is a serious new financial imposition.[729] Respondent 3347 explains this as follows:

> This would make our current Home Care service potentially unviable in areas for which demand is low. These areas are generally areas of low unemployment also where our current employees very much value the work that we can provide. Our clients currently demand services that can be as little as 15 minutes and in some regions this minimum engagement may make it impossible to provide a full roster and cost effective service. In addition our business in being squeezed by sole traders who are coming in with the ability to provide services at a fraction of the costs of our staff.[730]

1134. Multiple responses make reference to CDC; Consumer Directed Care. This service model gives clients greater control over the services they receive, when they receive them and by whom:

> Detrimental. We would no longer have the flexibility to provide some clients with their requests under CDC. For example, a two hour stint at night for assisting someone to bed. In our small rural community there is only one client we assist with this and we could not do it cost effectively if we had to engage someone for 4 hours instead of 2.[731]

[729] See for example response ID 2280.

[730] Response ID 3347. See also response ID 3141.

[731] Response ID 3143.

1135. Numerous respondents have identified that the additional costs associated with the ACTU's claim would have a serious impact on their viability.[732] Some go so far as to say that the business could not survive the financial implications of the claim if it were granted. For instance:

> We would not be in existence. We could not survive. The only way this could be overcome would be to deny care because we do not have staff to send to the clients.[733]

1136. The evidence establishes that the ultimate consequence of these increased costs would be felt by way of altered service delivery outcomes. Several references are made to the employer's inability to continue providing the services they presently offer if the proposed changes were made as it would be cost prohibitive. [734] Aged consumers who need care would either experience an increase in costs or a complete withdrawal of services, particularly in rural and regional areas. For example:

> Costs would increase due to the need to roster employees to attend outside appointments with residents. Sometimes these appointments may only take an hour or two. Employees are happy to accept these shifts, but if we are forced to give them a min. of 4 hours we would have to withdraw this service due to increased costs. This would than adversely affect the resident as a private nursing agency would charge considerably more for this service. A lot of residents do not have family who are able to accompany them to appointments.[735]

1137. Response ID 3133 similarly states:

> This would add significant costs to consumers, especially those receiving community services. It would also reduce flexibility of services to clients in the community. It would increase costs overall to the organisation.[736]

[732] See for example response ID 1581, 2022, 2026, 2176, 2262, 3130, 3307, 3392.

[733] Response ID 3095.

[734] See for example response ID 2207, 5753 and 3133.

[735] Response ID 2008.

[736] Response ID 3133.

1138. Many respondents also state that they would need to reduce the number of casual and/or part-time employees.[737] Others speak of funding constraints which would not cover the additional costs incurred:[738]

> This would have a huge negative financial impact on our Business as we are Government funded, all payments are regulated by Government Legislation, therefore we are unable to control income to our Organisation. We are a community based not for profit Organisation. Currently the minimum engagement for our Organisation as per our EBA is 2 hours.[739]

1139. As can be seen, a requirement that part-time and casual employees be paid a minimum of four hours will give rise to a whole raft of consequences for businesses, their employees and their clients:

> Due to the introduction of the CDC and NDIS, we need flexibility for our clients and employees.
>
> Introduction of the 4hr minimum may mean we employee less casuals or they get less hours as we cannot use them to fill a 3 hour shift (e.g. someone leaves work early and we get agency staff for last 3 hours).
>
> It may also mean we have to pay employees to make up for the 4 hour minimum, meaning we are paying for unproductive hours. As a not-for-profit, that is funds that could be better spent on our clients.
>
> Lastly, it would cause great difficulty organising staff meetings and training sessions for part-time and casual employees, as we could not ask staff to come in for a 2 hour meeting. Meaning they might miss out on valuable information and interactions with their colleagues.[740]

1140. The potential impact of the ACTU's claim on the aged care industry should not be underestimated. The survey responses we have here set out are but a sample of those found at **Attachment 20X**. They consistently indicate that employers covered by the Aged Care Award foresee an inability to absorb the increased costs, often due to their funding arrangements, and serious implications for the structure of their labour force and service provision.

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[737] See for example response ID 2026, 2125, 2126, 2182, 3160, 3221, 3242, 3267.

[738] See for example response ID 2280, 3219.

[739] Response ID 3267.

[740] Response ID 5089.

Banking, Finance and Insurance Industry Award 2010

1141. The Banking Award does not presently contain any minimum engagement or payment requirements. The ACTU has sought the inclusion of a four hour minimum engagement in respect of part-time and casual employees. We note that the ACTU has not mounted any evidence that is specific to this industry.

1142. Multiple survey respondents in this industry have cited the difficulties that would arise regarding the personal circumstances of employees and their availability if a minimum engagement period were introduced.[741] For instance, response ID 360 states:

> This would effect our organisation. We have a pool of casual staff we can choose from. This allows flexibility as staff can alternate, job share, work in small teams and choose the hours that suit them. We would most likely use less casual staff.[742]

1143. Some have identified that they may no longer be able to accommodate the hours that an employee seeks to work due to their caring responsibilities:

> major negative - some have limited availability due to other family commitments[743]

1144. Others state that they employ students who could no longer be engaged due to their study commitments:

> we wouldn't be able to offer any of them employment. As time doesn't allow a four hour shift due to the time restraints between the hours they finish school and our office closes.[744]

1145. The evidence suggests that this is an industry that is presently able to accommodate the needs of employees by engaging them for shorter shifts. A prohibition on doing so would reduce the extent to which such employees are engaged by these operators.

[741] See response ID 3590 and 5613.

[742] Response ID 360.

[743] Response ID 477. See also response ID 715.

[744] Response ID 4246.

Cleaning Services Award 2010

1146. The Cleaning Award contains a unique set of minimum payment provisions in respect of part-time and casual employees. The minimum payment to be made is contingent upon the 'total cleaning area' where the employee is engaged. The cleaning area is defined as 'the area that the employer is contracted to clean, including internal areas, offices, toilets, kitchens and all other common/public areas but excluding car parks'. That is, the minimum payment is effectively determined by the contractual obligations of the employer (being a business providing contract cleaning services to a client) with a third party.

1147. Clause 24.2 states: (emphasis added)

> **24.2 Part-time and casual employees**
>
> **(a)** Subject to the clause 24.3, the ordinary hours of work will be worked in periods of not more than 7.6 hours per day, on not more than five days, Monday to Sunday inclusive.
>
> **(b)** The employer will roster part-time and casual employees for the following minimum engagement periods, but in the event that the employer does not require employees to work for the full period of the minimum engagement, the employer must pay employees as if they had worked the minimum period.
>
> **(c)** Where only one employee is engaged at a small stand alone location with a total cleaning area (as defined) of 300 square metres or less, and where it is not practicable for a longer shift to be worked across two or more locations, the minimum engagement will be for one hour.
>
> **(d)** Where employees are engaged at a location with a total cleaning area (as defined) of up to 2000 square metres the minimum engagement will be for two hours.
>
> **(e)** Where employees are engaged at a location with a total cleaning area (as defined) of between 2000 and 5000 square metres the minimum engagement will be for three hours.
>
> **(f)** Where employees are engaged at a location with a total cleaning area (as defined) of more than 5000 square metres the minimum engagement will be for four hours.
>
> **(g)** The minimum engagements of three and four hours provided for in clauses 24.2(e)and (f) will operate from the date when a contract changes at a site or building between 1 January 2010 and 31 December 2014.

(h) Transitional arrangements

The following will continue to apply to ongoing contracts after 1 January 2010 until there is a change of contract, or until 31 December 2014 whichever is the sooner:

(i) For all States and Territories (excluding New South Wales and the ACT) the minimum engagement for part-time and casual employees will be:

- three hours on a Sunday or Public holiday; and
- two hours on a Monday to Saturday.

Provided that where the employee is the sole person employed on the premises, on a Monday to Saturday, the minimum will be one hour.

(ii) For New South Wales and the ACT, the minimum engagement for part-time and casual employees will be:

- three hours at the appropriate hourly rate for each start.

Provided that where one employee is employed at a small location, the employee will work and be paid on a one shift basis of no less than two hours where the total cleaning area (as defined) is 500 square metres or more and no less than one hour when the total cleaning area (as defined) is less than 500 square metres.

1148. The provision above is a clear example of a minimum payment provision that is tailored to the specific needs of an industry. Despite this, the ACTU seeks to delete subclauses (b) – (g) and replace them with a four hour minimum engagement for a part-time employee and a four hour minimum engagement or payment for a casual employee.

1149. The nature of the work performed by employees engaged by contract cleaners must properly be understood. During the Part 10A Award Modernisation process, the AIRC made the following observations about the industry and the work performed: (emphasis added)

> [59] The contract cleaning industry is characterised by high levels of part-time employment. Almost 50% of employees are engaged on a part-time basis often working shifts which may be of very short duration. It is also an industry where there are frequent changes of contract and where commonly employees cease employment with the outgoing contractor and become employees of the incoming contractor. It is an industry in which employees are highly reliant on the award and competition for contracts is primarily based on price.[745]

[745] *Award Modernisation* [2009] AIRCFB 50 at [59].

1150. We also note that the current minimum payment provisions found in the award were developed by consent between the industrial parties involved, which included the Liquor, Hospitality and Miscellaneous Union (as it then was).[746] It appears that the transitional arrangements were inserted in recognition of the fact the modern award terms would impose more onerous obligations on employers than those preceding them in the relevant pre-modern instruments.

1151. The location of the work, the volume of the work and the size of a particular job is determined by the client's needs. The business is responsible for servicing the client, subject to the terms of the contractual agreement that exists between them. The employer may be party to contracts with several clients who each require only small discrete cleaning tasks to be performed, which only necessitate one or two hours to complete. That an employer will be able to provide an employee with consecutive jobs at various locations in order to meet the four hour minimum cannot be assumed. This is a matter that does not sit entirely within the purview of the employer.

1152. If a client requires the employer to clean a 'small stand alone location with a total cleaning area (as defined) of 300 square metres or less', the job is at a distant location where the employer does not have a contract with other clients in the area and therefore 'it is not practicable for a longer shift to be worked across two or more locations', the award presently requires a minimum payment for one hour. This arrangement reflects the nature of the industry and its operations.

1153. Take for example response ID 3955. In respect of part-time employees, the relevant employer states that the change would result in a reduction of the number of part-time employees they engage:

> It would significantly reduce the number of staff we could employ.
>
> Essentially several people would loss their job to afford those hours to others to meet this minimum shift requirement.
>
> It would especially be a burden for sites we provide commercial cleaning services to, where the building is very small and there are limited other available sites nearby in

[746] *Award Modernisation* [2009] AIRCFB 50 at [58].

order to group them together to meet this minimum shift requirement (particularly in regional locations)[747]

1154. When answering the question regarding casual employees, the same respondent spoke of the cost increases that would be faced by their clients:

> It would overly inflate the cost of providing our services to our clients as we would have to charge for 4 hours, even if they only wished to purchase, and only required, one or two hours.[748]

1155. The financial implications of the proposed claim have been described as 'devastating' in light of the fact that most cleaning jobs undertaken by a particular employer only require two hours of work to complete.[749] Other employers share their experience of employees not seeking to work longer shifts:

> it would not work in this industry
> the worker not want more work in most cases[750]

1156. The ACTU has not made any attempt at addressing the industry-specific considerations that arise in respect of this award; considerations which its relevant affiliate recognised and acknowledged at the time when the award was made.

Fast Food Industry Award 2010

1157. The Fast Food Award requires a three hour minimum engagement of part-time and casual employees. The ACTU seeks to increase this to four hour. Ai Group seeks to vary the minimum engagement period applying to casual employees, such that the clause would enable an employer and employee to agree to an engagement of less than the three hour minimum. We refer to our submissions of 14 October 2015, 13 June 2016 and the evidence of Ms Limbrey.

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[747] Response ID 3955.

[748] Response ID 3955.

[749] Response ID 4969.

[750] Response ID 976.

1158. We refer the Commission to **Attachment 20Y** to these submissions, which sets out all responses provided by employers covered by the Fast Food Award to the joint employer survey questions. As can be seen, the vast majority of respondents indicate that the changes would have an adverse impact upon their business.

1159. It is important to appreciate the way in which respondents have described the *magnitude* of the effect that the ACTU's proposal would have on their business. Respondent 851 provides a comprehensive answer:

> Disastrous.
>
> * We would have to reconsider hiring any junior staff (say, under 17) as some barely cope with 3 hour shifts as it is.
>
> * We would probably have to close one of our locations in the evenings (after 5pm) as it would not be financially viable to keep it open with only older staff working evenings i.e. no school aged employees given we are open to 8pm and it's already quiet. This would also effect our ability to train new staff effectively, as we put them on quieter evening shifts to reduce their stress levels whilst they are learning.
>
> * We would have to reconsider hiring some women working during school hours as some only like to work a few hours a week, and simply will not commit to 'long' shifts.[751]

1160. Respondent 862 states that they would have to '*let [part-time employees] go*' and that the business would close. Respondent 867 states that they '*would cease employing anyone on a permanent part-time business*'. In respect of casual employees, respondent 867 states that '*it would may* (sic) *my wages expense even more unpalatable and my rostering even more difficult*'. Respondent 884 states:

> Massive repercussions. This would send us to the wall. My business has no need for a max 4 hour shift. We employ 99% school age. This would also have an effect on their schooling.[752]

[751] Response ID 851.

[752] Response ID 884.

1161. Respondent 4932 states the following in respect of the ACTU's part-time employment claim:

> I would have to let them go as we have no need for staff more that 2.5 to 3 hours over lunch. We already over roster due to the minimum being 3 hours. We only need 2 people from 12 to 2, but roster the extra hour, costing us 7 hours a week in wages we need not pay. 14 hours a week would send us broke, putting 10 people out of work[753]

1162. The same respondent answered the question regarding casual employment as follows:

> I would close down due to excessive wage bill. Again I need 2 staff on from 6 to 8pm, I have to roster 2 staff for 3 hours each night as the junior is required to do 3 hour shift. over all the regulation requiring me to roster a minimum 3 hour shift costs on average an extra $300 a week in wages that I do not need.[754]

1163. The number of employers who have indicated that the financial viability of their business would be compromised if the ACTU's claim were granted, is alarming.

1164. The survey responses also make clear that the claim would make hiring junior employees who currently perform work after school very difficult, if not impossible. Many cite the difficulties that would arise in relation to the engagement of school-going junior employees.[755] This is consistent with Ai Group's contention that the award should in fact provide greater flexibility in order to better accommodate the school commitments of young employees. Despite the submissions made by the ACTU regarding 'employee preference' for longer shifts, we cannot help but query whether it has in fact consulted its younger constituents who, the evidence suggests, would likely no longer be employed in the fast food industry.

1165. The evidence of Ms Limbrey, which we have earlier summarised, is also instructive. Ms Limbrey expressed the concern that "an increase to the minimum engagement period for employees from three hours to four hours

[753] Response ID 4932.

[754] Response ID 4932.

[755] See for example response ID 187, 849, 851, 867, 872, 884, 894, 2227, 2244, 2470, 4470, 4590, and 5017.

would have a significant impact on the ability of McDonald's restaurants to hire young people and to regularly engage them in employment".[756] She also considers it "likely that McDonald's restaurants would not be able to continue to employ this quantity of employees, because we would be forced to give more hours to existing employees".[757]

Food, Beverage and Tobacco Manufacturing Award 2010

1166. The FBT Award presently contains a three hour minimum engagement for part-time employees, with a facilitative provision that enables an employer and employee to reach agreement to reduce it. The AMWU seeks to replace this with a four hour minimum engagement, and a limitation on the facilitative element of the clause, such that agreement can only be reached to reduce the minimum engagement to three hours.

1167. The survey responses below establish that:

- respondents covered by the award consider that an increase to the minimum engagement period, albeit by one hour, would result in increased costs and a loss of flexibility; and
- the facilitative provision is presently being utilised by employees and employers to accommodate the employee's personal circumstances.

Response ID	Responses – part-time employment
1305	Would lead to reduction in head count as current shifts may not meet minimum 4hr requirement and therefore would need to streamline work force so that the employee could meet 4hr requriement
1743	I would have to terminate the services of one, however it wouldn't impact on the other two at this time.
1868	This would be a financial burden.
2746	May have some effect as some employees can only work 2 or 3 hours per day due to family commitments.

[756] Paragraph 32 of the Second Statement.

[757] Paragraph 41 of the Second Statement.

3626	* increased labour cost, * operational inefficiency * possible return to greater casual employment (if casual minimum engagement less than 4 hours) * less workforce flexibility would add to cost of labour * reduction in skill levels as change to minimum would effect our ability to offer flexible work arrangements which would also negatively impact mostly women in the workplace
3928	Add to running costs

1168. We note again that the AMWU has not provided any reasoning or advanced any probative evidence in support of the changes it seeks.

1169. The variation should not be granted.

General Retail Industry Award 2010

1170. The Retail Award requires that part-time employees be engaged for a minimum of three hours. The ACTU's proposal is to increase this to four hours. The responses below are a sample of those provided by employers covered by this award regarding this element of the ACTU's claim.

1171. Apart from issues pertaining to the cost increases that would necessarily result, two other themes emerge from the joint employer survey:

- the difficulties that the ACTU's proposal would create for junior employees who seek to work after school; and
- the practice of engaging part-time employees to cover break times, which does not necessitate four hours of work.

1172. As can be seen below, many of the responses indicate that the employer would make changes to the structure of their labour force by using fewer part-time employees. The responses are demonstrative of the fact that whilst the ACTU might suggest that the change it seeks is a small or incremental one, the potential impact upon businesses appears to be profound.

Response ID	Responses – part-time employment
545	Increased cost to business & reduced flexibility to cover peak customer periods.
684	I might look at making them redundant.
876	There would be a large increase in the wages payable on the store, This could result in not recruiting part time employees instead increasing the casual workforce.
879	Less flexible so harder to work with
886	This would be very inflexible for our business, in particular for retailers, where it isn't always possible both on a person's availability, business requirements and cost requirements.
1318	IN WHITE GOODS WE WOULD MAKE A LOSE AS THE PROFIT LINE WOULD NOT COVER IT
1319	Staff would have less flexibility. We would have less staff.
1433	I would not employ any part time employees
1630	I would not employ anyone if that was the case, as it would become to expensive. Is to force businesses to go broke by having to employ for longer hours when not required.
1793	Significant - PT workers are generally rostered for lunch covers and breaks, and to cover extended trading hours outside of our FT colleagues core hours
1824	We utilise some 3 hour shifts for break coverage. If we had to increase minimum shift to 4 hours we would be having to spend some hours at times when it is not required. This would mean we would not be able to create the most efficient rosters and service the customers in the best way.
1847	Increased cost when only required to cover lunch breaks of full-time retail employees. Too much overlap of hours.
1873	Would have to transition employees to casual and they would loose entitlements We would also loose some employees as they work in with the hours that they are available. We would also need to look at alternate business situations
1890	Some of our disabled workers are not able to work 4 hours in a day. It is too much for them.
2203	reduced employment numbers increased costs reduced flexibility
2227	this would mean juniors who come in after school could NOT work as they can only work for a maximum of 3 hours
2666	It would rule out school kids working after school
2725	would exclude casual school staff leading to employing part time workers thus increased wages

3626	* increased labour cost, * operational inefficiency * possible return to greater casual employment (if casual minimum engagement less than 4 hours) * less workforce flexibility would add to cost of labour * reduction in skill levels as change to minimum would effect our ability to offer flexible work arrangements which would also negatively impact mostly women in the workplace
3888	A REDUCTION IN FLEXIBILTY
3894	Problematic
3928	Add to running costs
3942	It would further limit our ability to carry out our business in an efficient and effective manner
4143	I would not have any
4892	it would be a disaster - the 2nd part of our business engages a larger number of part timers and an increase from 3 to 4 hours would make a number of our stores non-viable.
4975	Difficult because part time hours are contracted hours and because of 7 day trade difficult to roster.

1173. We turn then to casual employees. The award presently recognises the special circumstances of junior employees at clause 13.4, which states:

> 13.4 The minimum daily engagement of a casual is three hours, provided that the minimum engagement period for an employee will be one hour and 30 minutes if all of the following circumstances apply:
>
> (a) the employee is a full-time secondary school student; and
>
> (b) the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and
>
> (c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and
>
> (d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

1174. This clause was inserted after a series of decisions were handed down regarding multiple applications that were made to vary the Award to provide for a shorter minimum engagement provision for school students. The clause has been the subject of proceedings before Full Benches of the Commission's

predecessors and the Federal Court of Australia.[758] The ACTU has not provided any cogent reasons establishing why the relevant decisions should be departed from. Indeed it has not made any attempt to deal with the history preceding the relevant clause or to establish why a clause that is intended to enable employment opportunities for younger members of the workforce should be disbanded.

1175. As the Commission will see from the responses below, the employment of junior employees is one of the most frequently cited concerns in the joint employer survey. The responses also indicate the impact of the change from three hours to four hours for other employees:

Response ID	Response – casual employment
245	Would result in less casual staff. Would consider the opening hours of the business
252	This would impact our rostering and payroll budget
308	We would significantly cut back on head count and would negatively impact on customers service and therefore revenue
332	I would not be able to hire casuals
378	Staff would be cut and would have to work harder during the busy periods
440	Our store is only open until 5.30pm so we couldnt accommodate our school aged casuals from the end of school until we close the store. unless there was a provision left in place for after school hours, we would have to let them go.
544	It would prevent us employing a school or TAFE student in the future, they couldn't work from 3-5pm.
545	Reduced flexibility of staff roster. Increased labour costs. One location only opens 3.5 hours on a Saturday
588	THIS COULD COST US A GREAT DEAL IN QUITER TIMES PAYING STAFF WHEN THERE IS LITLE TO DO
593	We could not do this as most of our casual employees are juniors who still attend school so have limited availability. After school shifts would become impossible as they cannot get to work before 4pm but we close at 6pm and this cannot be changed due to shopping centre trading hours.
678	Probably would cut back on hours and staffing numbers, some days we dont need staff here for that long

[758] Re *General Retail Industry Award 2010* [2010] FWA 5068; Re *Appeal by the NRA and MGA* [2010] FWAFB 7838; Re *Application by NRA* [2011] FWA 3777, Re *Appeal by the SDA* [2011] FWAFB 625, Re *Application by the NRA* [2011] FWA 6602; *SDA v NRA (No 2)* [2012] FCA 480.

720	It would mean we would not have any school aged employees working.
803	The casuals would not get the work, putting more pressure/stress on other staff!
819	Would increase our costs and would probably mean that we would do this a different way without the casual. When we open on Saturdays we only open for 3 hours.
840	If we would normally employ a casual for three hours and there was a four hour minimum we would simply not employ them at all for that day, we would work by ourselves instead. If there was to be a four hour minimum our employees would each lose, on average, 6 hours a week of work. We would just make do without them and do the extra work ourselves.
854	Would make rostering more difficult to accommodate 4 hour shifts. Younger staff tire easily so we try to keep their shifts to 3 hours. Also often have a 3 hour shift over the busy middle part of the day - 4 hours would be too long and we would be paying wages we don't need to.
879	Detrimental
886	Incredibly inflexible and in many occasions difficult to provide due to the nature of our business operating hours. It would severely limit the ability to hire young workers due to school and other commitments.
891	economic unsustainable reduction in employee numbers
962	Average shifts are between 5-8 hours for casuals and we already employ casuals for a minimum of 3 hours as per award so a 4 hour shift would not have a huge impact on our business.
1101	Forced roster changes. Significant cost increase for no operational benefit.
1140	It would have a huge affect and become quite difficult on us with breaks etc. It would make me decide whether I should keep trading as it is hard enough now. Also some of my staff are at uni and this would not be convenient for them either as they need to fit in with study and lectures.
1208	Would not employ casuals
1216	we would no longer be able to employ young school age staff for after school and Saturday morning shifts
1235	Significant as more paid hours which could result in employing less staff and possible store closure(s) where profit is marginal.
1267	During peaks, we would need to significantly reduce the number of casuals we employed in some parts of the business.
1319	they would have less shifts allocated.
1433	I would seriously consider reducing the number of hours I employ casuals.
1500	it would change the roster for the 7 day period and also change the weekend and public holiday times and increase costs
1759	not good as most employees are unavailable for 4 hours minimum hours
1762	Probably would not employ them as four hours is too long
1819	We would have to do more work ourselves as four hours doesn't give us the

	flexibility we need. Our employees are happy to be flexible don't impose rules that aren't required.
1873	Business would need to amend trading hours Review of structure and rosters No flexibility
1881	Only junior employees who are still studying that complete a shift after school ie 2 to 3 hours minium required.
1901	they are already entitled to minimum of 3, however 4 in some stores would be too much for a cover shift.
1905	change of rostering habits less employees hired
1906	Increase to wages.
1913	LESS WORK FOR THEM
1915	We would not be able to employ after school casuals as we can only fit 3 hours after school. Most other shifts are 4-5 hours.
1917	NEGATIVE. 3 HOURS GIVES ME THE BREAK I NEED AT TIMES. I WOULD EMPLOY THEM LESS DAYS AS IT WOULD NOT BE VIABLE TO HAVE TO PAY THAT EXTRA HOUR.
1955	Close business reduce numbers to increase hours
1963	For the school kids after school - means that we would not be able to employ them. On weekends when our opening hours are only 3.5 hours means that we would probably lessen staff - not paying for time not worked.
1965	We probably wouldn't employ as many
2065	THIS WOULD EFFECT OUR WAGES AS THE THREE HOUR MINIMUM ALLOWS STAFF TO BE UTILISED WITHOUT A GREAT EXPENSE
2202	we would employ less
2203	Increased costs, reduced numbers
2246	negative. may result in paying the employee to fulfill nebulous and unnecessary tasks to meet the minimum obligation when genuine work isn't available. lost revenue.
2284	we would go broke or not employ casuals - as we operate only till 6 pm and 14 out of 26 are school age employees who would have to be paid for hours not work. the other part time employees do not have enough work to do a four hour shift due to the nature of their job (newspaper delivery) We have a contract with HWT to delivery papers by 7am. They arrive at 4 am we would pay staff to do nothing. It should be an arrangement between employer and employee the minimum hours worked.
2286	not good it will mean fewer people employed and small business owners forced to work longer hours to keep wage costs to a minimum
2287	This would have an effect on our base rosters, as lunch cover casual shifts are generally a 3 hour shift.

2407	It wouldn't be worth having casual workers on a sunday if that was the case. We only open for 5 hours sunday.
2426	Cost more wages for certain periods and would look to employ less people
2799	Would affect a few shifts eg Staurday and Sundays. Some shiftscould not extend eg after school shifts as students don't finish school to3.30pm and shop closes at 6 pm
2830	couldn't employ a school kid
2861	This would have a huge effect on the payroll budget. We would have to cut back hours somewhere in order to not exceed the payroll budget. It would greatly effect lunch cover shifts.
2903	Devastating! Sometimes a person is only needed for three hours. Why pay for more when you need less?
3398	This would only affect our junior employees (under the age of 18). We employ some local teenagers to work as assistants after school and these shifts are generally 2-3 hours. It would affect us negatively as we would have to employ older employees who can work a 2-6pm shift rather than a 4-6pm shift - costing more for an easy job eaaily fulfilled by juniors. Again we also see it as important that we c na offer work to local teenagers while still at school to give them experience etc.
3414	A major effect , they probably wouldnt have a job. We need the flexibility for a casuals to work less than 4 hrs per shift sometimes.
3608	It would affect the school kids as we shut at 7pm so only time for a 3 hour shift. Would not affect day staff but if also takes away the flexibility
3626	* increased labour cost * employ fewer casuals * increased workload on existing permanent staff as cost of additional resources too great * operational inefficiency (people engaged when work is not required or same work is completed over greater time frame) * compromised customer service * customer dissatisfaction and potentially less sales (walk out if service not prompt)
3785	We would be required to close 13 outlets that service schools as we would not be able to operate, as a business
3828	Severe. I would have to reassess weekend work and decrease the amount of staff required daily, therefore staff would have to work more hours under more pressure during the bust periods
3946	This would not work for our school age workers who come after school. they would not get any work as we close at 5:30pm and I would not pay for 4 hours.
3957	Would have to restructure
3983	it would diminish flexability when using school age casuals
3996	They can't work these hrs for us necessarily in one shift so they determine how long they work. For example, a secondary student starting work immediately after school (4pm) is not going to work until 8pm.

4143	I would not employ any
4218	We would have to re-arrange our staffing requirements, probably employ fewer persons for longer hours
4497	We would close the doors on Sunday Trade (only open 3 hours) After school Jnr would not get employed (only works 2 hrs after work) Job Loosses are 100% gauranteed
4687	It would be detrimental to some staff
4754	We use junior casuals to fill in the gaps between the full timers and the hours that shopping centre run and the 3 hour minimum is just right , 4 hours wouldn't allow for school students to work during the week at all .
4925	a financial burden would result
4970	Big cost increase
4975	difficult to employ students eg 5pm - 9 pm - they would not finish uni in time to get to work. We roster from 6pm to 9pm.
4989	This may put a strain on our funding should this occur, but at present our only casual employee works more than 3 hourly shifts
5019	REDUCED NUMBER OF EMPLOYEES GREATER DIFFICULTY IN ROSTERING STAFF TO EFFECTIVELY SERVE CUSTOMERS
5021	less staff would be given hours, requirement covered by owners
5067	Not good for our younger kids that can only work 3 hours per shift due to school committments and our opening hours. We ouldn't be able to employ them at all during the week. Only on weekends.
5258	This could prove disadvantageous as we often use a casual 3 hour shift over the lunch cover period.
5336	It would cost me money. One position in particular already requires less than three hours but we have to pay for three!
5462	defeat the need for flexibility in off season. Staff required to work minimum 4 hours would probably lose their jobs , and aim to reinstate next summer season. Especially impacting on regional locations.
5468	Four juniors would lose there jobs. We are only open for 2.5 hours after school. A 4 hour minimum would mean that juniors would cost more than senior staff for that period.

Health Professionals and Support Services Award 2010

1176. The Health Award covers, as the title suggests, health professionals as well as those in administrative and support roles. The award is an industry and occupational award. It does not presently prescribe a minimum engagement period for part-time employees but requires that casual employees be engaged for a minimum of three hours. An exception is provided for cleaners employed in private medical practices, who must be engaged for at least two

hours. The ACTU has proposed a four hour minimum engagement in respect of all casual and part-time employees.

1177. Responses to the joint employer survey by employers covered by this award are set out at **Attachment 20Z**. We once again observe that the majority of respondents have indicated that the claim would have an adverse impact on their business. Some make reference to their funding arrangements in circumstances where the service sought by the client is for a shorter period:

> The Community services program could not operate if it was required to engage a casual on 4 hourly limit, when the client on requires someone for 1-2 hours. The funding received would not cover the shift.[759]

1178. Respondent 3854 speaks of the business' efforts to accommodate the caring responsibilities of their employees, which would be undermined by the proposal:

> Honestly? There would be shifts we'd drop the casuals & make the part-timers work under increased pressure, vs having a casual alongside them sharing the load. We wanted to employ Yr 11/12 students after school, to let the mothers go home & be with their kids after 3.30/4pm, but as the HP&SS Award isn't in line with the Retail Award (i.e. still insists on 3hr minimum shifts) then too bad, the Mums must stay on until late. If this is changed to 4hrs for casuals, it will only worsen the situation. Beggars me why on one hand, as employers, we're continually told to "be flexible" with our employees (which we try to be!) but on the other hand, FWA are constantly reducing our avenues to offer such flexibility???[760]

1179. Respondent 4461 similarly makes reference to the engagement of employees who suffer from a disability, whose needs it seeks to accommodate:

> Waste of money. For recreation workers, once they've done the client drop off to school or sports lessons etc (they do a lot of taxiing), we don't have anything else for them to do - they're not qualified for office or social work. The three hour minimum already has this problem. For admin casuals, it's not so bad, but it means we're looking to either make work for them or find ways of not using them at all - e.g. to cover lunch breaks we would increasingly use other employees to do their work from the reception desk. The three hour minimum period is already problematic - we only really need coverage for 2 hours. We are an EEO employer and some of our casuals don't get work anywhere else (e.g. disabled employees). They are happy with any

[759] Response ID 2000.

[760] Response ID 3854.

work we can give them - the more the better of course. This sort of thing actually works against them rather than for them as it is probably intended to do.[761]

1180. The 24 hours a day/7 days a week nature of some employer's operations would result in significant cost increases, as stated by respondent 4147:

> Costs would increase by approximately 30% as we already pay a 3 hour minimum when often an employee is engaged on a job for under 2 hours. It would make offering the 24/7 on-call service unsustainable without a significant price for clients.[762]

1181. The provision of services such as counselling is necessarily limited in duration. As respondent 4457 points out, to require the engagement of such an employee for four hours would '*substantially affect the profitability of the business*'.

1182. We also note that the repercussions for employers in rural and regional areas is particularly acute:

> It would result in financial hardship for our not for profit organisation, restrict the no of younger staff members that could work for us, increase casul staff numbers and result in us having staff having nothing to do when the peak load time is finished. We are situated in a small rural town and getting staff is hard enough without more restrictions being placed on us. We need flexibility.[763]

1183. These responses provide only a glimpse of the consequences that would be faced by employers if the ACTU's claim were granted. Again the nature of the industry and the work performed by employees engaged in it is such that the imposition of four hour minimums cannot be accommodated by these employers.

Horticulture Award 2010

1184. The Horticulture Award covers work that is, to a very large extent, seasonal. It is trite to observe that various types of produce can only be grown and harvested during specific months in a year. Further, much of the work is performed outdoors and therefore is subject to inclement weather.

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[761] Response ID 4461.

[762] Response ID 4147.

[763] Response ID 5741.

1185. **Attachment 20ZA** to these submissions set out responses to the survey by employers covered by the Horticulture Award. Even a cursory glance reveals the very significant impact that the ACTU's claim would have. The Award does not currently have a minimum engagement or payment provision.

1186. Many employers state that the variation sought would have significant financial implications for their business.[764] One states that they would 'close the doors.'[765] Others state that they would employ less part-time or casual employees, or cease to employ them altogether.[766] For instance, the employer represented by response ID 577 states:

> I would close my business and stop employing 10 staff in the area.[767]

1187. Multiple survey respondents cite the impact of changing weather conditions. The absence of a minimum engagement means that an employer can direct an employee to cease performing work and go home in the event of inclement weather. For instance, at response ID 4566 states:

> we would have to lay off a casual worker. if it rains for half an hour and they cannot work, then we cannot afford to pay them for 4 hours. currently we pay them for 2 hours if this happens.[768]

1188. The ACTU's proposal is for a four hour minimum *engagement* for both full-time and part-time employees. In circumstances such as poor weather conditions or a breakdown in machinery (see response ID 213), it may in fact not be possible to *engage* a part-time or casual employee for four hours if there is no work that can be performed.

1189. The survey responses show that the ACTU's claim would have a severe impact on the horticulture industry. We note that in this context, the ACTU has

[764] See response ID 14, 510, 1160, 2665, 2732, 3405, 3417 and 4961.

[765] Response ID 3372.

[766] See response ID 456, 577, 3137, 3417, and 4566.

[767] Response ID 577.

[768] Response ID 4566. See also response ID 2732 and 4961.

not presented any evidence that is specific to employees covered by the Award.

1190. Further, Ms Colquhoun gave evidence of the circumstances in which the ACTU's proposed change would be impracticable for the Mitolo Group because it would not in fact have any work for the employees to perform for a period of four hours:

- A change in weather conditions can cause harvest to cease for the day. As the business' pivots are located in remote areas, there is no work for the harvest crew to perform thereafter.[769]
- Potatoes are harvested according to sales requirements. If only a small amount of a particular product is required, that work will be completed in less than four hours.[770]
- "There will also be circumstances where there may be a small amount of that pivot that has been left due to [the business] not be able to overload [its] trucks to send them down from that site, so there may (sic) require another small dig to complete that particular pivot".[771]

Hospitality Industry (General) Award 2010

1191. The Hospitality Award presently requires that part-time employees be engaged for a minimum of three hours and that casual employees receive a minimum payment for two hours. Whilst we oppose the ACTU's proposal to increase this to four hours in respect of both forms of employment, for present purposes, we focus on the Joint Employer Survey responses in respect of the casual minimum payment clause.

1192. We refer the Commission to **Attachment 20ZB**, a collation of all responses by employers covered by this award to the relevant survey question. The red shading indicates those responses that foreshadow a negative impact upon

[769] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.
[770] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.
[771] Transcript of proceedings on 16 March 2016 at PN2753.

the employer's enterprise, with regard to the services it provides or employment opportunities in the industry. The proportion of such responses speaks for itself.

Manufacturing and Associated Industries and Occupations Award 2010

1193. We have earlier set out the AMWU's proposal to increase the minimum engagement of part-time employees in the Manufacturing Award to four hours and to limit the facilitative provision such that the minimum engagement period could be reduced no further than three hours in order to accommodate the personal circumstances of the employee.

1194. Below is a sample of responses to the Joint Employer Survey by those employers covered by the Manufacturing Award. They are indicative of the impact that a four hour minimum engagement would have on certain businesses in the manufacturing industry:

Response ID	Response – part-time employment
82	Difficulty in managing available work to align with fixed hours of employment. Incoming work is random at best.
104	I would be paying them sometimes to do nothing - that wouldn't be too smart economically..
120	Currently none, but in the future with Flexibile workplace arrangements especially associated with an aging workforce and parental requirements it will impact our ability to provide flexibility
188	The part-timer is already being paid for 3 hours minimum shift when the work is often finished after 2.5 hours. We would reduce employment to one day a week instead of two days a week.
515	The company would need to pay for time not worked. For example one of our part-time employees has elected to work two hours a day, five days a week because it suits her personal circumstances. If the company had to pay for minimum of 4 hours a day, we would expect four hours work in which case it would be highly likely the employee would resign. We have other part-time employees in similar situations.
516	This will increase our cost and probably forced us to retrenching people
564	Would reduce the reliance of local labour and use overseas contracted labour
947	may decrease flexibility during peaks and troughs in demand, we may not be able to accommodate what the part-time employee wants (ie they don't all want 4 hours)

1195. The survey responses speak of the nature of the potential impact that would be felt by employers who presently engage part-time employees for less than four hours. It also demonstrates that the facilitative provision in the award is being utilised to accommodate the needs of employees who seek to work shifts of less than 3 hours in length (see response ID 515).

1196. It is important to appreciate that whilst the AMWU may characterise the variation sought as a modest one, it will nonetheless adversely impact upon operations in the manufacturing sector that engage part-time employees for a shorter period of time as well as those employees who seek to access a shorter minimum engagement period. It cannot be assumed that the change is one that can necessarily be accommodated or that the increased costs incurred can be absorbed. The AMWU has not led any evidence or attempted to deal with these considerations in their material.

Nurses Award 2010

1197. The Nurses Award is an occupational award. It covers employers in the health industry and their employees covered by the classification structure as well as employers who employ a nurse/midwife, principally engaged in nursing/midwifery duties comprehended by the classifications listed in the classification structure. The Award's coverage is not limited to traditional notion of nurses employed in a hospital. It would also apply to, for instance, nurses engaged in aged care facilities, in-home care, private medical practices, community health care facilities, and so on. In this away, the coverage of the award is very broad.

1198. As the Commission will see in **Attachment 20ZC**, the very vast majority of respondents have identified that the changes sought would have an adverse impact upon their operations. In some cases, the impact is described as severe. The nature and extent of the impact relates to funding arrangements,[772] increased costs to an extent that would undermine the

[772] See for example response ID 682

financial viability of the business,[773] an inability to accommodate employees' desires to work short shifts,[774] a reduction in the number of staff,[775] increased costs and lesser flexibility for clients accessing the employers' services,[776] and so on. The types of difficulties identified are similar to those raised by employers covered by the Aged Care Award.

1199. Ms Neill of CHG also gave evidence in this regard. She states that there are certain instances in which a casual employee may be required to work a shift of two hours duration. For instance, shifts rostered to cover lunch breaks or opening/closing procedures. Similarly, employees engaged at onsite services may be required to work a shift that is less than four hours' duration based on the availability of the work to be performed. If the ACTU's claim to introduce four hour minimum engagement/payment periods were granted, it would require the payment of wages in the absence of work for the employee to undertake and thereby, the business would not be generating any revenue during that time.[777]

1200. The evidence reveals the extent to which the ACTU's claim would result in operational impossibilities and cost increases that would not be able to be absorbed by the employer. The very nature of the work requires the flexibility that is currently afforded by the Award, which does not prescribe a minimum engagement period in respect of part-time employees and contains a two hour minimum payment provision in respect of casual employees. The current arrangements should not be disturbed.

[773] See for example response ID 1581.

[774] See for example response ID 497.

[775] See for example response ID 2126.

[776] See for example response ID 3133.

[777] Witness statement of Kay Neill, dated 24 February 2016 at paragraphs 46 – 47.

Restaurant Industry Award 2010

1201. The Joint Employer Survey responses in respect of the Restaurant Award largely speak for themselves. At present, part-time employees must be engaged for a minimum of three hours and casual employees must be paid for a minimum of four hours.

1202. Restaurants and cafes experience peak periods of demand for food service which often last less than four hours. Given that this is the busiest part of the day for businesses, additional casual and part-time employees are rostered to perform work at this time. To the extent that the work required to be performed is less than four hours in duration, the employer would be obligated under the proposed clauses to engage part-time employees or pay casual employees for a minimum of four hours.

1203. In response to the question regarding part-time employees, the sample of responses below demonstrates the assessment made by employers of the impact that would be felt by their business. This includes a significant new financial burden, reduced rostering flexibility and increasing the number of casual positions in lieu of part-time employees.

Response ID	Response – part-time employment
311	Would reduce my rostering flexibility and blow up costs when business is unexpectedly quiet. Customers are fickle, so I must be able to respond to demand in an immediate and flexible manner.
1126	would have a high impact as our venues mostly need flexible hours should employees need sending home and to save labor.
1856	I would need to change them to casual. I need more flexibility than this
2754	They already are and it's a heavy financial burden and fostering issue
3054	Our costs would go up, our staffing flexibility would go down...our gross profit would be compromised..and this is what is used to hire other people. Do the math.
3058	WOULD HAVE TO REDUCE THE NUMBER OF EMPLOYEES
3137	employ less people
3288	I would have to make them casual. Most shifts are 3 hours and we need that flexibility

3305	We would suffer
3604	Horrendous financial burden
3896	Payroll would increase significantly as we would have to pay for non-productive work and we would reconsider employing on a Part-Time basis
4087	They would go to Casual Staff
4622	We would probably not hire part-time staff but only use casuals.

1204. The response to the question regarding casual employees generated a number of responses that highlight the significant impact of the ACTU's claim. Such employees are presently entitled to a minimum two hour payment. We highlight those responses where the employer assesses that the impact of the claim would be particularly detrimental.

Response ID	Response – casual employment
311	Again, similar as previous answer. Casual employees are hired for flexibility. 4 hours is half of our working day...and customers generally generate demand for 2hr periods. If we had to engage for 4 hrs, they would be idle for 2hrs and would significantly erode our ability to make any profit, which is already difficult as we have to pay exorbitant rates for untrained/non-career staff.
406	It wouldn't work for us due to our business requirements. It would penalise us.
462	We can't afford to guarantee hours
504	It would make harder to manage costs.
1126	higher labour costs as many are only needed for short periods during peak times.
1183	Much harder to sustain casual employees.
1322	There would be times where we would be paying more for an employee to do a shift where we don't require the labour.
1424	This would make it difficult especially during our quieter periods when we might only need someone in for a few hours to cover a busy lunch or to assist with a group checkout
1765	We would restructure our working day abd employ less staff
1856	Catastrophic, in quite times I don't make enough money to employ someone for this amount of time. We may only have a need for 2 hours over a lunch period. We just don't make enough money to cover this.
2390	significant impact on labour oosts; 3 hour shifts cover main food service periods.

2543	it would fail to run appropriately
2783	our usual minimum shift is 4 hours but this could have a negetive effect for events for which we need to employ people for less than that
3054	Same answer as for part-time
3058	WOULD HAVE TO REDUCE NUMBER OF EMLOYEES
3288	I would close the doors most probably. It would mean that I would not be able to run my very small business without flexibility. Also, a lot of my staff do not want four hour shifts as they are studying of have other jobs.
3305	It would make it very hard for us as business owners
3415	Would place enormous burden and lack of flexibility on the business
3431	would not work for us because shop most things are do by us to save money, and most of staff could not work those amounts
3443	cut employees
3454	We would have to close our restaurant Mon-Thur as we couldn't afford to staff each meal service. We only need our casuals for 2-3 hour shifts. We couldn't afford to pay them anymore. We could afford to employ them Fri-Sat.
3457	This would NOT work - on some occasions when it is quiet the business isn't even open for a total of 4 hours. Other occasions there just aren't enough jobs for the employees to complete a 4 hour shift. If we had to employee for a minimum 4 hour engagement it would send our business broke very quickly as we would be paying employees especially in the quieter months to do NOTHING but stand around or send them home.
3498	Minimal effect. Only juniors are engaged for less than 4 hours at any one time. Impact would be less work for juniors (16yrs) and less experience provided to these team members
3604	horrendous financial burden
3702	Would reduce number of employees & close earlier
3896	Payroll would be higher than normal as we would be paying for non-productivity. A quiet night would mean an earlier close and knock off but would seriously affect our cash flow and sustainability as a business.
4087	My Business could not be sustained and would be forced to close, I require the flexibility to have staff between 2 and 6 hours to ensure our business is profitable.
4362	Disastrous
4622	We would not be able to have extra staff on because if we don't need them for 4 hours we have to pay them anyway. We would have to do more work with less people.
4648	Fewer personnel would be employed.
4764	Closeure couldn't afford to trade under those circumstances
5602	It would impact on my staff as fewer people would get roistered hours. There are only so many hours of work to offer staff. Some would miss shifts while others get longer shifts.

Storage Services and Wholesale Award 2010

1205. Clause 11.4(a) of the Storage Award guarantees a casual employee a four hour engagement for every start. Therefore, casual employees covered by the award are not relevant to the ACTU's claim. Part-time employees, however, must presently be rostered for a minimum of three consecutive hours on any shift, pursuant to clause 11.3(e). The ACTU seeks to increase this requirement to four hours.

1206. Whilst the variation here sought is of a smaller increment, the numerous Joint Employer Survey respondents below indicate that it would nonetheless introduce additional employment costs and would have implications on the business's decision as to whether such employees are in fact retained or recruited. Response IDs 1127 and 1264 speak specifically of a part-time employees who presently works less than four hours so as to accommodate their personal circumstances.

Response ID	Response – part-time employees
543	would have considered converting casuals to part-time but if it had to be 4 hours then would definitely reconsider
662	impact on our ability to employ some of them
690	some would leave and would add cost
830	Increased Wage Budgets Store Closures due to profitability Loss of jobs for casual employees
1095	Will reduce staff number Give give remaining staff more hours
1127	For the most part there would be no affect as we don't have split shifts & most shifts are 5 hour minimum. However, one part-timer also studies & fits in her work around her study. Sometimes she only works 3.5 hours - but that's her choice.
1264	Most of our part time employees work a minimum of 4 hours per shift at present. We have one employee who chooses to work 3 hour shifts as it suits her family requirements - we wuold need to review her employment if the Award changed.
3621	Would have to reduce opening hours, or use full-time employees on overtime and dismiss the part-timers.
5373	EXTRA COSTS

1207. The evidence demonstrates more generally that the Commission cannot assume that where the increase sought to a minimum engagement or payment provision is by a relatively smaller amount, that:

- the cost implications would be limited; and
- any increased costs would be able to be absorbed by businesses or increased inflexibilities accommodated.

Social, Community, Home Care and Disability Services Award 2010

1208. The SACS Award does not prescribe a minimum engagement period for part-time employees covered by it. Clause 10.4(c) of the award deals with minimum payments for casual employees in the following manner:

> **(c)** Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:
>
> **(i)** social and community services employees except when undertaking disability services work—3 hours;
>
> **(ii)** home care employees—1 hour; or
>
> **(iii)** all other employees—2 hours.

1209. The tailored approach taken to these minimum payment periods recognises the types of work engaged in by employees covered by this award. We have earlier referred to the performance of home care in the context of the aged care industry. The minimum payment of one hour for home care employees reflects precisely what we have earlier put; that such employees visit a client at their home to provide a certain service which will very often require no more than one hour to complete. The imposition of a four hour minimum payment in respect of such employees, as well as other casual and part-time employees, would be particularly damaging to this industry, and to the clients who the industry provides services to.

1210. We direct the Commission's attention to **Attachment 20ZD** where we have set out all responses provided by employers covered by the SACS Award. As the Commission will recognise, a very significant proportion of employers indicate the severity of the impact that the ACTU's claim would have on their

operations and the services they provide. Numerous respondents also cite their funding arrangements, which would not accommodate a four hour minimum engagement.

Vehicle Manufacturing, Repair, Services and Retail Award 2010

1211. The Vehicle Award does not presently contain a minimum engagement or payment period in respect of casual or part-time employees. We have earlier set out the variations sought by the AMWU – Vehicle Division in this regard.

1212. It is important to note the very broad range of enterprises covered by this award. The Award covers employers whose establishment, plant or undertaking is principally connected or concerned with:

- the selling, distributing, dismantling/wrecking/restoring, recycling, preparing for sale, storage, repairing, maintaining, towing, servicing, and/or parking of motor vehicles of all kinds, including caravans, trailers or the like and equipment or parts or components or accessories thereof including the establishments concerned for such vehicles and the like;
- operations or allied businesses concerned with selling, distributing or supplying running requirements for vehicles (including motor fuels, gas and oils);
- the selling and/or handling and/or retreading and/or storing/distribution and/or fitting and/or repairing of tyres or the like made of any material;
- the repair and servicing of motor vehicles in the establishment of an employer engaged in the motor vehicle rental business;
- the manufacturing, assembling or repairing of carriages, carts, wagons, trucks, motor cars, bodies, motorcycles, railway cars, tram cars, side-cars or other vehicles or parts or components or accessories in wood, metal and/or other materials;
- any operation concerned with roadside/mobile service; or

- driving school instruction.

1213. In circumstances where an award applies to such a broad range of businesses that have varying operational requirements, the Commission should not hasten to introduce minimum engagement periods absent close consideration as to the impact that the change might have on each of the various sectors that fall within the scope of the award. The AMWU – Vehicle Division has made no attempt at dealing with this.

1214. The Joint Employer Survey responses below are indicative of the types of concerns that employers covered by the Award have about the unions; claim for a minimum four hour engagement being introduced in respect of part-time employees:

Response ID	Response – part-time employees
175	make it less likely to employ
547	This would not work for our organization.
922	Significant impact on operation
1374	3HOURS MIN IS HARD ENOUGH. WOULD EMPLOY LESS ON A PARTIME BASIS
1408	Would provide less flexibility for Associate and the organisation if min. 4 hours was required to be worked. Some requests may need to be declined or altered to suit business needs and comply with entitlement.
1873	Would have to transition employees to casual and they would loose entitlements We would also loose some employees as they work in with the hours that they are available. We would also need to look at alternate business situations
2814	We would be likely to stop using them as they remove our flexibility to work with the employee to achieve a mutually beneficial result.

1215. Similarly, the following responses regarding a minimum engagement period for casual employees indicate the adverse impact that it would have:

Response ID	Response – casual employees
657	Staff work more than a four hour shifts but may done less if only one job to do does not happen very often
922	Major impact on the operation. We would most likely lose a large proportion of our current driver list as they are semi retired and do not wish to work full time. Business would be tipped upside down.
1374	NO WORK AVAILABLE RETAIL TOO FICKLE NEVER SURE WHEN YOU WILL BE BUSY100
1873	Business would need to amend trading hours Review of structure and rosters No flexibility
2190	I would reduce the staff level
2697	We employ juniors for cleaning and stacking shelves each afternoon, if they had to be paid 4 hours on each occasion then we would have to look at alternatives.
2814	There are many examples where we would simply get out of certain types of work We cannot compete on a cost basis if we have to pay this as a minimum engagement period.
4818	Most would loose their casual job
4905	We would consider alternatives to employing them.
5772	As a business we prefer to offer our employees a minimum hours per shift, but we still require the flexibility. We have casuals who by choice come in after school and work less than 4 hours. We would be unable to offer them shifts because of store opening hours and their availability if the min was 4 hours. Some stores in trade areas are only open for minimal hours on Sundays ie 3-4 this would have a cost impact.

23.13 SECTION 138 AND THE MODERN AWARDS OBJECTIVE

1216. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

1217. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the

modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

1218. We also note that each award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether four hour minimum engagements/payments should form part of the minimum safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

1219. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its *Preliminary Jurisdictional Issues Decision*:

> [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.[778]

[778] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

1220. The 'necessary' test must be considered with respect to each element of every proposal put by the ACTU and its affiliates. By way of example, the unions must establish that in respect of part-time employees covered by the Mining Award:

- a minimum engagement/payment period is necessary, and if so;
- a minimum engagement of *four hours* is necessary.

1221. The same must then be established in respect of casual employees covered by the Mining Award. Similarly, the AMWU must demonstrate that in respect of part-time employees covered by the Manufacturing Award:

- a minimum engagement period of *four hours* is necessary; and
- it is necessary to amend the existing longstanding facilitative provision that allows the minimum engagement period to be reduced by agreement, to be confined to three hours.

1222. The ACTU and its affiliates have failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the awards that are the subject of the claims before the Commission meet the modern awards objective.

1223. We make one additional observation in relation to the potential impact of the claim. The witness evidence and the Joint Employer Survey demonstrate that employers in those industries relevant to the claims will be adversely impacted by the changes proposed. The nature of that impact varies. In some cases, the respondents have indicated that they would alter the structure of their enterprise such that they would employ fewer part-time or casual employees; or that they would make changes to their rostering patterns. In other cases, the changes would result in increased costs, so much so that numerous employers have suggested that it would undermine the viability of their business. Some employers have also indicated that changes would need to be made to the way in which their services are provided to customers or clients, and to the cost and availability of those services.

1224. We acknowledge that the severity of the consequences felt by a business from the introduction of, or increases to, minimum engagement/payment provisions will vary. There may admittedly be some enterprises that do not experience any change. This could be because the very nature of the work performed or the manner in which the business chooses to operate is such that part-time and casual employees are not rostered to perform work for less than four hours. Alternatively, an enterprise agreement may apply to an employer which already imposes a minimum engagement/payment of four hours or more.

1225. In other instances however, the impact may be catastrophic. The responses to the Joint Employer Survey that we have attached to this submission are indicative of this.

1226. It should also be noted that in some cases, respondents to the survey have indicated that at the time of responding to the relevant question, the claim would not result in any material difference or change. They go on to state that nonetheless, should there later be an alteration to their operations or hiring practices, the clause proposed would have a specified impact. These responses are by no means irrelevant and should not be disregarded. They are indicative of the types of decisions that employers would make with respect to engaging casual and part-time employees as well as the circumstances in which they would roster these employees to work if the relevant award were varied as proposed.

1227. That the variations proposed by the ACTU and its affiliates will not adversely affect all employers in an industry is not the test to be applied in determining whether the variation should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

1228. The employer parties in these proceedings do not bear any onus to demonstrate that the claims will result in increased employment costs or undermine productivity in a certain industry or for employers covered by an award. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

1229. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of individual businesses as well as industry at large.

1230. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision, '*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'*[779] (emphasis added). It is therefore for the proponent, or in this case, the various proponents, to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon individual businesses and industry at large.

[779] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

A fair and relevant minimum safety net

Fairness

1231. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> [109] … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[780]

1232. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[781]

1233. The imposition of additional costs and inflexibilities upon all employers in all industries is both unfair and unjustifiable.

1234. It cannot be assumed that the introduction of a minimum engagement/payment or an increase to the duration of a pre-existing

[780] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[781] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

minimum can be accommodated by an employer. The nature of an employer's operations may be such that the flexibility currently afforded by the relevant award is essential. The work performed by an employee in those industries may be such that there is no 'workaround' that can be implemented by an employer in order to ensure that a part-time or casual employee can be engaged for at least four hours at a time. Numerous examples of this arise in aged care, health, and the social and community care industries, to name just a few.

1235. It cannot be assumed that a consequent increase in costs can be absorbed by an employer. As can be seen from responses to the Joint Employer Survey, many employers have indicated that the financial impact of the claims would seriously undermine the financial viability of their business. Others suggest that the increased costs would be passed on to their customers or clients, although an employer's capacity to do this will necessarily be limited by market forces and competition.

1236. Many of the Joint Employer Survey responses indicate that employees work shifts that are less than four hours in length because they so choose. This is either due to their caring responsibilities, their educational commitments or otherwise. Certain responses refer to the employment of older workers or those with a disability, who cannot work for four hours at a time. The imposition of a minimum four hour engagement is unfair for such employees.

1237. With respect to those awards that the ACTU seeks to vary by deleting a facilitative provision, as well as the AMWU's claims to limit the scope of pre-existing facilitative provisions in certain awards, a similar observation can be made.

1238. In addition to the unfairness to employers and employees, it will obviously be patently unfair to aged, ill and disabled clients to lose access to in-home care services, or be forced to pay prohibitive prices, or be forced to move into a nursing home earlier than would otherwise be the case, as a result of the unions' ill-considered claims.

Relevance

1239. Reference is made in s.134(1) to the provision of a *relevant* safety net by an award. Whilst this is often taken to mean that the safety net must be relevant in a temporal sense, in our view it also requires that the safety net is relevant to the needs of the industry in which that safety net applies. This warrants consideration of factors pertaining to the nature of the work performed, the consequential needs of employers in the industry, economic factors facing the industry and so on. This is precisely why the adoption of a one-size-fits-all approach as proposed by the unions, without due consideration being given to the specific industry or sector in which the proposed clause would apply, is inappropriate.

Relative living standards and the needs of the low paid (s.134(1)(a))

1240. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> [310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> [311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[782]

1241. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> [362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[783]

[782] [2015] FWCFB 3500 at [310] – [311].

[783] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

1242. It is sufficient to note for present purposes that the ACTU has not undertaken the analysis required by s.134(1)(a).

1243. The ACTU submits that the proposed variation will ensure that 'low paid workers' earnings per engagement are more viable after the costs of attending work are accounted for'.[784] We have dealt with the invalidity of this assertion earlier in our submission and need not repeat our contentions here.

1244. The ACTU also submits that the variations will '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'.[785] The ACTU has neither established that 'short shifts' cause 'poor quality work traps' nor has it explained how the imposition of a four hour minimum would remedy the issues that it complains of.

The need to encourage collective bargaining (s.134(1)(b))

1245. We submit that the absence of a four hour minimum engagement/payment will leave greater room for bargaining and may incentivise employers and employees to negotiate terms and conditions that are specific to their conditions of employment. We note that the ACTU does not seek to rely on s.134(1)(b).

1246. The significance of this element of the modern awards objective is reinforced by s.3(f) of the FW Act, which emphasises the importance of enterprise bargaining.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

1247. Neither the ACTU nor its affiliates have called evidence in support of the proposition that longer minimum engagements/payments will increase workforce participation. They assert that the participation of women and those

[784] See ACTU submission dated 19 October 2015 at paragraph 116.

[785] See ACTU submission dated 19 October 2015 at paragraph 117.

with caring responsibilities will increase however this is certainly not borne out in the evidence from the Joint Employer Survey.

1248. The survey responses rather suggest that a four hour minimum would lead to situations in which an employer is unable to accommodate an employee's desire to work a shorter shift. An obvious example arises in respect of school aged children covered by the Fast Food Award and the Retail Award, as we have earlier set out. The responses there suggest that the ACTU's claim would result in a significant number of school students being excluded from employment opportunities in those industries. It is important to appreciate such openings are often a pathway for young people into the workforce and enable them to develop essential transferrable skills. The ACTU's claims are entirely at odds with promoting the participation of young persons in the workforce.

1249. The Commission's Issues Paper relevantly asks whether there should be a shorter minimum period of engagement for school students engaged as casual employees. We respond to this question in a similar vein to the response we earlier provided regarding the introduction of facilitative provisions. Whilst an exception for school students would better enable an employer's ability to engage such employees, we do not consider that it would serve to alleviate the various other implications of the proposed claims.

1250. Examples can also be found in the survey responses we have extracted of women who seek to work shorter shifts to accommodate their caring responsibilities. It cannot be assumed that, as per the ACTU's assertions, all female employees seek longer minimum shifts and that this would best serve the goal of encouraging their participation in the workforce. The introduction of such inflexibility would be against the interests of employees, employees and the broader community.

1251. It should also be noted that many of the survey responses we have extracted indicate that employers would restructure their workforce such that they no longer engage part-time or casual employees, or would engage less of them.

This further demonstrates that the ACTU's claim undermines this element of the modern awards objective.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

1252. As the responses to the Joint Employer Survey establish, the variations sought by the ACTU, AMWU and AMWU – Vehicle Division quite clearly undermine the need to promote flexible work practices and the efficient and effective performance of work. They remove the ability of an employer to tailor the working hours of their employees to the work that needs to be performed.

1253. In certain cases, the employer may attempt to re-arrange how and when work is performed to the extent that this is possible, however it may eventuate in a less than optimal result that is inefficient and ineffective. For example, the Commission will identify that certain survey responses indicate that the relevant employer would choose not to roster a part-time or casual employee to work a particular shift and would instead require another employee to undertake the tasks. This could be in circumstances where the employee who would be required to perform the tasks is not as skilled as the casual or part-time employee who would have performed the task, thereby leading to an inefficient outcome.

1254. The notion of flexibility connotes an ability to readily modify work practices in response to the various factors that influence the manner in which a business operates. These factors include clients' requirements, fluctuations in demand, seasonal fluctuations, climatic conditions, market forces, regulatory changes, increased competition, changes to an employer's workforce caused by employee absences, and so on. An ability to engage part-time and casual employees is an important means through which a business is able to facilitate or respond to each of these matters. It simultaneously allows employers to accommodate the personal circumstances of employees.

The need to provide additional remuneration (s.134(1)(da))

1255. In response to the ACTU's contentions in respect of s.134(1)(da), we refer above to that part of our submissions where we have dealt with the interaction between the proposed minimum engagement/payment provisions and pre-existing award clauses that apply to work performed on a weekend or public holiday.

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e))

1256. The ACTU submits that:

> 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.[786]

1257. In our view, s.134(1)(e) cannot be relied upon in support of the ACTU's contention.

1258. The notion of "equal remuneration for work of equal or comparable value" is defined by the Act. The phrase appears in s.12 of the Act (the dictionary), with a reference to s.302(2). Section 302 falls within Division 2 of Part 2-7 (Equal Remuneration) of the Act. Section 302(2) states:

> Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.

1259. Consideration given to whether an award provides equal remuneration for work of equal or comparable value requires an assessment of whether men and women workers receive equal remuneration for work of equal or comparable value. The comparison to be made under s.134(1)(e) is by reference to gender, not, for example, types of employment or shift length.

[786] See ACTU's submission dated 19 October 2015 at paragraph 130.

The likely impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

1260. The claims, if granted, will self-evidently impose additional employment costs on employers. In many cases, it would result in an employer remunerating an employee in circumstances even though the employee is not in fact required to perform work. This is not a matter than can be trivialised. As can be seen from the Joint Employer Survey results, the impact in certain industries would be devastating.

1261. It must also be remembered that this may not be an expense that arises with respect to just one or two employees. The entire operations of a business may be structured around the ability to engage part-time and casual employees for shorter periods at a time. The significant financial impacts upon employers, small and medium sized business,[787] cannot be ignored.

1262. We have earlier dealt with the inflexibility that would result from the proposed clauses. This inflexibility would undermine the productivity of a business.

1263. The adverse impacts of the proposed provisions on businesses mandate that the claims of the ACTU, AMWU and AMWU – Vehicle Division be rejected.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

1264. The need to maintain a stable modern award system runs contrary to the unions' claim. This element of s.134(1) must be seen in light of the absence of a probative evidentiary case before the Commission in these proceedings.

1265. The unions have failed to mount a case that can or should move the Commission to adopt its proposals. The need to maintain a stable award system tells against granting the unions' claims in the complete absence of a proper and convincing evidentiary case.

[787] See s.3(g) of the Act.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

1266. To the extent that the insertion of the provisions proposed is inconsistent with ss.134(1)(b), (c), (d), (f) and (g), the unions' claims will adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy**.** This would arise, for instance, as a result of reduced workforce participation levels, and through the termination of a large number of casual employees, as has been foreshadowed by respondents to the Joint Employer Survey.

23.14 CONCLUSION

1267. The final question contained in the Commission's Issues Paper is in the following terms:

> Should a casual minimum engagement period be introduced in awards which do not currently have one (such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*) or where the current minimum period is only nominal (such as for home care employees under the *Social, Community, Home Care and Disability Services Industry Award 2010*)? If so, what should the length of the minimum period be?

1268. For all of the reasons stated above, the unions' have not made out a case for introducing new minimum engagement/payment periods in those awards that do not contain one, or to increase pre-existing minimum engagement/payment periods (whether 'nominal' in length or otherwise) for casual or part-time employees. No award variations in this regard are warranted. The unions' claims should be dismissed.

24. THE PROHIBITION ON ENGAGING AND RE-ENGAGING AN EMPLOYEE TO AVOID ANY AWARD OBLIGATIONS

The Claim

1269. The ACTU, AMWU and AMWU – Vehicle Division are seeking the insertion of the following new term in 109 modern awards:[788]

> An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or outsourced, to avoid any obligation under this award.

1270. The proposed clause purports to deal with circumstances in which an employee is engaged, that engagement is brought to an end, and the employee is subsequently re-engaged. The clause requires that an employee must not be engaged and then re-engaged for the purposes of avoiding any obligations under the award that applies to the employee. In so doing, the clause specifically states that an employee must not be so re-engaged as:

- A casual employee;
- A fixed term or task employee; or
- An independent contractor.

1271. We note that this list is not intended to be exhaustive.

1272. The clause also makes reference to outsourcing, although its intended meaning is somewhat unclear. It states that 'an employee must not be engaged and re-engaged … or outsourced, to avoid any obligation under this award'. We assume that the purpose of the clause is to mandate against the outsourcing of *work performed* by a particular employee, or the responsibilities of an employee, for the purposes of avoiding an award obligation. The clause does not, however, make this clear.

[788] See Attachment B to the ACTU's submissions dated 19 October 2015.

Award Clauses on which the Proposed Clause Appears to be Based

1273. It appears that the clause which the unions are proposing may have had its genesis in the 1999 award simplification decision of Senior Deputy President Marsh in relation to the *Graphic Arts – General – Interim Award 1995* (**Graphic Arts Award 1995**).[789] The relevant clause in the Graphic Arts Award 1995 is reproduced in Attachment A to the *Metal Industry Casual Employment Decision*.[790] The clause stated:

> 4.1.4(c)(iv) An employee must not be engaged and re-engaged as a casual under 4.1.4(c) to avoid any obligation under this award.

1274. The Full Bench inserted the following similar provision into the Metals Award 1998 as part of the casual conversion clause inserted as a result of the *Metal Industry Casual Employment Case*:

> 4.2.3(e) An employee must not be engaged and re-engaged to avoid any obligation under this Award.

1275. During the Award Modernisation Process, the following provision was inserted into the Manufacturing Award and Graphic Arts Award at clause 14.5 and 12.6 respectively.

1276. It appears that there has been no detailed consideration given since modern awards were made, as to whether or not these clauses meet the requirements of s.136 and 139 of the Act.

Jurisdictional Considerations

1277. Before turning to the unions' justification for the proposed clause (to the extent that they have in fact provided any), we first set out our primary contention; that the Commission does not have power to include the proposed clause in a modern award and hence the provisions in the Manufacturing Award and Graphic Arts Award are of no effect as a result of s.137 of the Act.

[789] Print R7898 and Print S1785.

[790] Print T4991.

1278. The ACTU and unions have made no attempt at addressing the threshold issue of whether the proposed provision is one that may be included in an award pursuant to s.136(1). Nonetheless, we propose to briefly set out the reasons for our contention that it does not permit the inclusion of the clause sought.

1279. A modern award must only include terms that are permitted or required by those parts of the Act that have been identified at s.136(1). We need not deal with ss.136(1)(b) – (d) in any detail. The proposed clause is self-evidently not one that:

- Must be included in a modern award by virtue of ss.143 – 149D;
- Deals with the interaction between the NES and a modern award pursuant to s.55; or
- Is permitted or required by the NES.

1280. For completeness, we acknowledge that the provision is not one that cannot be included by virtue of s.136(2).

1281. Section 136(1)(a) permits the inclusion of a term that is permitted by Subdivision B of Division 3, Part 2-3 of the Act. Section 139(1) forms part of Subdivision B. It states that a modern award may include terms that are 'about' any of the matters listed thereunder. It is our submission that the proposed clause is not 'about' any of the matters listed at s.139(1) and therefore, cannot be included in a modern award. In so doing, we refer to the relevant authorities we have earlier cited, which are instructive as to the proper construction of s.139(1). Importantly, they establish that each of the matters referred to at s.139(1) should be given their ordinary meaning in accordance with their general usage in the field of industrial relations.

1282. It is important to first consider and characterise the proposed clause, for the purposes of determining what it is 'about'. This requires an assessment of the subject matter of the term sought; a matter that the ACTU and unions have not attended to.

1283. The proposed clause is preventative by its design. It creates an award derived prohibition on the engagement and re-engagement of an employee for the purposes of avoiding any award obligations. In this way, it purports to protect employees from an employment practice that might be adopted by an employer in order to subvert an obligation imposed upon it by the award. In essence, it is a clause about the potential re-engagement of an employee, whether they be so re-engaged as an employee or independent contractor, and it is a clause about the outsourcing of work.

1284. It is therefore readily apparent that the provision is not one that is 'about' any of the matters listed s.139(1):

- Section 139(1)(a) – minimum wages;
- Section 139(1)(b) – type of employment;
- Section 139(1)(c) – arrangements for when work is performed;
- Section 139(1)(d) – overtime rates;
- Section 139(1)(e) – penalty rates;
- Section 139(1)(f) – annualised wage arrangements;
- Section 139(1)(g) – allowances;
- Section 139(1)(h) – leave, leave loadings and arrangements for taking leave;
- Section 139(1)(i) – superannuation; or
- Section 139(1)(j) – procedures for consultation, representation and dispute settlement.

1285. An award may also include a term pursuant to s.142(1) of the Act, if it is:

- Incidental to a term that is permitted or required to be in the modern award; and
- Essential for the purpose of making a particular term operate in a practical way.

1286. Earlier in this submission, we have set out authority for the proposition that s.142(1) imposes a significant hurdle. Even if it were determined that the proposed clause is 'incidental' to a term that is permitted or required to be in an award (a matter that we do not concede), there is neither any suggestion from the unions, nor any evidence that might establish that the proposed term is essential for the purpose of ensuring that another permitted award term operate in a practical way. There is a complete absence of material before the Commission that would enable it to conclude that, as a factual proposition, a permitted award term is not operating in a practical way and that the proposed clause is "absolutely indispensable or necessary"[791] in order to remedy this. As a result, s.142(1) does not provide a basis upon which the clause sought can be included in a modern award.

1287. For the aforementioned reasons, the claim made by the ACTU, AMWU and AMWU – Vehicle Division should be dismissed on the basis that the Commission does not have power to include the clause sought.

1288. Should the Commission conclude that it does not have jurisdiction to insert the proposed clause, consideration of whether a merit case has been made out for its inclusion is not warranted. In the event that the Full Bench does not, however, make such a ruling, we contend that the clause is not one that is 'necessary' as required by s.138. We here proceed to develop this contention further.

[791] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [101].

The Unions' Justification for the Proposed Clause

1289. Neither the ACTU AMWU nor the AMWU – Vehicle Division have provided any justification for why the proposed clause is necessary to achieve the modern awards objective. Indeed neither have made any arguments in support of the proposal. There is a clear absence of any submissions from the proponents of the variation as to the basis (or bases) upon which the proposed provision is sought. Further, no reference has been made to the modern awards objective or s.138 of the Act.

1290. In order to establish that the proposed clause is necessary, it is incumbent upon the unions to establish that employers covered by the relevant modern awards engage and re-engage employees to avoid award obligations. This is a factual proposition that must be established by way of evidence.

1291. We have not identified any evidence that has been filed by the unions that supports such a contention. Indeed it is not clear to us whether the unions seek to make that assertion.

1292. In the absence of any evidence that the actions to which the proposed clause is directed is in fact taken by employers, the Commission cannot conclude that the provision is necessary.

Other Protections

1293. We turn briefly to consider whether under the current legislative regime, an employee would have access to any recourse should they be engaged and re-engaged to avoid an award obligation. That is, whether in the absence of the proposed clause, an employee is otherwise protected against the mischief that the award provision is directed.

1294. Section 340(1) of the Act requires that a person must not take adverse action against another person because the other person has a workplace right or to prevent the exercise of a workplace right by the other person. This is a civil remedy provision.

1295. A person has a workplace right if, relevantly, the person 'is entitled to the benefit of … a workplace instrument'.[792] Section 12 defines a 'workplace instrument' as an instrument that is 'made under, or recognised by, a workplace law' and 'concerns the relationships between employers and employees'. A 'workplace law' includes the Act.[793] Accordingly, a modern award is a 'workplace instrument'.

1296. Section 342(1) sets out the circumstances in which an employer takes 'adverse action' against an employee:

- If the employer dismisses the employee;
- If the employer injures the employee in his or her employment;
- If the employer alters the position of the employee to the employee's prejudice; or
- If the employer discriminates between the employee and other employees of the employer.

1297. It should be noted that the proposed clause applies where an employer engages an employee and re-engages that employee. The re-engagement of an employee necessarily requires a termination of the first engagement or employment relationship. We also note that the proposed clause is directed towards circumstances in which such a re-engagement occurs 'to avoid any obligation' under the relevant award. The corollary of an award obligation imposed on an employer is an employee's entitlement to the benefit of a modern award.

1298. If an employer terminates an employee to avoid an award obligation, irrespective of whether that employee is re-engaged, the employee is protected by s.340(1). This is because, the termination of an employee in such circumstances amounts to adverse action by an employer against an

[792] See s.341(1)(a).

[793] See s.12.

employee because the employee is entitled to the benefit of a modern award, being a workplace instrument as defined by the Act. Such an employee is eligible to make an application to the Commission to deal with a dispute pursuant to s.365(1) of the Act.

1299. In the alternative, should an argument arise that the re-engagement of an employee does not necessarily follow the dismissal of an employee, the employee may nonetheless be protected if the employer has:

- Injured the employee in his or her employment;
- Altered the position of the employee to the employee's prejudice; or
- Discriminated between the employee and other employees of the employer.

1300. In such circumstances, the employee may file an application to deal with a dispute pursuant to s.372 of the Act.

1301. In circumstances where an employee's employment is terminated, and their dismissal was 'harsh, unjust or unreasonable'[794], the employee may also be protected from unfair dismissal and accordingly file an application for an unfair dismissal remedy pursuant to s.394.

1302. It would appear to us that the legislative regime already protects an employee from being engaged and re-engaged to avoid an award obligation. The provisions cited above provide such employees with an ability to file an application to deal with a dispute and/or to seek a remedy should this occur.

1303. Section 138 only permits the inclusion of an award term where such a term is *necessary* to achieve the modern awards objective; that being to ensure that the award provides a fair and relevant minimum safety net of terms and conditions. The insertion of an award provision that provides for a protection that is already provided for in the Act along with a mechanism by which an

[794] See s.385(b).

employee may take action, cannot be considered necessary. Such duplication is unwarranted and does not overcome the threshold set by s.138.

Conclusion

1304. The proposed clause is not one that can properly be included in a modern award. The Act does not grant the Commission the power to include it for the reasons we have earlier set out. Further, the unions have not sought to advance any arguments or evidence that might establish that the provision is necessary in the sense contemplated by s.138. The claim should therefore be dismissed.

25. THE PROHIBITION ON INCREASING THE NUMBER OF CASUAL OR PART-TIME EMPLOYEES

The Claim

1305. The ACTU seeks the insertion of the following provision in some 109 modern awards[795]:

> An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours.

1306. The AMWU and the AMWU – Vehicle Division seek the insertion of similar clauses in the Manufacturing Award, Graphic Arts Award, FBT Award and the Vehicle Award.

1307. The Commission's Issues Paper poses the following question in respect of the proposed clause, which goes to the manner in which the obligation imposed by it would be discharged:

> … what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?

1308. The ACTU appears to be of the view that its proposed clause requires nothing more than the communication of the availability of additional hours of work to current casual and part-time employees, via the usual means of communication that it utilises in its business.[796]

1309. The AMWU takes a slightly different view:

> The employer would be said to have discharged their obligation under this clause if they communicated with relevant employees … via their usual method … asking them if they are available to perform additional hours for the duration that is required (an extended absence, a peak in production, a summer trading period, ongoing work, etc).

[795] See Attachment B to the ACTU submission dated 19 October 2015.

[796] Final written submissions for the ACTU dated 20 June 2016 at paragraphs 142 and ACTU responses to issues paper dated 20 June 2016 at paragraph 52.

> Once the employees were given a reasonable time to respond (which would depend on the time frame in which a replacement needs to be found) the employer can assign the hours to the staff that volunteered or attempt to find a new employee if they are unable to fill the additional hours with existing staff.[797]

1310. It is curious that the ACTU and its affiliates' understanding of a provision that they have proposed does not accord with the text of the provision itself. Nor have the unions made so much as an attempt to consider the practical consequences that would flow from the implementation of the clause.

1311. The clause effectively places a limitation on an employer's ability to engage new casual or part-time employees. The proposed clause would require that the employer first allow an existing casual or part-time employee 'engaged on similar work', whose 'normal working hours' are less than 38 per week, an opportunity to increase their 'normal working hours'. It is only after this exercise has been undertaken by the employer that additional casual or part-time employees can be engaged.

1312. It would appear to us that the provision requires that the following steps be undertaken by an employer:

- Identify the specific work that will be performed by the new casual or part-time employee that it seeks to employ;
- Identify existing casual or part-time employees that are performing 'similar work' (noting the difficulties associated with making this assessment, as explained below);
- Ascertain which of those employees' 'normal working hours' are less than 38; a matter to which we return later in this submission;
- Communicate the availability of additional hours of work to such existing casual or part-time employees (we later deal with the difficulties associated with selecting existing employees for this purpose);

[797] AMWU's response to FWC issues paper dated 14 June 2016 at paragraphs 31.5 – 31.6.

- Allow time for the relevant employees to respond to the employer;
- Consider the responses received and assess which if any of those employees requests can be accommodated;
- Advise the relevant employees of the outcome;
- Deal with employee queries or concerns regarding the outcome, as well as dealing with any disputes that might arise (see section below regarding the dispute settlement procedure);
- Implement changes as necessary to working arrangements or rosters; and
- Make an assessment as to whether the need for an additional part-time or casual employee has been alleviated and if not, undertake the entire process once again given that the clause is cast so as to impose the relevant obligation in each instance that an employer seeks to engage a new casual or part-time employee.

1313. The ACTU and AMWU's abbreviated explanation as to how the clause would in fact operate disregards the practical reality of that which it has proposed. The process that would necessarily need to be undertaken is self-evidently a lengthy, resource intensive and cumbersome one. The unions seek to gloss over the administrative burden that would in fact be imposed by the provision, which we address in greater detail below.

The Unions' Justification for the Proposed Clause

1314. The unions' case appears to have been brought on the basis that some of its constituents who are engaged on a part-time or casual basis seek to work additional hours. Reference is also made to data that allegedly establishes the "underemployment" of casual and part-time employees.[798]

[798] Final written submissions for the ACTU dated 20 June 2016 at paragraph 139. AMWU's response to FWC issues paper dated 14 June 2016 at paragraphs 31.3 – 31.4.

Casual or Part-Time Employees

1315. Whilst the proposed clause is not clear in its terms, it appears that if an employer seeks to engage a new casual employee, it must first allow pre-existing casual *and part-time employees* on similar work an opportunity to increase their hours. That is, the obligation in these circumstances is not confined to offering additional hours to pre-existing *casual* employees. Similarly, if an employer seeks to employ an additional part-time employee, additional hours must be offered to pre-existing part-time *and* casual employees.

1316. Casual and part-time employees are not appropriate substitutes for one another. That is to say, the purpose for which an employer may seek to engage a new casual employee cannot necessarily be fulfilled by allowing a part-time employee to work additional hours, and vice versa.

1317. Many employers require access to a pool of casual employees who are mobilised primarily in circumstances where an unexpected need arises such as a sudden increase in production or due to the absence of permanent staff (e.g. personal/carer's leave). In order to ensure that an employer is able to meet these needs, the business may have made an assessment that at any given time, they require a certain number of casual employees 'on their books'.

1318. In the event that an employer needs to replenish its pool of casual employees by engaging an additional such employee, the proposed clause would require that it first offer additional hours to existing casual employees *and* part-time employees engaged on similar work. In the circumstances that we have described above, the operational needs of the business cannot necessarily be fulfilled by an existing part-time employee. Indeed the very purpose of engaging a new casual employee might be to work alongside the existing

part-time employee or to temporarily replace the part-time employee should the need arise. We refer to the evidence of Mr Norman in this regard.[799]

1319. Part-time employment does not necessarily afford the employer with the same flexibility as casual employment, as part-time employees typically work a set number of hours in accordance with the relevant award clauses. Hours of work performed in addition to those that are pre-determined may constitute overtime and therefore, a part-time employee cannot be compelled to work them.

1320. Similar issues arise when considering whether additional hours of work performed by a casual employee can provide a business with an appropriate substitute to engaging a new part-time employee. Self-evidently, this is not the case. If an employer requires that an employee perform work for it on a regular basis at certain fixed times, a pre-existing casual employee cannot be relied upon for this purpose.

Similar Work

1321. The obligation to offer additional hours applies to those pre-existing employees who are engaged on 'similar work'. The term 'similar work' has not been defined or described by the ACTU or its affiliates. The application of the clause is therefore entirely unclear. For instance:

- Is the application of the clause limited to part-time and casual employees who perform work under the same classification as that which will be performed by the new employee that the employer intends to engage?

- Does the notion of 'similar work' require an assessment of the overall skills and training required to perform a particular role? Or does it relate more broadly to the type of work performed in a specific part of the business? Mr Norman gave evidence that employees engaged to perform 'similar work' may nonetheless require a very specific set of

[799] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 62 – 64.

skills in order to perform their role:

> The work performed by Viterra's employees requires a specific skills set. An employee engaged on "similar work" may not necessarily possess the skills set, knowledge or experience needed to perform the additional work. If Viterra nonetheless had to offer the additional work to such existing employees, this would undermine our productivity.[800]

- Does the notion of 'similar work' also encompass consideration as to the level of responsibility or performance requirements?

- Does the clause take into account the location at which the work is performed? If an employer engaged employees who perform 'similar work' at a factory in Victoria and New South Wales, is the employer required to offer additional hours to its employees in Victoria before engaging a new employee in New South Wales? Is the answer to this question any different if the two factories are located closer to one another? If so, how close?

- How is an assessment of 'similar work' made where an employer requires a new part-time or casual employee to perform a range of different tasks on an as-needed basis?

- In the content of labour hire, does the 'similar work' apply only to the work of one client or all current clients?

1322. The proposed clause does not give consideration to any of the above complexities and self-evidently is not 'simple and easy to understand'. The nature of the obligation imposed on an employer is ambiguous and likely to give rise to disputation. On this basis alone, the claim should not be granted.

Normal Working Hours

1323. The proposed provision twice makes reference to the 'normal working hours' of an existing part-time or casual employee. This element of the clause is also confusing. The very nature of casual employment is such that the hours of work may vary from week to week. In the context of casual employees, a

[800] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 61.

reference to 'normal working hours' is therefore unclear and in fact contrary to the basis upon which casual employees are engaged. An assessment as to a casual employee's 'normal working hours' where there is little if any regularity to the number of hours worked, cannot be made.

1324. It is also relevant to note that the proposed clause does not draw a distinction between ordinary hours and overtime. That is to say, if a part-time employee's ordinary hours of work are less than 38 hours per week, however the employee also works overtime, for instance, outside the spread of hours stipulated by the relevant award, the obligation to offer additional hours to that employee nonetheless arises. Overtime hours however, may only be worked as and when the need arises; they may not be worked regularly. If they are nonetheless to be taken into account in assessing an employee's 'normal working hours', this only serves to further complicate the task.

Selecting Existing Employees

1325. We observe firstly that the terms in which the obligation proposed is cast appear to require that the opportunity to increase their 'normal working hours' need only be offered to a particular pre-existing employee of the employer's choosing, rather than an obligation to consult generally with all such employees engaged on 'similar work'.

1326. It is concerning, however, that this is not consistent with the submissions of the AMWU and ACTU, which suggest that the offer to work additional hours must be communicated to all employees who would be so eligible. Whilst we do not consider that the proposed clause in fact reflects their understanding of the obligation, we proceed on the basis that the intention is to require a consideration of all existing employees that perform 'similar work' and whose 'normal working hours' are less than 38.

1327. Consideration must be given to the requirement that the proposed clause would impose on businesses which engage large numbers of casual and part-time employees (for example, a large labour hire company may have more

than 10,000 casuals engaged at any point in time or, as per the Commission's Issues Paper, an employer such as McDonald's).

1328. If an employer is required to offer additional hours to all pre-existing part-time and casual employees engaged on 'similar work', and several of those employees indicate that they seek to increase their hours, the basis upon which an employer is to determine which employee or employees will have their hours increased is not clear. It is trite to observe that this is likely to give rise to disputation between an employer and its employees.

The Dispute Settlement Procedure

1329. The insertion of the proposed clause has implications for the scope of the dispute settlement procedure that is present in every award. It is triggered 'in the event of a dispute about a matter under [the relevant] award'. Where such a dispute arises, the dispute resolution clause states that:

- In the first instance, the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor.

- If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner between the employee or employees concerned and more senior levels of management as appropriate.

- If the dispute cannot be resolved at the workplace and the above steps have been taken, a party to the dispute may refer it to the Commission. The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

- Where the matter remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

1330. The dispute settlement procedure would apply to a dispute about a matter arising from the model clause. For instance, if an employer did not provide pre-existing employees with an opportunity to increase their 'normal working hours' prior to engaging a new casual or part-time employee, the dispute settlement procedure would apply. Moreover, if an employer did engage in the process required by the clause but subsequently declined to increase the employee's hours on the basis that the clause does not expressly require that it do so, the dispute settlement procedure would also apply to these circumstances.

1331. We are concerned that in this way, an employee may be given a formal avenue through which they can seek an increase to their 'normal working hours'. That is, an employee may argue that the proposed clause creates an obligation on the employer to grant the employee additional hours of work if requested, without any caveat. Similarly, where multiple employees seek to increase their 'normal working hours', but the employer is only able to increase the 'normal working hours' of one of those employees, the dispute settlement procedure would also apply to a contest in this regard.

1332. The agitation of disputes by employees and their union representatives would appear a likely consequence of inserting the proposed clause across the award system.

Employer Discretion

1333. The clause does not expressly grant an employer any discretion. It compels an employer to offer additional hours to existing part-time or casual employees in the circumstances prescribed. If an employee or multiple employees indicate that they seek to increase their hours, it is not clear whether the employer *must* acquiesce or whether the employer is able to refuse.

1334. Whilst the obligation created by the proposed clause appears to extend only to the employer offering its employees an opportunity to increase their hours, its terms cast some doubt over the extent to which an employer may, once

having engaged in that process, nonetheless decline to increase the 'normal working hours' of any such employees due to the operational needs of the business or otherwise.

1335. To the extent that the proposed provision is intended to compel the employer to increase the 'normal working hours' of an employee and thereby, prohibit an employer from increasing the number of casual or part-time employees it engages, this is a serious encroachment upon an employer's prerogative without any regard being given to the needs of the business or the purpose for which the employer seeks to increase its headcount. The model clause removes an employer's ability to structure its workforce in a very significant way. The ACTU and its affiliates have not offered any justification for why this might be appropriate or necessary.

Operational Requirements

1336. At its core, the proposed clause fails to recognise that there are legitimate reasons why an employer needs to add employees to its overall headcount. These are issues that we have also canvassed in the context of the other elements of the ACTU and AMWU common claims, for instance:

- As we have earlier stated, an employer may need access to a pool of casual employees who can be required to work on an ad hoc basis from time to time, as and when the need arises, often at short notice.

- An employer may seek to retain a pool of casuals who ensure that the business is able to meet the ebbs and flows in demand that cannot otherwise be satisfied by its existing employees, even if they were to work additional hours.

- An employer may require additional employees to enable it to service more than one client at a time in circumstances where the employer has little if any control over when those services are to be provided.

- There may be circumstances in which an employer requires that a certain amount of work be performed within a set timeframe. This can

only be achieved by additional personnel working alongside existing employees. The performance of additional hours of work by existing employees will not achieve the outcome required, as the work will necessarily span over a greater number of hours.

- A particular casual or part-time employee that the business wishes to recruit may have skills or other attributes that are needed by the business, even though the work to be carried out is broadly similar to that carried out by one or more existing casual or part-time employees.

1337. The proposed clause stymies the extent to which an employer is able to satisfy the operational requirements of the business. It removes an employer's prerogative to manage and structure its workforce as is necessary to meet the needs of the business. The effect of the clause would be to stifle an employer's ability to increase the number of part-time and casual employee it engages at the whim of existing employees who seek to work additional hours, irrespective of whether the performance of those additional hours would in fact fulfil the very purpose for which the employer requires additional employees.

The Regulatory Burden

1338. The proposed clause creates an obligation that is both time consuming and costly for an employer, particularly in circumstances in which it engages a large number of casual and part-time employees, which is by no means uncommon. Labour hire providers and companies such as McDonald's provide pertinent examples.

1339. We urge the Commission to turn its mind to the time and cost that will be incurred by an employer in undertaking the process we have earlier outlined. In circumstances where an employer needs an additional casual or part-time employee as a matter of urgency the requirement is obviously completely unworkable. The above process would significantly delay the recruitment of a new employee.

1340. The ACTU and its affiliates have not sought to grapple with whether the proposed clause would also trigger the obligation to consult under the model consultation clause about changes to rosters or hours of work (see for instance clause 9.2 of the Manufacturing Award). To the extent that this provision may also apply, it adds yet another layer of regulation that is entirely unjustified.

1341. The proposed clause would also apply to labour hire agencies. The application of the proposed clause on such employers will result in absurd outcomes. Labour hire agencies may have tens of thousands of casual employees engaged at a time. Should one of their clients seek a new casual employee, the proposed clause would require the labour hire agency to first undertake the process we have set out above in respect of a very large number of employees. This may be in circumstances where the client indicates that, for instance, they simply require a new casual employee to perform some work for them on the following day due to the sudden illness of an existing employee. It would be impossible for a labour hire agency to comply with the proposed clause in this situation.

Employment Costs

1342. The regulatory burden and inefficiencies that will result from the clause will obviously be costly for employers.

1343. Also, the performance of additional hours of work by an existing part-time or casual employee may, in some circumstances, result in the employee performing overtime. This might arise where, for instance:

- The employee works in excess of the maximum number of weekly ordinary hours, which in most awards is set at 38; or
- As a result of the employee working additional hours, he or she performs work outside the spread of hours stipulated by the award.

1344. Moreover, it is unclear how the clause is intended to operate in the context of award clauses that mandate agreement about the actual hours of work for

part-time employment (for example clause 13 of the Manufacturing Award) and require, in effect, that any additional hours worked are paid at overtime rates, unless a written agreement to vary an individual's ordinary hours is entered into. The proposal does not appear to contemplate any amendment to such provisions in order to reflect the operation of the new clauses.

1345. The proposed claim appears to provide an employer with no option but to permit an existing part-time employee to work beyond their ordinary hours of work, regardless of whether the employee has formally agreed to vary their 'agreed working hours' as contemplated by the current part-time clause. Nothing in the proposed clause requires that a part-time employee reach an agreement to vary their 'agreed hours of work' in the manner contemplated by clause 13.4 of the Manufacturing Award. Consequently, the effect of the proposed clauses would be that an employer is left with no option but to allow part-time employees to work additional hours at overtime rates. This could result in very significant cost increases for employers.

1346. Alternatively, the proposed clause could be argued to effectively require an employer to agree to alter the employee's 'agreed hours' if the employer wants to avoid paying overtime rates for the additional hours. This would be completely unreasonable, for example if the employer had only intended to employ additional casuals due to a temporary increase in demand.

1347. To the extent that the model term requires that an employer increase the 'normal working hours' of existing employees as a result of which that employee then works overtime, this will result in increased employment costs for an employer which might otherwise not be incurred. The clause sought therefore imposes a new unjustifiable expense.

Fatigue Management

1348. The proposed clause does not have any regard for an employer's fatigue management obligations. Many employers have fatigue management policies or protocols in place that influence how and when an employee can be required to work. In other industries, such as the road transport industry, there

are specific regulations in place that require operators to actively take responsibility for the management of fatigue and have a significant bearing on an employer's ability to require an employee to work. Work health and safety laws are also relevant. The ACTU submits that the provision does not require that work be offered to an employee in such circumstances, however this is not at all apparent from the terms of the proposed clause.[801]

1349. Assuming the proposed clause does not grant an employer the discretion to decline an employee who seeks to increase their 'normal working hours', the clause is at odds with an employer's responsibility to manage their employees' fatigue. We refer to Mr Norman's evidence in this regard.[802] It can lead to circumstances in which an employee seeks to work for lengthy periods of time which may be unsafe, having regard to the nature of the work.

1350. In certain circumstances, it may also conflict with those award clauses that require that employers, 'wherever reasonably practicable' arrange overtime such that "an employee has at least 10 consecutive hours off duty between the work of successive working days". Where this does not occur, an employer is required to pay a penalty rate.[803]

1351. In this way, the proposed clause undermines the need to ensure that employees are not subjected to unsafe work practices.

[801] Final written submissions for the ACTU dated 20 June 2016 at paragraph 141.

[802] Witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 60.

[803] See for instance clause 40.4 of the *Manufacturing and Associated Industries and Occupations Award 2010*. We note that the AMWU is seeking to vary this clause by removing the casual exclusion in clause 404(b).

The Joint Employer Survey

1352. Respondents to the Joint Employer Survey were asked the following question:

> Before you increase the number of casual and part-time employees in your business, do you currently offer the hours to be performed by that casual or part-time employee to existing casual and part-time employees performing similar work?

1353. 33.83% respondents reported that they always do. 23.26% reported that they often do and 25.85% said that they sometimes do. 7.33% reported that they do not.[804]

1354. While the responses show that some employers already offer additional hours to existing part-time and casual staff prior to increasing the number of part-time or casual employees they employ, this can be explained by the fact that there is a financial incentive for doing so. Minimising the costs associated with an increased headcount is an outcome that many employers would consider attractive, to the extent that this can be accommodated by the business, having regard to its operational needs. Furthermore, it does away with the resources associated with recruiting, inducting and training new employees.

1355. It should be noted, however, that almost 50% of respondents indicated that they *sometimes* or *often* offer additional hours to pre-existing part-time or casual employees. This alone suggests that it is a practice that is implemented by businesses if and when it can be accommodated, but that this is not always the case. In this context, it cannot be argued that the unions' proposal is without consequence for such businesses (in addition to those that never undertake such a process) because it would mandate that an employer must undertake the lengthy process we have earlier set out in each and every instance that it seeks to employ a new casual or part-time employee.

1356. The survey also asked:

> What would be the effect on your organisation if you were forced to offer additional hours to existing casual and part-time employees working less than 38 hours per week, before increasing the number of casual or part-time employees in your business.

[804] Witness Statement of Benjamin Waugh, dated 22 February 2016 at Attachment H, page 45.

1357. Some of the survey responses are set out below and reflect the concerns we have earlier set out:

Response ID	Response
56	Additional hours would mean penalty rates to be paid to employees i.e. more costs involved to complete the job. Usually contracts are quoted & penalty rates are not usually included in quoted works, therefore profit & viability of the contract is compromised
154	We would strongly oppose this. We operate on a 24/7 basis and need flexibility to cover all rostered hours. We want to make the decision to employ the best workers; our brand takes pride in delivering exceptional service which can only be achieved with exceptional employees
158	With a restaurant in a seasonal location I need lots of employees for short shifts at the busy times. This would be disaster for my business.
200	Given the nature of our industry and our contractual arrangements with insurance companies, this would have a significant adverse effect on our business. We are restricted in the amount of travel time and kms we can charge our clients - with numerous cost centres specified across the country. We need to have casual investigators spread geographically across the country in order to service those cost centres. If we were forced to offer additional hours to existing casual employees rather than employee casuals in the geographical areas they were required, we would incur significant costs in paying casuals to travel, which we would be unable to recover from clients. The business would quickly become unviable.

Workforce Participation

1358. The Commission's Issues Paper inquires as to whether "there is anything in the modern awards objective … which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant minimum safety net".

1359. Section 134(1)(c) of the Act relevantly requires that the Commission must take into account the need to promote social inclusion through increased workforce participation. That is, the Commission must take into account the need to promote increased employment.[805] This is one factor that must be weighed against other elements of the modern awards objective:

> [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

[805] *4 yearly review of modern awards – Common issue – Award flexibility* [2015] FWCFB 4466 at [166].

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.[806]

1360. The effect of the proposed clause is to limit employment opportunities that would arise. The circumstances in which a new position would become available would be restricted. The proposed clause would deny those who are unemployed an opportunity to participate in the workforce. It would also limit the circumstances in which an employee seeking to explore new possibilities and develop additional skills could undertake a different role.

Section 138 and the Modern Awards Objective

1361. The ACTU, AMWU and AMWU – Vehicle Division have not made any substantial attempt at addressing why the proposed provision is necessary in the sense contemplated by s.138. There is a complete absence of material before the Commission that would enable it to conclude that the provision is necessary to ensure that each of relevant awards provides a fair and relevant minimum safety net of terms and conditions.

1362. As reflected in the submissions above, it is our contention that the clause is at odds with the following elements of s.134(1):

- Section 134(1)(c): the need to promote social inclusion through increased workforce participation;
- Section 134(1)(d): the need to promote flexible modern work practices and the efficient and effective performance of work;
- Section 134(1)(f): the likely impact on business, including on productivity, employment costs and the regulatory burden;
- Section 134(1)(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

[806] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

- Section 134(1)(h): the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

Conclusion

1363. For all of the reasons stated above, the unions' claim should be dismissed.

26. THE REQUIREMENT TO PROVIDE CERTAIN INFORMATION TO CASUAL EMPLOYEES UPON ENGAGEMENT

The Claim

1364. The ACTU is seeking the insertion of a clause in 109 modern awards[807] that requires an employer to provide casual employees with certain information upon engagement. The model clause proposed is in the following terms:

> An employer when engaging a casual must inform the casual that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required.

1365. The clause applies when an employer engages a casual employee. It requires that at that time, the employer must inform the employee of their category of employment, the identity of the employer, the classification, the rate of pay and the likely number of hours required. The clause does not stipulate the form in which such information must be provided.

1366. Of the 109 awards that form part of the ACTU's claim, there are two awards in respect of which the AMWU has proposed a different variation. Those awards are:

- The Manufacturing Award; and
- The FBT Award.

1367. In respect of those awards, the AMWU seeks the following variation to the existing clause 14.3 in the Manufacturing Award and clause 13.3 in the FBT Award:

> An employer when engaging a casual must inform the employee <u>in writing</u> that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay<u>, an employee's right to become full-time or part-time consistent with clause X.X Casual Conversion</u> and the likely number of hours required.

[807] See Attachment B to the ACTU's submission dated 19 October 2015.

1368. Similarly, the AMWU – Vehicle Division seeks to vary clause 13.2 of the Vehicle Award as follows:

> 13.2 An employer when engaging a casual must inform the employee in writing that they are employed as a casual employee, stating by whom the employee is employed, the classification level and rate of pay, the employee's right to become full-time or part-time consistent with clause 13.4 Casual Conversion, and the likely number of hours required.

1369. The AMWU and AMWU – Vehicle Division's proposal goes further than that proposed by the ACTU in two respects:

- the information would need to be provided in writing; and
- in addition to the matters already identified by the pre-existing provisions, an employer would be required to inform employees that they have the right to convert under the relevant casual conversion provisions.

1370. Ai Group opposes the variations sought.

The ACTU's Justification for the Model Clause

1371. The ACTU has not offered any justification in its written submissions for the model clause. It has neither explained the intention underpinning its proposal, nor has it addressed why the provision is 'necessary' in each of the awards it has nominated. Further, it has not pointed to any of the evidence it has called in support of its claim.

The AMWU's Justification for the Proposed Variation

1372. The AMWU has offered only the following arguments in support of the variations it has proposed to the Manufacturing Award and FBT Award:

- There is evidence that many employers do not notify their employees of their conversion entitlements and many employees are not aware of their conversion entitlements. Reference is made to the ACTU and AMWU surveys.[808]

- Identification upon engagement of an employee's entitlement to convert will assist employers and employees to understand their obligations and encourage improved workforce planning.[809]

1373. The AMWU – Vehicle Division supports and relies upon the submissions of the ACTU and AMWU in respect of it claim to vary the Vehicle Award.[810] It cites evidence 'which suggests that significant proportion of employees are not aware their conversion rights under the Awards, despite an explicit obligation on an employer to inform them of such rights'.[811]

1374. We address each of the above arguments later in this section of our submission.

Prior Consideration of the Issue

1375. As part of the AMWU's application to vary casual employment provisions in the Metals Award 1998, it sought the insertion of the following clause:

> Upon engagement, an employer shall provide to a casual employee an instrument of appointment in writing which stipulates the type of employment and informs the employee of the duties required, the number of hours required, and the rate of pay.[812]

[808] See AMWU submission dated 13 October 2015 at paragraph 65.

[809] See AMWU's submissions dated 13 October 2015 at paragraph 66 .

[810] See AMWU – Vehicle Division's submissions dated 2 November 2015 at paragraph 90.

[811] See AMWU – Vehicle Division's submissions dated 2 November 2015 at paragraph 89.

[812] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [28]).

1376. The proposed clause required an employer to provide to a casual employee, in writing, an 'instrument of appointment' setting out the type of employment, the duties required, the number of hours required and the rate of pay.

1377. Employer representatives and the Commonwealth resisted the claim on various grounds, including the imposition of 'unnecessarily onerous processes on employment' and an additional administrative burden.[813]

1378. The AIRC recognised that there was force to each of the arguments put by the employer representatives and stated its reluctance to 'burden employers or employees with unnecessary paper work'.[814] Despite this, the AIRC determined on a provisional basis that the following modified clause would be inserted:

> An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual, stating by whom they are employed, the duties, the actual or likely number of hours required, and the relevant rate of pay.[815]

1379. Ultimately, following the settlement of orders process, the provision below was inserted:

> An employer when engaging a person for casual employment must inform the employee then and there that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed and the classification level, the actual or likely number of hours required, and the relevant rate of pay.[816]

1380. The above clause did not require the provision of the relevant information in writing and modified, to some degree, the information that an employer was required to be given. A separate provision was also inserted in respect of 'a casual employee who has been engaged for one or more periods of employment extending over three or more weeks in any calendar month, and whose employment is or is likely to be ongoing'. In such circumstances, the

[813] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [119]).

[814] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [120]).

[815] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [124]).

[816] PR901028.

employer was required to provide written advice to an employee about the matters there listed.[817]

1381. It is important to note that the AMWU's claim was granted in the context of submissions and evidence specific to the manufacturing industry, which led the AIRC to conclude that the union's claim should be granted. Further, the claim was considered against a markedly different statutory scheme. This is in contrast to the vacuum in which the Commission has here been called upon to consider the claims, absent any argument, assertion or evidence that the provision is *necessary* to achieve the modern awards objective in each of the 109 awards nominated by the ACTU.

The *Fair Work Regulations 2009*

1382. Section 536(1) requires that an employer must give an employee a pay slip within one working day of paying an amount to the employee in relation to the performance of the work. The pay slip must include any information prescribed by the *Fair Work Regulations 2009* (**Regulations**).[818] Regulation 3.46 sets out the matters that must be included in a pay slip. Relevantly:

- Regulation 3.46 sets out the matters that must be included in a pay slip. Relevantly:
- Regulation 3.46(1)(a) requires that a pay slip must specify the employer's name;
- Regulations 3.46(1)(e) and (f) require that a pay slip must specify the gross and net payment made;
- Regulation 3.46(1)(g) requires that a pay slip must specify any amount paid to the employee that is a loading; and

[817] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [124]) and PR901028.

[818] See s.536(2)(b).

- Regulation 3.46(3)(a) requires that if the employee is paid an hourly rate of pay, the pay slip must include the rate of pay for the employee's ordinary hours (however described).

1383. By virtue of s.536(1) and the Regulations cited above, an employee, including a casual employee, will necessarily be informed each time they are paid an amount in relation to the performance of work as to:

- whom they are employed by; and
- their hourly rate of pay, including the casual loading.

1384. By virtue of s.323(1)(c), an employee must be paid in relation to the performance of work at least monthly. Many modern awards contain terms that require that payment be made weekly or fortnightly. Pay slips are therefore also required to be provided to employees weekly, fortnightly or monthly each time they are paid. We note that the Commission has decided to insert a note in all exposure drafts (and ultimately, the awards) that refers to Regulation 3.46, thereby drawing the employer's attention to the requirement that certain content be included in a pay slip.[819]

1385. In 2000 when the *Metal Industry Casual Employment Decision* was handed down, the pay slip content requirements in Regulation 132B of the *Workplace Relations Regulations* did not require that casual loadings be separately specified, unlike Regulation 3.46(1)(g) in the Regulations. Also, the pay record requirements in Regulation 131T did not require that an employer specify whether an employee's employment was full-time, part-time or casual, unlike Regulation 3.32 of the Regulations.

1386. In light of detailed pay slip obligations in the Regulations, it is unnecessary for a modern award to include a requirement that an employee be provided with such information upon their engagement. The application of the Act and the Regulations will ensure that an employee will be informed of the identity of their employer and their hourly rate of pay on an ongoing basis. This means

[819] *4 Yearly Review of Modern Awards* [2015] FWCFB 4658 at [57]

that if the rate of pay changes over the course of their employment, the employee will be informed of this. This is in fact a more effective mechanism for ensuring that an employee is aware of their current hourly rate of pay than notification at the time of engagement, after which that rate may change.

1387. We note that s.536 is a civil remedy provision and thus an employee or the FWO may seek orders against an employer in a competent jurisdiction if an employer is in contravention of the relevant provision.

1388. The introduction of an award obligation to provide information that an employer is already required to provide to an employee each time they are paid creates unnecessary duplication and an additional administrative burden on employers. The unions have not established why the provision is nonetheless 'necessary' to achieve the modern awards objective.

Pre-Existing Award Terms

1389. Whilst the vast majority of awards do not presently contain a provision of the sort proposed by the ACTU, some already require that an employer advise a casual employee of certain conditions, such as the fact that they are a casual employee.[820] Other awards contain provisions that require that an employer inform an employee of their 'terms of engagement'.[821]

1390. The model term would result in overlap, duplication and confusion in certain awards. The ACTU has made no attempt at explaining how the model clause might interact with pre-existing provisions or indeed why the model clause is 'necessary' in awards that contain provisions such as the above.

1391. The ACTU should be put to the task of explaining what work its proposed clause will do in each of the relevant awards, having regard to any pre-existing terms that require the provision of information to an employee upon engagement. To the extent that any of the awards that form part its claim

[820] See for example clause 10 of the *Aged Care Award 2010*, clause 11.1 of the *Airline Operations – Ground Staff Award 2010*, clause 10.2 of the *Ambulance and Patient Transport Industry Award 2010*.

[821] See for example clause 10.2 of the *Electrical Power Industry Award 2010* and clause 11.2 of the *Waste Management Award 2010.*

include a provision of this nature, the ACTU ought to clarify how the model term would intersect with such terms and why the model term is necessary to achieve the modern awards objective.

The Employee's Classification Level

1392. The model clause requires that the employer advise the employee of their classification at the time of engagement. We are concerned that this may have unintended but substantive implications under certain awards, where a casual employee is not engaged for one specific classification. That is, the employee's engagement is not in all circumstances as a 'level 2' employee. Rather, their classification level may change depending upon the type of work that the casual is engaged to carry out.

1393. Take for instance the Horse and Greyhound Award. Clause 10 is headed 'types of employment' and requires only that it must be 'clearly indicated by the employer whether the employee is engaged on a full-time, part-time or casual basis'. The terms of clause 10.4 (casual employment) do not, either expressly or impliedly, require that a casual employee be engaged at a particular classification or that an employee be informed of their classification at the time of engagement.

1394. Clause 13.1 sets out the classification levels. An employee is to be paid the minimum wage prescribed for the relevant classification. The classification structure does not presuppose the appointment of an employee to a particular level. With the exception of stablehands, it does not specify a minimum amount of experience or qualifications. An employee is simply classified in accordance with the work a casual employee is required to perform which, under the terms of the award, may well differ each time.

1395. The requirement that a casual employee be engaged at a particular classification can have unintended consequences for the application of other award terms, such as clause 17 (higher duties). Clause 17.1 applies where an employee is required to do work 'for which a higher rate is fixed than that provided for in their ordinary duties'.

1396. If an employee is advised upon engagement that they are classified at a particular level, it may be argued that the minimum award wage payable for that classification is the rate prescribed for their 'ordinary duties'. If a casual employee were subsequently required to perform work for which a higher rate is fixed, and such work exceeded four hours on any day, the employee would be entitled to be paid at the higher rate for all work done on that day.

1397. This differs from the operation of the present award, which requires that a casual employee be paid 'the appropriate minimum wage prescribed in clause 13'. Thus, a casual employee is paid, on an hourly basis, the appropriate minimum rate prescribed in accordance with the relevant classification, which is contingent upon the work they are performing. This can very hour to hour, shift to shift, engagement to engagement.

1398. The Horse and Greyhound Award provides only one example of an issue that we consider is likely to arise in other awards. The unions have not made any attempt to explain how the model term would interact with the pre-existing terms of the relevant awards, so as to satisfy the Commission there is no unintended consequence or alteration to award entitlements that extends beyond the provision of certain information upon the employee's engagement.

1399. For these reasons, the Commission should not introduce a model provision across the modern awards system without giving due consideration to how it would intersect with pre-existing provisions of each of the awards.

The Widespread use of In-house Job Titles and Classifications

1400. Employers very commonly use 'in-house' job titles rather than those in awards. For example, an employee may refer to an employee as a 'boilermaker' or 'fitter' rather than an 'Engineering Tradesperson – Fabrication' or an 'Engineering Tradesperson – Mechanical' respectively. A requirement to provide the award classification level to an employee on engagement would impose an unnecessary administrative burden upon employers.

1401. In the initial version of the *Workplace Relations Regulations 2006*, as made at the time when the Work Choices legislation was implemented in March 2006, an employer was required to specify each employee's award classification in pay records and on pay slips. The requirement caused widespread problems because of the fact that employers very commonly use in-house job titles and classifications, rather than award classifications.

1402. The requirement was removed from March 2007 as a result of amendments to the *Workplace Relations Amendments 2006*. The Explanatory Statement for the *Workplace Relations Amendment Regulations 2006 (No. 4)* relevantly stated (emphasis added):

> The amendments in Schedule 2 amend the Principal Regulations by repealing the existing Part 19 of Chapter 2 and replacing it with a streamlined set of record keeping and payslip requirements. The streamlined requirements are designed to ensure that sufficient records are maintained in order to ensure compliance with the Australian Fair Pay and Conditions Standard, while significantly reducing the administrative burden on employers.
>
> The Government received a number of representations concerning the operation of the record keeping requirements from stakeholders and constituents and discussed possible changes with a number of key stakeholders who are required to keep records under the regulations. On 13 November 2006, the Minister issued a media release explaining the proposed amendments to streamline the record keeping requirements to more closely reflect the pre-WorkChoices requirements.

1403. The requirement has not been reintroduced under the Fair Work system - no doubt in recognition of the problems that arose in 2006.

The Employee's Rate of Pay

1404. The model clause requires that an employer inform a casual employee of 'the rate of pay'. The meaning of this term is entirely unclear. For instance:

- Does the clause require the employer to inform the employee of the relevant minimum rate prescribed by the award?
- Does this include separately identifiable amounts such as loadings, penalties and allowances?
- Does this include over award amounts?

- Is the rate of pay to be expressed as an hourly amount?

- Which rate of pay is an employer to provide to an employee covered by an award such as the Horse and Greyhound Award, where the employee is not employed at a particular classification?

1405. The proposed clause is clearly ambiguous. The ACTU has failed to explain how the model clause is intended to operate and the circumstances in which the obligation imposed by the clause would be satisfied.

1406. We refer to the submissions earlier made regarding the Regulations. By virtue of the Act and the Regulations we have cited above, an employee's pay slip must state their hourly rate of pay, including the casual loading. This necessarily includes any overaward amounts. As a result, where an employee is in receipt of overaward payments, they will be informed of their actual rate of pay via the pay slip that their employer is required to provide. Our central contention, therefore, is that it is not 'necessary', in the sense contemplated by s.138, to insert an award obligation to provide information that is already required by the Fair Work regime.

1407. As the Commission has earlier determined in this Review, modern awards provide a safety net of minimum terms and conditions. They prescribe the minimum rates that an employer must pay an employee covered the relevant award.[822] Over award payments are not a matter dealt with by the awards system. Therefore, it is not appropriate for an award to require the provision of information regarding an employee's entitlements that are not mandated or made compulsory by the award system.

1408. We are also concerned that information provided as a consequence of the model clause may effectively create a contractual obligation between an employer and employee, which would then require an employer to maintain overaward payments. Such an obligation extends well beyond the provision of a 'fair and relevant minimum safety net' as required by s.134(1) of the Act.

[822] *4 Yearly Review of Modern Awards* [2015] FWCFB 4658 at [96].

1409. Accordingly, should the ACTU's claim be granted, the model clause should only require that the employer inform the employee of the minimum rate prescribed by the award.

The Likely Number of Hours

1410. The ACTU's model clause requires an employer, when engaging a casual employee, to inform the casual of the 'likely number of hours required'. This element of the ACTU's claim is highly problematic.

1411. Firstly, it is unclear what the clause in fact requires. That is:

- Does the model clause require an employer to specify a precise number of hours, or is it sufficient to provide a range of hours that will likely be required? That is, is the obligation satisfied if an employer informs an employee that the likely number of hours required will be 10 – 20 hours per week?

- Does the model clause require an estimation of the number of *ordinary* hours that will be required, or is the employee to be advised of the likely number of hours inclusive of overtime?

- Is the 'likely number of hours' to be expressed as a daily, weekly, fortnightly, or monthly amount? Does the clause require the employer to advise of the likely number of hours that will be required over the entire duration of the casual employee's engagement? Or does it require the employer to inform the employee of the number of hours that will be required each time the employee is required to work (i.e. for each day/shift)?

1412. The provision, as presently drafted, is clearly ambiguous and on this basis alone, should not be inserted into the award system. The clause is by no means 'simple and easy to understand'.

1413. Secondly, we deal with the obvious practical difficulties associated with informing a casual employee upon their engagement of the 'likely number of

hours required'. Casual employees are employed by the hour. It is often impracticable, if not impossible, to determine the likely number of hours a casual employee will be required to work when they are engaged. The model clause erroneously assumes that a casual employee will in fact have a *likely* number of hours.

1414. The evidence filed by the unions shows that often casual employees have variable hours. For instance, we refer to the evidence of Ms Linda Rackstraw. In her witness statement of 8 October 2015, she stated:

> The first 2.5 years of my employment at McDonalds I received a reasonably regular number of hours of work (normally approximately 18 hours per week) except during school holidays when I received very little work and in the last year of my employment I was only given approximately 5 hours per week. … My hours of work dropped significantly to approximately 10 hours per fortnight from May 2015 until I finished working there in July 2015.[823]

1415. Ms Rackstraw's evidence establishes that over the course of her engagement as a casual employee, her hours varied from 5 hours a week to 18 hours a week. There does not appear to be any argument by the unions that this was contrary to or inconsistent with the terms of the relevant modern award or enterprise agreement. The evidence rather demonstrates the flexibility that casual employment affords and the ability of an employer to meet its operational requirements by utilising casual labour to varying degrees.

1416. It is difficult to fathom how, in circumstances such as Ms Rackstraw's, an employer could inform a casual employee of their 'likely number of hours' at the time of engagement. The nature of casual employment is such that there is the clear possibility of significant variability in the hours that will be worked by a casual employee. This poses an obvious difficulty for an employer to whom the model clause would apply.

1417. There may well be occasions upon which an employer cannot identify a likely number of hours that will be required, as that is a matter that is contingent upon various factors over which the employer has little (if any) control. This includes seasonal fluctuations, variations in customer demand, climatic

[823] See paragraph 10 of the Statement of Linda Rackstraw, dated 8 October 2015.

conditions, emergencies, changes within the businesses of suppliers and/or customers etc. Businesses in certain industries may be particularly susceptible to such unpredictability. Indeed, this is the very reason why many employers utilise casual labour.

1418. Ms Colquhoun describes the impossibility of the obligation that would be imposed by the proposed clause on an employer in the horticultural industry in the following terms:

> Due to the nature of horticultural work and the quality, weather, yield and sales demand, [the Mitolo Group is] unable to predict a pattern of work or hours for our casual workforce. Placing an obligation to provide a casual their likely number of hours of engagement is not achievable.[824]

1419. Similarly, Ms Neill, the CEO of CHG stated that even if CHG was required to inform a casual employee of their "likely number of hours per week" at the time of engagement, the business would "still find [itself] having to adjust and change those hours through [its] monthly rosters".[825]

1420. We are concerned that the very nature of casual employment is such that there will be a very significant proportion of circumstances in which it would be virtually impossible for an employer to comply with this element of the ACTU's model clause. For example, this would be particularly so for labour hire providers, who may not be able to inform a casual employee at the time of engagement as to their likely number of hours as this is determined according to their client's needs. These difficulties, compounded by the lack of clarity around the obligation that is in fact imposed by the term, calls upon the Commission to exercise its discretion to dismiss the ACTU's claim.

1421. Thirdly, as we have earlier stated, casual employment is employment by the hour. By its very definition, the hours that a casual employee is required to work may vary. We are concerned that the provision of information pursuant to the model clause may be construed as a contractual obligation to require a casual employee to work only the number of hours identified at the time of

[824] Witness statement of Paula Colquhoun, dated 26 February 2016 at paragraph 27.

[825] Witness statement of Kay Neill, dated 24 February 2016 at paragraph 49.

their engagement as the *likely* number of hours. This would, in effect, undermine and run contrary to the notion of casual employment under the award system which, as we have consistently argued throughout this submission, provides employers with a necessary flexibility as such employees do not have a fixed number of hours.

1422. Fourthly, the insertion of the model clause has implications for the scope of the dispute settlement procedure that is present in every award. It is triggered 'in the event of a dispute about a matter under [the relevant] award'. Where such a dispute arises, the dispute resolution clause states that:

- In the first instance, the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor.
- If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner between the employee or employees concerned and more senior levels of management as appropriate.
- If the dispute cannot be resolved at the workplace and the above steps have been taken, a party to the dispute may refer it to the Commission. The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.
- Where the matter remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

1423. The dispute settlement procedure would apply to a dispute about a matter arising from the model clause. For instance, if an employer did not provide information to an employee in accordance with the model clause and a dispute arose in this regard, the dispute settlement procedure would apply. Moreover, if an employer informed an employee at the time of engagement that the likely number of hours required would be, for instance, 20 hours per

week, and during the course of their engagement the employee was required to work less than or in excess of 20 hours in a week, and in this context a dispute arose about the information provided to the employee pursuant to the model clause, the dispute settlement procedure would also apply.

1424. We are concerned that in this way, an employee may be given a formal avenue through which they can seek an alternation to the hours that they are required to work by their employer, by reference to the information provided to them pursuant to the proposed clause. That is, an employee may argue that the information provided pursuant to the model clause creates an obligation on the employer to offer the employee the number of hours of work nominated by the employer at the time of engagement.

1425. The agitation of disputes in this regard by employees and their union representatives would appear a likely consequence of inserting the model clause across the award system. To compel an employer to require a casual employee to work hours that are consistent with the information provided at the time of engagement as to the *likely* number of hours that will be required would be a serious encroachment upon an employer's prerogative. These concerns also tell against granting the ACTU's claim.

1426. Fifthly, the provision of information pursuant to the model clause may interact with the unfair dismissal regime provided for in the Act. A casual employee may be protected from unfair dismissal. Amongst other criteria, the employee must have completed a period of employment with his or her employer of at least the minimum employment period.[826] A period of service as a casual employee does not count towards the minimum employment period unless:

- the employment as a casual employee was on a regular and systematic basis; and

[826] See s.382(a).

- 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.[827]

1427. A determination of whether, during the period of service, a casual employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis, is a matter of fact that must be established by way of evidence. The provision of information by an employer pursuant to the model clause may be relied upon by an employee as evidence of this determinant. That is, if an employer, in accordance with the model clause informs an employee at the time of engagement that the likely number of hours that they will be required to work is 20 hours a week, an employee may seek to rely upon the provision of such information in support of the proposition that 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 (i.e. that the employee had a reasonable expectation of continuing employment by the employer for 20 hours a week).

1428. Information provided by an employer in compliance with the model clause could provide probative evidence of an employee's reasonable expectation of continuing employment on a regular an systematic basis even in circumstances where there is little (if any) other evidence to support this contention. In this way, the model clause would significantly impact upon the eligibility of casual employees to seek an unfair dismissal remedy and undermine the intent of the legislative regime to limit the application of the relevant provisions to a certain category of casual employees.

1429. Similar concerns arise regarding the circumstances in which a casual employee is entitled to request a change in working arrangements pursuant to s.65(1). By virtue of s.65(2)(b)(ii), a casual employee is not entitled to make a request unless the employee has a reasonable expectation of continuing employment on a regular and systematic basis. Further, s.67(2) sets out the

[827] See s.384(2)(a).

circumstances in which a casual employee is entitled to parental leave and related entitlements. It lists various limitations including a requirement that the employee would have a reasonable expectation of continuing employment by the employer on a reasonable and systematic basis.

1430. The ACTU has not addressed any of the potential implications that may arise as an extension of the model clause being inserted. It is not clear whether they are intended consequences or inadvertent but potential outcomes that are sought by the ACTU, without justification. In any event, they are of obvious significance and would actively undermine the legislative scheme. Indeed if the provision of information by an employer as to the likely number of hours required in accordance with an award clause alone constitutes evidence of a reasonable expectation of continuing employment by the employee on a regular and systematic basis, the model clause would virtually undermine the limitation otherwise imposed by the legislation on the circumstances in which a casual employee is eligible for the relevant entitlements. The need to otherwise establish such an expectation may no longer arise.

1431. Information provided by an employer in accordance with the model clause may also have a bearing on an order made by the Commission for the payment of compensation to a person who has been unfairly dismissed. Section 392 of the Act states that in determining an amount for the purposes of such an order, the Commission must take into account all the circumstances of the case including the matters there listed. One such matter is 'the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed'.[828] The likely number of hours identified by an employer at the time of engagement may also be relied upon by the Commission for the purposes of making such an assessment.

1432. Our concerns are of course premised on the assumption that despite the information provided by an employer at the time of engagement the hours

[828] See s.392(2)(c).

actually worked by a casual employee could vary considerably from that which they were advised of. It is for this reason that an assessment of whether a casual employee had a reasonable expectation of continuing employment on a regular and systematic basis and of the remuneration that the employee would have received or would have been likely to receive had they not been dismissed, would ordinarily be made based on the particular circumstances of each individual case. This would require an analysis of the facts of each case. To the extent that such an approach would be circumvented by simply relying upon information that an employer is required to provide in accordance with an award clause, that is clearly problematic for all the reasons we have here outlined, is of obvious concern.

1433. For all of the reasons we have here outlined, we urge the Commission to reject the ACTU's claim.

1434. Further, the AMWU has identified [829] that 16 modern awards [830] presently require an employer to inform a casual employee at the time of engagement of the likely number of hours required (or in some cases, the 'actual or likely number of hours required'). For the reasons here stated, we propose that those 16 awards be varied by removing this requirement.

The Requirement to Provide the Information in Writing

1435. The amendments proposed by the AMWU and AMWU – Vehicle Division to the Manufacturing Award, FBT Award and Vehicle Award, if made, would require an employer to provide the relevant information to a casual employment upon engagement in writing. The current clauses do not prescribe the medium by which the information must be communicated to an

[829] See AMWU's submissions dated 13 October 2015 at paragraph 370.

[830] Alpine Resorts Award 2010, cl. 10.6(a); Aluminium Industry Award 2010, cl. 10.4(c); Broadcasting and Recorded Entertainment Award 2010, cl. 10.5(a); Building and Construction On-Site General Award 2010, cl. 14.3; Food, Beverage and Tobacco Manufacturing Award 2010, cl. 13.3; Higher Education (Academic Staff) Award 2010, cl. 14.1; Joinery and Building Trades Award 2010, cl. 12.2; Live Performances Award 2010, cl. 10.4(a); Manufacturing and Associated Industries and Occupations Award 2010, cl. 14.3; Mobile Crane Hiring Award 2010, cl. 10.3(b); Pastoral Award 2010, cl. 10.4(a); Seafood Processing Award 2010; 12.3; Sporting Organisations Award 2010, cl. 13.1; Transport (Cash in-transit) Award 2010, cl. 11.5(b); Vehicle Manufacturing, Repair, Services and Retail Award 2010, cl. 13.2; Waste Management Award 2010; cl. 14.2.

employee. The unions have not provided any submissions or evidence in support of their proposal.

1436. We refer to the *Metal Industry Casual Employment Decision* regarding the AMWU's application to vary the Metals Award. The union had there sought the insertion of a clause that would require the provision of information in writing to a casual employee upon engagement.

1437. The AIRC recognised that the proposed clause may create unnecessary paper work and would, at least in the context of short term engagements, be burdensome.[831] Accordingly, the Full Bench decided to insert a modified version of the AMWU's proposal, which did not require the provision of written advice, except in certain circumstances.[832]

1438. The Commission should again decline to make the variation sought by the unions. As accepted by the AIRC, the proposal would introduce a significant and unnecessary additional administrative burden on employers, that is potentially time consuming and costly. In many cases, it may result in duplication where an employer, as a matter of course, provides some of the information listed in the relevant clauses to their employees by way of a letter of appointment or contract.

1439. Above all else, the unions have not established that the current provisions are failing to achieve the modern awards objective or that the clause proposed is necessary to achieve such objective. They have provided few if any arguments in support of a change that would result in the imposition of a greater regulatory burden on employers.

1440. The variation proposed by the unions should not be made.

[831] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [120]).

[832] Re *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [124]).

The Casual Conversion Clause

1441. The AMWU and AMWU – Vehicle Division are seeking a variation to existing provisions in three modern awards [833] such that an employer would be required to inform a casual employee, in writing, at the time of engagement of an employee's right to become full-time or part-time consistent with the casual conversion provisions contained in those awards. The variation is sought on the basis that there is evidence that currently, employers covered by those awards do not notify employees of their right to convert. The unions assert that as a result, employees are not aware of this entitlement.

1442. The Manufacturing Award [834], FBT Award [835] and Vehicle Award [836] each require that an employer must give the employee notice in writing of the provisions of the casual conversion clause within four weeks of becoming eligible to convert to permanent employment. In this way, an employer is presently required to notify an employee of their right to convert within four weeks of that right crystallising. The unions submit that their claim is in response to non-compliance with these provisions.

1443. The unions have brought insufficient evidence to make good the proposition that there is widespread non-compliance with the current clauses. However, even if the unions' submission were accepted, the union has not made submissions or called evidence which establishes that the variations proposed will effectively address their concerns.

1444. In order to determine whether the proposals will serve their intended purpose, consideration must be given to the cause for non-compliance. This does not appear to have been undertaken by the unions. They have not provided any analysis as to whether:

[833] That is, the Manufacturing Award, FBT Award and Vehicle Award.

[834] See clause 14.4(b).

[835] See clause 13.4(b).

[836] See clause 13.3(b).

- The alleged failure to notify employees of their right to convert occurs because an employer has not understood, from the terms of the current clause, that they are required to do so; or

- The alleged non-compliance with clauses that require notification of the right to convert when that right arises will necessarily be addressed by a provision that instead requires an employer to inform an employee of that right upon engagement; or

- The proposed variations would simply add an additional layer of obligations on employers that would not aid in addressing the alleged non-compliance that the unions complain of.

1445. The proposal introduces an additional requirement rather than addressing the alleged failure to comply with a pre-existing obligation under the relevant awards. Such non-compliance can, of course, be dealt with through the dispute resolution procedure contained in awards or by making an application to a court of competent jurisdiction on the basis that an employer has contravened a term of the award.[837] Not surprisingly the unions have made no submissions about the number of applications they have made to deal with disputes over the alleged non-compliance with the requirement to notify employees of their right to convert. Ai Group is unaware of any such applications being made over the past 16 years.

1446. In addition, the following problems would arise from the union's proposal:

- Many casuals do not work on a regular or systematic basis for at least six months and such casuals are likely to be misled into believing they have a right to elect to convert; and

- At the time when a casual is engaged there is no way of knowing whether the casual will be engaged on a regular and systematic basis for the next six months.

[837] See s.45.

1447. As set out in Ai Group's October 2015 submission, the requirement to advise employees of their right to convert is an unnecessary red tape burden on employers, for all of the reasons set out in that submission. Most of the arguments in our October 2015 submission would apply equally to an obligation to advise employees in writing of the right to request conversion at the time of engagement.

Access to the Award

1448. Each modern award presently contains a clause in the following terms:

> The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

1449. The clause has been the subject of review by a Full Bench in the context of the exposure drafts published by the Commission. In a decision of December 2014, the Commission decided that the term would be amended:

> The employer must ensure that copies of the award and the NES are available to all employees to whom they apply, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means~~, whichever makes them more accessible~~.[838]

1450. The rationale for the revised clause was explained by the Full Bench as follows:

> [29] We agree with the submissions of the AMWU and the existing clause will be retained. Further we propose to delete the words 'whichever makes them more accessible' from the current formulation. It seems to us that these words give rise to an obligation which would be difficult to meet in practice and that the primary obligation under the clause is clear, that is: 'The employer must ensure that copies of the award and the NES are available to all employees to whom they apply...'. We will also add the word 'accessible' before 'electronic means' in the current clause to make it clear that if the award and the NES are provided by electronic means then the means provided must be accessible to all employees. …[839]

1451. The provision requires an employer to ensure that the award is available to all employees to whom it applies. The intention of the provision is clearly to make

[838] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [29]

[839] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [29].

certain that employees have access to the award and can ascertain their entitlements under it. The obligation created by the clause is an ongoing one; it is not limited, in a temporal sense, to the time of engagement of an employee.

1452. The insertion of an award term that requires an employer to provide information about entitlements arising under the award is clearly not 'necessary' in circumstances where the awards already require that employees be provided access to the award over the course of their employment. This, in and of itself, enables an employee to determine their classification, rate of pay (particularly given that the awards will now contain schedules summarising hourly rates of pay) and their right to convert (where relevant). The additional provision proposed by the ACTU, and the amendments sought by the AMWU and AMWU – Vehicle Division, are unnecessary given the existence of the aforementioned clause in all modern awards.

Section 138 and the Modern Awards Objective

1453. An award may include terms that it is permitted or require to include, only to the extent necessary to achieve the modern awards objective.[840] As we have earlier stated, the ACTU and its affiliates have not cited s.138, the modern awards objective, or any elements of it in support of its claims. They have failed to establish that the terms proposed meet the threshold requirement established by s.138 of the Act.

1454. The matters we have here raised clearly indicate that the variations proposed are contrary to the following elements of the modern awards objective:

- the need to promote flexible modern work practices and the efficient and productive performance of work;[841] and

[840] See s.138.

[841] See s.134(1)(d).

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[842]

- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.[843]

1455. Further, it would appear that the remaining matters listed at s.134(1) are either irrelevant to the matter here before the Commission or are not advanced by the proposals.

1456. It is apparent the provisions proposed are not *necessary*, in the sense contemplated by s.138.

Conclusion

1457. For all of the reasons stated above, the ACTU's claim to insert the proposed model clause should not be granted. If the Commission decides against us, we submit that the provision sought should be amended to ensure that it goes no further than to require that an employer, when engaging a casual employee, inform the employee that they are employed as a casual and by whom they are employed. There should be no requirement that the advice be given in writing.

1458. The variations sought by the AMWU and AMWU – Vehicle Division should not be granted.

[842] See s.134(1)(f).

[843] See s.134(1)(g).

27. CLAIMS TO REMOVE THE CASUAL EXCLUSION FROM PROVISIONS REQUIRING A MINIMUM BREAK AFTER OVERTIME

1459. Ai Group opposes the AMWU's claim to remove the exclusion for casuals from the following:

- Clause 40.4(b) of the Manufacturing Award;
- Clause 33.3(b) of the FBT Award;
- Clause 31.4(b) of the Sugar Award; and
- Clause 23.3(a)(ii) of the Oil Refining and Manufacturing Award.

1460. The AMWU incorrectly characterises the above clauses (as they currently operate) as excluding casual employees from provisions which require that a minimum break of 10 hours be taken after overtime.

1461. Each of the above awards includes a provision that states:

> (a) When overtime work is necessary it must, wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.

1462. The above subclause (a) appears immediately before subclause (b) which states:

> (b) An employee (other than a casual employee) who works so much overtime between the termination of the employee's ordinary work on one day and the commencement of the employee's ordinary work on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to this clause, be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

1463. It is clear that the AMWU has mischaracterised the basis of its claim. Subclause (a) does not exclude casual workers from a rest period after working overtime - it applies to all employees covered by the relevant award.

1464. The effect of subclause (a), despite the claims by the AMWU, is to protect all employees from working arrangements whereby they would not have a 10 hour rest period after overtime.

1465. Subclause (b) (which is the clause subject of the AMWU claim) provides an entitlement to employees other than casual employees to 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

1466. It follows that the obligation for an employer to provide a rest period of 10 consecutive hours off duty between the work on successive days provided for in subclause (a) is a different and separate obligation to the entitlement in subclause (b), which requires the employer to provide a payment to employees (other than casual employees) who are not provided with such a rest period.

1467. The AMWU, at paragraph 382 of its submission, suggests that the exclusion of casual employees from a 10 hour rest period after overtime has "*critical implications for workplace health and safety and fatigue management".* The AMWU also relies on the evidence of Ms Valance to support its argument.[844] The argument holds little weight, given that employers are, by effect of subclause (a), required, wherever reasonably practicable, to provide a rest period of 10 consecutive hours off duty between work on successive days.

1468. The AMWU's submission attempts to draw a correlation between the history of the '*rest break after overtime*' clause in the metals and manufacturing industry and the '*changing nature of casual work*' to suggest that the exclusion of casual employees is no longer justified.[845] The AMWU's reasoning is flawed.

1469. We note that the exclusion of casuals from the provision of payment for work performed without a 10 hour rest period in the then Metals Award 1998 was raised in the *Metal Industry Casual Employment Case* at paragraphs 13 and

[844] AMWU Submission dated 13 October 2015 at paragraph 383.

[845] AMWU Submission, paragraph 381.

17 of the decision.[846] The provision equivalent to subclause (b) remained in the Metals Industry Award 1998 following this case.

1470. Also noted is that the exclusion of casuals from the payment described in subclause (b) was considered during award simplification and the making of the Metals Award 1998.[847] Subclause (b) was agreed to by the parties, which included the AMWU. An extract from the Senior Deputy President Marsh's decision is provided below (emphasis added):[848]

> **6.4.4 Rest Period After Overtime**
>
> 6.4.4(a), (b) and (c)
>
> These provisions are agreed between the parties with the exception of the MTIA proposed additional sentence to 6.4.4(c) which states:
>
> "By agreement between the employer and individual employee, the 10 hour break provided for in this clause may be reduced to a period no less than 8 hours."
>
> The existing award provision (clause 21) provides for a 10 hour break in certain circumstances and for an 8 hour break in others. The non agreed provision in the proposed award provides for a reduction in the 10 hour break to 8 hours on the basis of individual agreement. On the basis that the safeguards set out in clause 2.2.2 (Facilitation by Individual Agreement) apply to this clause I am prepared to adopt the MTIA provision. The clauses are allowable pursuant to s.89A(2)(b) and (k) and s.89A(6).

1471. The Commission should not permit a party to depart from a consent position which it has reached, other than where there are very strong cogent reasons, because to do so would significantly reduce the chances of consent being reached in the future.

[846] Metal Industry Casual Employment Case, 29 December 2000, Print T499189 at 13 and 17.

[847] Print P9311.

[848] Print P9311.

1472. We note the following comments of Senior Deputy President Kaufman in the Contract Call Centre Award during the 2012 Modern Awards Review:[849]

> [40] It is manifestly undesirable that an Award that resulted from the agreed adoption of the Contract Call Centres Award 2003, which itself was made by consent after lengthy negotiations involving not only the ASU and AiG, but with other unions as well as the ACTU, should not be disturbed in the 2012 Review without, Fair Work Australia being provided with very strong cogent reasons for so doing. This, the ASU has failed to do.
>
> [41] Not only was the Award based on the Contract Call Centre's consent award, but that award largely replicated another consent award to which the ASU was also a party - the Telecommunications Services Industry Award 2002."[850]

1473. Similarly the relevant industry parties, including the AMWU, did not raise issue with the exclusion of casuals from the payment described in subclause (b) during the making of the Manufacturing Award.

1474. During the making of the Manufacturing Award, the Award Modernisation Full Bench noted that the terms of the modern award had been largely agreed between Ai Group and the MTFU (of which the AMWU is a member).[851] The relevant extract from the decision is provided below:

> [177] The terms of the modern Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing award) are largely those agreed between AiGroup and the Metal Trades Federation of Unions (MTFU).

1475. The joint Ai Group / MTFU draft award submitted to the AIRC during the award modernisation process included the following relevant extract (emphasis added):

> **5.5.4 Rest period after overtime** (AGREED)
>
> 5.5.4(a) When overtime work is necessary it must, wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive working days.
>
> 5.5.4(b) An employee (other than a casual employee) who works so much overtime between the termination of his or her ordinary work on one day and the commencement of their ordinary work on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to this subclause, be released after completion of the overtime until the employee has had

[849] [2012] FWA 9025.

[850] [2012] FWA 9025.

[851] [2008] AIRCFB 1000 at [117].

10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. …[852]

1476. In the case of the FBT Award, the Full Bench of the AIRC decided that the modern award would be based on the draft award submitted by Ai Group at the time, which largely adopted the terms and conditions of the modern Manufacturing Award.[853]

1477. The incidence of casual employment has not increased since 1998 (see section 5 of this submission). There have been no significant changes to casual employment since the key events identified above that would warrant the removal of the exclusion of casual employees in subclause (b).

1478. The exclusion of casual employees from payment for work performed without a 10 hour rest period continues to have important work to do. The provision enables the engagement of casual employees, where it is not reasonably practicable to provide a 10 hour rest break (see subclause (a)).

1479. It provides necessary flexibility to employers and the opportunity for extra hours of work for casual employees to account for unforeseen circumstances.

1480. The AMWU's survey – particularly question 25 which asked respondents *"[h]ave you ever worked so much overtime that you didn't get a break of at least 10 hours before the start of your next shift?*" – cannot be relied upon as credible because the question is asked without any qualifying context. For example, was the respondent required to work because it was not reasonably practicable for the employee to have a 10 hour break, or was the respondent covered by a modern award or enterprise agreement which enabled the employee to work overtime between successive shifts with a rest period of less than 10 hours? For example, some awards require an eight hour break.

1481. Furthermore, the characterisation of a casual employee within the AMWU's survey is flawed. See for example the dichotomy which exists between question 1 of the survey (which askes respondents to describe their

[852] http://www.airc.gov.au/awardmod/databases/metal/Draft/AiGroup_draft_manufacturing_award.pdf.

[853] [2009] AIRCFB 450 at [87].

'employment situation') and question 3 of the survey (which asks respondents whether they work 'full time' or 'part-time' hours). Therefore, despite the AMWU's assertion that 22 percent of casual and labour hire respondents answered Yes to question 25,[854] no-one can be certain that the respondents surveyed for the purpose of question 25 where casual employees.

1482. Also, given that a casual employee is engaged by the hour and that their hours of work can be varied more flexibly than the hours of work for a permanent employee, it would be logical that subclause (b) relating to payments would only apply to permanent employees. This is consistent with the comments of by Public Service Arbitrator Galvin (formerly Galvin 39 C) in *AEU & others v Minister for Navy* (1955) 35 CPSAR 461, referred to by the Full Bench of the AIRC in the *Metal Industry Casual Employment Case*:

> who stated that, since casual employment at the Naval Dockyards was hourly employment, it would be inconsistent to apply to casuals the then eight hour minimum break after overtime.[855]

1483. It is clear that the AMWU's arguments in support of its claim do not meet the 'necessary threshold' in s.138 of the Act for a variation to a modern award term. The AMWU must show that the variation is necessary to achieve the modern awards objective in s.134. The AMWU has failed to do this.

1484. The Manufacturing Award, in so far that it includes clause 40.4(b), continues to be meeting the modern awards objective, namely those elements dealing with:

- Relative living standards and the needs of the low paid (s.134(1)(a)) and the need to promote social inclusion through increased workforce participation (s.134(1)(c)):

  The current provisions further these objectives by providing casual employees (including casuals who are women, older workers, younger

[854] AMWU Submission, paragraph 383.

[855] Metal Industry Casual Employment Case, 29 December 2000, Print T499189 at 89.

worker and workers with a disability) with the opportunity to work additional hours.

- The need to encourage collective bargaining (s.134(1)(b)):

  To the extent that employee bargaining representatives may seek to provide a payment to casual employees who work without a 10 hour rest period between successive shifts, the existing provisions encourage collective bargaining.

- The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)) and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)):

  The unions' claim would reduce flexibility and adversely impact upon efficiency and productivity. For example, the existing provision provides necessary flexibility to enable employers to deal with unforeseen circumstances.

1485. The same considerations apply to the unions' claims to vary clause 33.3(b) of the FBT Award, clause 31.4(b) of the Sugar Award and clause 23.3(a)(ii) of the Oil Refining and Manufacturing Award.

1486. The AMWU's claim should be rejected.

28. RESPONSE TO THE COMMISSION'S ISSUES PAPER

1487. This section provides responses to the questions raised in the Issues Paper published by the Full Bench on 11 April 2016.

CASUAL AND PART-TIME EMPLOYMENT - GENERAL

1. What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part-time employment?

1488. Casual and part-time employment are distinct types of employment relationship recognised and regulated under modern awards.[856]

1489. Chapter 10 of these submissions has already addressed the definition of casual employment in detail.

1490. To the extent that awards define the respective types of employment relationships there are implications for the status of the employment relationship as recognised under the award generally and the FW Act.

1491. In Chapter 10, we have extracted particularly insightful passages of the important Full Bench decision in *Telum Civil v CFMEU*.[857] In that matter the Full Bench considered the historical and current treatment of casual employment under federal awards and concluded that entitlements under the FW Act are based on the definition that applies to the relevant employee under any applicable federal industrial instrument, including an award. The Full Bench held (emphasis added):

> [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

[856] As contemplated under s.139 of the FW Act.

[857] [2013] FWCFB 2434.

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 "causal 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).

1492. There are differences in the way that awards define casual employment and distinguish it from part-time employment. This is in itself a reason why matters associated with types of employment need to be considered on an award by award basis.

1493. It is the relevant award definition of casual employment compared to, and contrasted with, the treatment of part-time employment under an award that gives rise to core conceptual difference between the two types of employment. The entitlements and rights which attach to the different categories of employees pursuant to the awards and FW Act must then be determined by reference to the term of the particular award and the legislation. These will differ, to some extent, between awards.

1494. Regardless, the Full Bench should not lose sight of the fact that no party has proposed a change to the definition of casual employment contained within any particular award or awards generally. It is not a matter that has been squarely put in issue in these particular proceedings which are being conducted by reference to specific claims. As the ACTU's final written submissions state:

> The ACTU application does not, however, call for a wholesale reassessment of the definitional provisions in modern awards…[858]

1495. At paragraphs 17 to 19 of their final submissions the ACTU take issue with the proposition that an award definition of casual employment is conclusive of award status, as contemplated in *Telum Civil v CFMEU*[859] and numerous

[858] ACTU Final Written Submissions, paragraph 19.

[859] [2013] FWCFB 2434.

other cases referred to in chapter 10 of this submission. They suggest that the approach undermines the safety net. There can be little force to an argument that an award "undermines the safety net" prescribed by the legislation when the legislature has expressly excluded casual employees from a raft of entitlements and left the definition of casual employment to be determined under applicable industrial instruments. The legislation was enacted against a longstanding history of federal award regulation of casual employment.

1496. To the extent that the ACTU quibble with the capacity for an award to determine employment status, we observe that the operation (or potential operation) of the casual conversion clauses they are pursuing rests upon the assumption that awards may, for relevant purposes, regulate the nature or type of an employment relationship pursuant to which an employee is engaged. That is, awards may define whether an employee is casual, full-time or part-time in a manner that excludes or overrides the operation of any position under the general law. It is difficult to understand how any of the unions' proposed provisions could operate if an award was not capable of establishing an individual's employment status as casual or otherwise for relevant purposes.

2. What are the fundamental elements of part-time and casual employment?

1497. As set out in response to question 1, for the purposes of the award safety net and the FW Act, casual employment and part-time employment have the elements which are defined in the relevant award.

Fundamental elements of casual employment

1498. Although there are differences in award definitions of casual employment, the Full Bench in *Telum Civil v CFMEU* identified what might be considered the fundamental elements of casual employment in this context. That is, the employee is engaged as a casual and paid as a casual, including the payment of a casual loading:

[38] All of the modern awards contain a definition of casual employment. Those 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.*

Fundamental elements of part-time employment

1499. The ordinary meaning of 'part-time employment' in Australian workplace relations parlance is a type of employment based upon an ongoing contract of employment that is recognisable by the employee working less than full-time ordinary hours. Awards differ significantly on how regular the ordinary hours of a part-time employee need to be, and whether agreement needs to be reached on the hours. There are 52 awards out of the 122 that require agreement between the employer and employee as to the hours of work.

1500. Often the distinction between one category of employment and another, as provided for by a particular award, is best revealed by a reading of the award provisions regarding "types of employment" in their entirety.

1501. A small number of awards do not provide for part-time employment.

1502. Some awards do not expressly 'define' part-time employment but instead regulate essential elements of the relationship in a manner which is different to the award's treatment of casual and full-time employment.

1503. There are of course differences between the entitlements of casual and part-time employees under awards and the NES. Many of these are obvious, such as differing entitlements to paid leave. Others are less well known and vary between awards. For example, some awards provide different entitlements in relation to matters such as minimum engagement periods and access to, or the level of, penalty rates. It is necessary to have regard to the entirety of an award, not just the clause dealing with types of employment, in order to identify all of the differences.

Response to the ACTU

1504. The ACTU's response to this question seeks to distinguish casual employment from part-time employment. It erroneously contends that casual employment is employment *"…to carry out work which is ad hoc, irregular and unpredictable from one day to the next."*

1505. For the already articulated reasons, it is wrong to assert that casual work must be ad hoc, irregular and unpredictable from one day to the next. Such an assertion is squarely inconsistent with the manner in which casual employment is recognised and treated under both the award system and the FW Act. It is also inconsistent with the unions' proposed clauses which would allow employees to remain casual indefinitely, if that is what they wish.

1506. In paragraph 5(b) of the ACTU's response to the Issues Paper, the ACTU states that an employer of a casual employee has the option to offer or withhold work on any given day, and the employee has the option to accept or reject any work which is offered. This is a reasonable characterisation, although we note that there are regulatory considerations which somewhat intrude upon this broad proposition including unfair dismissal laws.

1507. A key distinguishing characteristic that differs between casual and part-time employment under awards and the Act is broadly the assumption of the absence of a specific ongoing obligation on an employer of a casual employee to provide work or for an employee to perform work. This is tempered somewhat by the effective recognition within awards and the legislation of a broader employment relationship and the associated provision of certain rights to casual employees by reference to this. These rights include:

- Certain rights under the right to request and parental leave provisions of the NES, and under the unfair dismissal laws, that apply to long term casuals who have worked on a regular and systematic basis and have an expectation of ongoing employment; and

- Casual conversion provisions in awards which, from their inception, have recognised that casual employees often work regular hours for extended periods and often have no desire to be weekly employees.

1508. At paragraph 6 of its response to the Issues Paper, the ACTU submits that, *"All other work is permanent work. Permanent work where less than 38 hours a week are guaranteed is part-time work."* This statement is not accurate. Within the award system a part-time employee is commonly an employee who is employed or works for less than 38 ordinary hours of work. However, some awards provide that full-time employees work less than 38 ordinary hours per week (e.g. the *Black Coal Mining Industry Award 2010*). The notion of an ongoing relationship is nonetheless common. Perhaps the highest it should be put is that under awards part-time employees are generally employed or guaranteed less ordinary hours of work than full-time employees.

1509. Even if a casual is employed on a regular and systematic basis, there may still not be an expectation of ongoing employment. This is reflected in the definition of a "long term casual" under the Act.

1510. It is unhelpful to characterise "work" as "casual work" or "part-time work" in the manner adopted by the ACTU.[860] It is the nature of relationship itself that differs between casual and part-time employment. The actual work undertaken by the employee is immaterial to such matters.

3. What factors lead employers to engage casuals?

1511. The Joint Employer Survey provides a meaningful insight into the various factors that lead employers to engage casual employees. Reasons that commonly emerge from the responses provided can be broadly categorised as follows:

- Casual labour is essential where there is uncertainty as to the volume of work that will be required to be performed and/or whether the requirement to perform that work might cease.

[860] ACTU response to the issues paper Q1.

- Casual labour provides the flexibility necessary to manage fluctuations in production and customer demand. The ability to alter the hours of a casual employee enables the employer to respond to peaks and troughs in the flow of the work to be performed.

- Casual employees enable an employer to accommodate the impact of seasonal factors on the business. The "peak season" will often require additional labour, however once the season passes, there will be less (if any) work to be performed by those employees.

- Casual employees enable an employer to manage employment costs in circumstances where there is little work to perform or a complete absence of work required to be undertaken.

- Casual employees enable an employer to meet the needs and demands of customers or clients; a matter that sits largely beyond the business' purview.

- Casual employees are utilised to replace temporarily absent staff for reasons such as annual leave, personal/carer's leave or any other form of unexpected (or expected) absence.

- Casual employees are also utilised to replace staff that are not performing work during a portion of their day/shift, for example during a meal break.

- The employment of permanent staff in the circumstances identified above may cause the employer to incur additional costs such as redundancy pay, notice on termination of employment or overtime/penalty rates where the employee is required to work additional hours.

- Casual employment allows employers to accommodate the desires of individual employees who seek to participate in the workforce and require greater flexibility than that which can be afforded by permanent

employment. Examples include employees with caring responsibilities, study commitments, those engaged in more than one job etc.

- Casual employment allows employers to accommodate individual employees who prefer to receive a higher hourly rate of pay (by virtue of the casual loading) in lieu of other entitlements afforded to permanent employees.

1512. Various factors that are specific to the nature of the work performed in certain industries also emerge from the Joint Employer Survey. For example, employers covered by the Aged Care Award and the SACS Award repeatedly referred to the need to meet the demands of clients. This was also apparent from the witness evidence called by the ACTU, which we have earlier summarised. Businesses in the fast food industry and the retail industry cited the employment of junior school-going employees whose availability to perform work is significantly limited by their study-related commitments. Casual employment provides those employees with an opportunity to participate in the workforce. Seasonal fluctuations were cited by employers covered by the FBT Award, the Hospitality Award and the Horticulture Award. Employers covered by the Manufacturing Award consistently referred to fluctuations in production levels.

1513. We refer to the Commission to chapter 20 of our submissions in this regard, where we have extracted numerous responses from the survey results that demonstrate the above summary.

1514. As cited by the AMWU in its response to the Commission's Issues Paper,[861] in the *Metal Industry Casual Employment Case,* the Full Bench identified the following major uses of casual labour:

> [98] We accept that a substantial body of evidence demonstrated that there is considerable and justifiable use of casual employment in the industry. Primarily, that use relates to operational circumstances in which uncertainty or contingency preclude an employer's capacity to do other than maintain as much flexibility in the size of the workforce as practicable. The AiG case presented details of a wide range

[861] AMWU's response to FWC issues paper dated 14 June 2016 at paragraph 3.2.

of use and justifications from particular employer's view points of a need for unrestricted access to the "flexible" use of casual engagements. The fact of such use was not controversial. The AMWU's expert witnesses each provided a worthwhile analysis of why employers may have made increased use of casual employment in the metals and manufacturing industry. In the *SA Casual Clerks Case,* Stevens DP summarised evidence given by Dr Campbell. Similar evidence was given by Dr Campbell in the hearing before us:

> "In his research on casual employment he had looked at the possible advantages for employers, and found about five different headings. He believed that in certain circumstances casual employees offered cheaper labour costs, they offered greater ease of dismissal, they offered the opportunity to match labour time to fluctuations in demand, they offered greater administrative convenience, and they offered a greater opportunity for enhanced control of employees. He thought there was some ideological attraction for employers to engage casual employees as well as for administrative convenience, particularly for small business employers. He thought that if an employer faced fluctuating work demands, so long as they were regular and predictable, that the employer should be using permanent part-time employment or even perhaps fixed term employment, unless there was an overwhelming need for flexibility. As for permanent part-time employment he considered that the definition thereof should require the ability for employees to work regular and predictable weekly hours."[862]

1515. It is important to note that the use of casual labour is also, in part, a product of the regulatory regime applying to the employment of full-time, part-time and casual employees. This includes entitlements afforded to such employees pursuant to the FW Act as well as modern awards. The following excerpt of the transcript of proceedings during which Professor Markey was called to give evidence demonstrates that the Professor acknowledged this: (emphasis added)

> Let me put this to you. Do you think when the manager sits down to write a roster that they have first and foremost in their mind balancing the demands of the customer with the cost of structuring the roster in a rational way?---Yes, and they will be looking at that in an immediate sense.
>
> In the context of a modern award, they will be considering whether or not it is optimum to meet the customer's demands and to meet their cost imperatives by full time employment, part time employment, casual employment, and they do that rationally?---Within the framework that they are operating in.
>
> Of course it is within the legal framework?---And the cultural frameworks.
>
> SENIOR DEPUTY PRESIDENT HAMBERGER: Can I just put a proposition to you, Mr Markey, which is that historically – it may or may not be so true anymore, but historically talking about developing a culture and management culture, if you look at

[862] Print T4991 at [98].

the typical awards, there are a lot of rules about employing full time, and that was historic law (indistinct) full time employee that there are all sorts of provisions about, and then there were provisions for casuals that were actual very simple and most of the awards didn't apply to casuals. And therefore in terms of it being easier to employ casuals, this was because the system itself made it easy to employ casuals, whereas it was complicated to employ part timers. Part timers weren't even an option until relatively recently. It was a full timer or a casual and that therefore that is the way it is - the way businesses have developed the way – they need that flexibility, they have gone to using casuals because the rest of the provisions have been complicated and potentially difficult. This is a long term culture. It takes years and years to change?---Yes.

But if you look at the history in Australia, casual employment was pretty straight forward from an employer point of view. Whereas the non-casual employment was relatively complex and possibly more complex than in other countries?---Yes, which is why I said at the start cultural and institutional. That was meaning regulatory as well.

MR WARD: Sorry, thank you. Prof Markey, I am actually going to take up the leave of his Honour, can I show you a modern award that is the subject of these proceedings and I have picked one that comes from a heavily unionised sector, so hopefully it won't be too controversial. I am going to show you the Quarrying Award 2010?---Thanks.

…

It talks about part-time employees in 12, which I'm going to come back to. If you go to clause 13, it talks about casual employees. Again, I suspect that the definition of casual employees is one that you find slightly offensive, and that is:

> *A casual employee is an employee employed and paid as such.*

Can I just put this proposition to you: you will see there that on its face there are no constraints on how a casual employee can be employed. I accept that there are other provisions in this award which bear on what a casual gets paid and when they get paid, but there are no constraints, effectively, on how you can roster a casual employee. Do you just accept that as a general proposition?---Yes.

Yes. Can I then ask you to go to the part-time clause. I'm just going to read it out:

> *Clause 12, part-time employees. 12.2: part-time employee is an employee who: works less than 38 hours a week; works a regular number of ordinary hours each week. 12.2: at the time of first being employed the employer and the part-time employee will agree in writing on a regular pattern of work specifying at least the hours worked each day, which days of the week the employee will work, and the actual starting and finishing times of each day. 12.3: any agreement to vary the regular pattern of work will be made in writing before the variation occurs.*

… Would you agree with me that by comparison, the part-time employment provisions in this award have very substantial fetters?---Yes, reasonably, yes.

So isn't one of the rational considerations a manager in Australia has to take, in the context of the modern award, when they're looking at their labour profile, they have to

actually understand not just the flexibility of the casual, but the inflexibility of the part-time employee?---Yes.

Yes. And can I put to you that in many cases that might actually tip them towards using a casual rather than some philosophical or cultural bent to using casual employees?---In some cases, but there are a lot of other explanations too.

I understand that. But in some cases you would accept that?---Yes.[863]

1516. This aspect of Professor Markey's evidence and a consideration of the restrictive part-time provisions that prevail in many modern awards provide an important explanation and justification for any perceived employer preference for engaging casual employees. That is to say, the employment of casual employees does not necessarily exhibit a bias towards casual employees or an inherent prejudice against the employment of permanent workers. Indeed there is evidence before the Commission of employers speaking to the benefits that accrue to a business through the engagement of permanent workers.[864]

1517. Despite assertions by the unions to the contrary, there is *not* any evidence that employers are led to employing casual employees for an illegitimate or unjustifiable reason. Nor is it a fact in evidence that casual employees are employed purely so that a business might enjoy managerial ease. The responses to the Joint Employer Survey, coupled with the above evidence of the ACTU's expert witness rather suggests that there are various operational imperatives that necessitate casual employment or, at the very least, that create a set of circumstances that cannot readily be accommodated through the use of permanent labour.

[863] Transcript of proceedings on 23 March 2016 at PN9055 – PN9075.

[864] For example witness statement of Krista Limbrey, dated 24 February 2016 at paragraphs 17 – 18 and transcript of proceedings on 21 March 2016 at PN7253. See also witness statement of Benjamin Norman, dated 22 February 2016 at paragraph 52.

4. What are the positive/negative impacts of casual work on employees?

1518. In considering this question the Commission should be careful to distinguish between negative impacts that are attributable to the type of employment, from those that may merely be commonly, or disproportionally commonly, experienced by casual employees.

1519. The Commission should also remain mindful that it is tasked in the current proceedings with considering whether there is a necessity to alter award provisions in order to ensure awards and the NES provide a "fair and relevant minimum safety net of terms and conditions of employment". The task is not to ensure that employees receive the optimal outcomes possible from employment, nor is it to ensure that casual employees receive employment related benefits or outcomes that are in all instances comparable to employees engaged in permanent employment. The AMWU's asserted conclusion that the, "balance of advantage lies in permanent employment" is not (even if it were true) an appropriate justification for the introduction in any award of a new or expanded limitation on casual employment, as comprised by the unions' claims.[865]

1520. The fundamental issue that falls for determination in these proceedings (at least in respect of the casual conversion claims) is whether it is necessary in most (but not all awards as a number are not the subject of a claim) for there to be an absolute right granted to certain employees to convert from casual to permanent employment. Such determination must be made through taking into account the matters identified in s.134(1) and other relevant considerations flowing from the broader framework and context of the FW Act. Central to any such assessment must be acknowledgement of the legislature's endorsement of casual employment and its provision of appropriate specific entitlements and exclusions under the NES. It is particularly significant that the legislature has recognised the existence of long term casual employees whose employment relationship incorporates an ongoing expectation of regular and systematic work, and has granted such

[865] AMWU response to the issues paper, paragraph 4.3

employees certain entitlements under the NES and the unfair dismissal laws. The Commission should not accept that the impact of any difference in entitlements under the safety net is a justification for granting the unions' claims.

1521. In considering the benefits of casual employment the Full Bench must remain conscious of the benefits of employment generally, over unemployment. An employer who is faced with the mere risk of having to convert casual employees in circumstances where there is a reasonable basis for refusing such conversion can be expected to take steps to mitigate any such risks. For some employers this will mean terminating casual employees prior to them qualifying for a conversion entitlement or outsourcing the work to a labour hire provider. Others may seek to restructure their workforce in order to reduce their reliance upon casual employment.

Positives Impacts

1522. There are a raft of positive impacts of casual work on employees. These vary in relevance depending upon individual circumstances.

1523. The fundamental benefit flowing to a casual employee is the opportunity to be employed. It cannot be assumed, and has not been established by the unions, that restricting access to casual employment will have no impact upon employment levels. At the micro level, the Joint Employer Survey responses establish the very predictable likelihood that granting the unions' claim will result in significant numbers of casual employees being terminated. The survey responses depict employer perceptions and as such are indicative of the way in which such employers will respond to the claim, irrespective of whether this is necessarily the most rational course of action.

1524. Another major benefit of casual employment is the flexibility that it provides. The written submissions of the AMWU acknowledge that: *"It is a truth universally acknowledged that for some employees, casual employment suits stage of life requirements".*

1525. At paragraph 4.2 of their response to the Issues Paper the AMWU accepts that some employees, particularly young and older workers and students, prefer casual employment. In the table set out in that paragraph they also identify that the ACTU survey indicates that 50% of casuals are content with their employment type.

1526. The availability of flexible forms of employment, such as casual employment, are likely to be particularly important to some employees who are balancing family or caring responsibilities.

1527. Some casual employees also undoubtedly value the freedom associated with casual employment. A core element of casual employment is that employees have a capacity to decline work. Put another way, the nature of their employment relationship does not compel or require them to work. The extent to which this translates into a capacity to make themselves unavailable without any consequential impact upon the employer's preparedness to continue to make work available to them will of course depend upon individual circumstances.

1528. Casual employment also often affords employees a pathway into permanent employment or into more skilled jobs. Evidence advanced by various unions demonstrates numerous examples of employees who converted to casual employment following a period of engagement as a casual or labour hire worker.

1529. A further benefit of casual employment is of course the higher earnings as a consequence of the application of the 25% casual loading. Any question of whether the 25% loading appropriately compensates for the absence of all entitlements attached to permanent employment does not fall for determination in these proceedings. There has been no proposal to vary the quantum of the casual loading.

Negative Impacts

1530. The unions have alleged a number of negative impacts of casual work. Previous sections of these submissions have responded to such assertions and the extent to which they have been established. The unions' case grossly overstates the negative impacts of casual work on employees.

5. Does the evidence demonstrate any change over time in the proportion of casual employees engaged including via labour hire businesses?

1531. The level of casual employment in Australia is set out in chapter 5 of this submission. Relevant labour hire statistics are set out in chapter 8.

1532. None of these statistics point to an increase over time in the proportion of employees of labour hire businesses who are casual. Labour hire businesses have always predominantly employed casual employees because of the uncertainty surrounding the needs of their clients.

CASUAL CONVERSION

General concepts

6. Is it appropriate to establish a model casual conversion clause for all modern awards?

1533. The Answer is no.

1534. This question invites consideration of the following separate matters:

(a) Should casual conversion clauses be included in all modern awards?

(b) Should casual conversion clauses that are inserted into particular awards contain common provisions?

1535. We deal with each issue separately below.

(a) Should casual conversion clauses be included in all modern awards?

1536. As set out in section 4 of this submission, Ai Group opposes the development of any model clauses relating to casual and part-time employment. The concept of model clauses is inconsistent with the imperative that casual and part-time employment be dealt with on an award by award basis. If any model clauses are developed, there would be a significant risk that inadequate weight and attention will be given to the needs of employers and employees in particular industries and to the unique characteristics of those industries.

1537. The ACTU contends that it is appropriate to establish a model clause, except in circumstances "…*where the industry can demonstrate a structural peculiarity such that employees might ordinarily be expected to be engaged regularly and systematically for longer than six months but less than 12 months*."[866] The ACTU contends that the number of industries falling in that category would be "very small"; a bald assertion that is unsupported by evidence and can accordingly be given no weight.[867]

1538. The AMWU contends that it is "generally" appropriate to have a model clause. However, it accepts that a different approach may apply *"…where a party is able to present a case for fine-tuning supported by industry or other specific circumstances."* [868] Notwithstanding this submission, the AMWU seeks a fundamentally different conversion process to that pursued by the ACTU in the context of most awards. This is said by the AMWU to be justified by:

> …factors including but not limited to:
>
> - Industry circumstances – including patterns of production, casual/permanent mix, part-time/full-time mix, tenure of casual engagement;
> - existing industry standard of conversion provisions;
> - the experience of casuals seeking to convert under current provisions; and

[866] ACTU Response to the Issues Paper at 17.

[867] ibid.

[868] AMW response to the issues paper at paragraph 6.1.

- Previous Commission consideration of casual conversion provision.

1539. The AMWU rightly points out that existing modern award provisions contain differences.

1540. A salient point not highlighted by the AMWU is that most modern awards do not contain any casual conversion provisions. Consistent with the *Preliminary Jurisdictional Decision*, the Full Bench should proceed on the basis that prima facie these awards achieve the modern awards objective.

1541. Inherent in the submissions of the unions is an acknowledgement that there are industry-specific circumstances and other factors that have a bearing on the consideration of the appropriateness of a casual conversion provision. Indeed both of the major proponents of claims in these proceedings accept that there may be circumstances which render a model clause inappropriate for some industries or in the context of particular circumstances. Ai Group agrees with this discrete proposition.

1542. It is impossible to reconcile the ACTU's submission with the AMWU's claim for a significantly different casual conversion provision in a small number of awards.

1543. The difficulty with the broad approach proposed by the unions is that it invites the Commission to simply presume that casual conversion provisions are appropriate in the context of an award unless a party or "industry" proves otherwise. This represents an inherently risky approach to the development of the award system. This matter is not unfolding in the manner akin to a traditional 'Test Case' given the nature of the Review. It is not a party/party matter and there can be no assumption that parties will be in a position to advance material to establish that proposed claims will be problematic. There are limits to the extent to which employer parties can be expected to rise to every union claim advanced given their limited resources. No inferences can be drawn from an absence of evidentiary material being led by employer parties.

1544. In the context of the Review there is a need for a proponent of a claim to advance a robust and persuasive case in support of their claim. This should include establishing the likely impact of the claim. As observed by Deputy President Kovacic and Commissioner Roe in the context of the review of the Stevedoring Award;

> …consistent with the approach adopted in the Security Award decision, the onus falls on the Applicants *"to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes*.[869]

1545. It is incumbent on a proponent of variation to a particular award to establish that the clause is necessary. It is important to appreciate that the test contemplated by s.138 applies in the context of individual awards. Consequently, this matter turns in part on the threshold consideration of whether the unions have established that it is necessary, as contemplated in s.138 of the Act, that casual conversion provisions be inserted into each modern award the subject of a claim. The Commission could not be satisfied on the material before it. Most awards have not been the subject of any discrete evidence or submissions addressing either the need for casual conversion provisions or their potential impact.

1546. Most modern awards do not contain casual conversion provisions. The Commission has, to date, dealt with such considerations on an award by award basis. In the Part 10A Award Modernisation process there was no determination that casual conversion provisions should be developed and included in all awards. Where they were included it was merely a product of the approach of maintaining the traditionally applicable or common standard for a particular industry under the relevant predecessor awards.

1547. There are industry specific considerations that ought to be taken into account before any award is varied to limit an employer's capacity to engage employees on a casual basis. Such matters would include:

[869] [2015] FWCFB 1729 at [150].

- Patterns of production or service undertaken by an employer (i.e. the need for labour);
- Workforce characteristics, requirements and preferences;
- Labour market dynamics at play within a particular industry or occupation;
- The existing level and pattern of casual employment within an industry (this should include the level of disruption that would potentially flow from the operation of a casual conversion clause);
- The operation of other award provisions specific or peculiar to an individual award;
- The arbitral history of a particular award's provisions dealing with types of employment, including casual conversion provision;
- The characteristics of employers covered by particular awards (including their size and their capacity to absorb additional costs flowing from the claim); and
- The reasons for the use of casual employees within a particular sector.

(b) Should casual conversion clauses in particular awards contain common provisions?

1548. There is of course a tension flowing from the different claims being pursued by the ACTU. The ACTU seeks that model clause be inserted into awards the subject of their claims, apart from certain major manufacturing awards that the AMWU has a significant interest in. Casual conversion provisions should not be a product of the differing preferences of individual unions with an interest in particular awards.

1549. The AMWU has not established a sufficient evidentiary case to make good the proposition that characteristics of employers and employees in the industries the subject of their claim are so different from those in other

industries covered by awards that contain casual conversion provisions so as to necessitate a different approach being adopted.

1550. There are significant differences in existing casual conversion provisions in particular awards, and Ai Group does not support the removal of these differences through a levelling-up exercise. For example, if the right to request conversion in a particular award currently applies after 12 months of regular service, this should not be reduced to six months.

1551. Casual and part-time employment provisions are award-specific issues.

1552. Any attempt to standardise provisions, would most likely lead to costs and requirements being imposed on individual industries that are not appropriate for those industries.

7. Should the establishment of any model clause be subject to the right to apply for different provisions or an exemption in a specific modern award based on circumstances peculiar to that modern award?

1553. For the reasons outlined in response to question 6, the Commission should not adopt the approach of establishing a model clause, even if it afforded a right to apply for different provisions or an exemption. Instead the Full Bench should form the view that proponents of the claims to vary awards have failed to make out a case for varying each award as proposed.

1554. There are industries in which casual conversion clauses would be particularly problematic. This would include sectors that currently have significant reliance upon casual labour or that are subject to fluctuating operational requirements which necessitate greater numerical flexibility in their workforce. The evidence of employer witnesses[870] and the employer responses contained in the Joint Employer Survey are sufficient to establish that there cannot be an assumption that proposed clauses are workable in all or even most sectors.

[870] See for example the evidence of Krista Limbra, Ben Norman and Paula Colquhoun

1555. Of course, if the Commission forms the view that it would be appropriate for casual employees to have a greater opportunity to access permanent employment it does not follow that this should be addressed through casual conversion clauses. Instead the Commission should look to the underlying barriers to employers offering permanent employment, such as the inflexible nature of many award provisions regulating part-time employment.

8. Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?

1556. Existing casual conversion clauses merely provide for a change in the type of employment relationship under which the employee is engaged. They do not, and should not, have any impact on what constitutes an employee's *"job"* in the sense of the work that the employee has been employed to perform.

1557. As a consequent of altering the "type" of employment, the employee receives the entitlements applicable to the relevant employment type.

1558. An award should not attempt to regulate a job into existence. It is doubtful that the Commission would have the power to include a term in an award requiring the creation of a new job. It is not a matter that appears to fall within any of the categories identified in s.139 of the FW Act. To the extent that such a power did exist it would have to arise from s.142, although it is not apparent how such a contention could be sustained.

1559. The arrangement of what work an employee undertakes is a matter that must properly and fundamentally be determined by the exercise of managerial prerogative, subject to whatever agreement has been reached between the employer an employee, and considerations of what may be considered a lawful and reasonable direction.

1560. The meaning of the term "job" was considered by a Full Bench in *Ulan Coal Mine Limited v Henry Jon Howarth and Others*:

> [17] It is noted that the reference in the statutory expression is to a person's "job" no longer being required to be performed. As Ryan J observed in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 a job involves "a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees' organisation, to a particular employee" (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions.[871]

9. Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which currently exists for that casual employee?

1561. The answer is no.

1562. It is vital that an employer's right of reasonable refusal is retained in casual conversion clauses for the reasons set out in chapter 22 of this submission. Where there is a right to convert because refusal would be unreasonable, casual conversion clauses generally do not, and should not, require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which they currently perform. The ACTU and AMWU appears to be of the same view.

1563. The ACTU response to this question provides: *"No, for the reasons explained in respect of Q8 above."* The ACTU's response to question 8 stated: "*The premise of the casual conversion provision is that an employee is working regularly and systematically for a period. The "conversion" is in point of principle simple a recognition of the existing nature of the job…"*

1564. In their response to the issues paper the AMWU submits:

> 9.5 There is no current or claimed requirement for the employer to convert a casual employee to a permanent position with a pattern of hours which is different to that existing for that casual employee prior to conversion.

[871] [2010] FWAFB 3488 (10 May 2010)

1565. The position of Ai Group, the ACTU and the AMWU is consistent on this point.

1566. Current award provisions dealing with the conversion of casual employees do not require conversion to different hours. Such clauses currently provide:

> (g) 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.

1567. Regardless, the existence of the limited right to refuse conversion under current casual conversion would mean that any difficulty accommodating a different pattern of hours would be relevant to why an employer might refuse such a request.

1568. Under the claims advanced by the unions there is no mechanism to deal with how the new or different hours would be selected. It would be unrealistically optimistic to assume that such matters would readily be agreed between the parties in circumstances where there was no right of reasonable refusal.

10. Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part-time work under the relevant award?

1569. The answer is no.

1570. Ai Group opposes the inclusion of casual conversion clauses in awards for the various reasons set out in this submission.

1571. This question however appears to be directed more narrowly at the issue of whether conversion should be required when an adjustment, but not a major adjustment, to an employee's existing pattern of hours is required for the conversion to be accommodated under the relevant award.

1572. The scheduling of work is a complex matter that necessitates balancing numerous competing considerations. Employers will have varying capacities to accommodate changes to hours of work, even where such changes are not major.

1573. The Commission should not impose any obligation on employers to accommodate even minor adjustments to the pattern of hours performed by employees as a consequence of the operation of conversion clause. Given that employers often engage casuals on an "as needed basis" it cannot be assumed they are required at other times. The cumulative negative impact of such a proposal on employers with large numbers of casual employees could of course be significant.

1574. Regardless, none of the claims proposed by the unions appear to require that an employer make adjustment to an employee's existing pattern of hours of work.

Response to the ACTU and AMWU

1575. It is impossible to reconcile the positive answers of the ACTU and AMWU to this question with their previous answers to question 9.

11. What would be the consequences for employers if "regular" casuals had an absolute right to convert to non-casual employment (after 6 or after 12 months)?

1576. This issue is addressed in substantial detail in chapter 22 of this submission. The consequences would be devastating for a large number of employers and a large number of employees.

1577. The Joint Employer Survey provides a valuable insight into what employers perceive to be the impact of the claim upon their organisations. We urge the Full Bench to review the details of their responses. Even accounting for any potential differences in respondent perceptions of the term "regular" the survey responses are a powerful and persuasive articulation of the negative

consequences that would be inflicted upon employers and the action they would take in response.

1578. The overall impact upon employers would be the loss of the flexibilities that are associated with their capacity to engage casual employees on an ongoing basis. There are numerous elements to the flexibility that the availability of casual employment delivers. At the heart of this is the ability to engage an employee in a manner that does not require the employer to provide the employee with a specific amount of work per week or to engage them at specific times.

1579. Generally, awards do not afford an employer a right to either reduce a full-time or part-time employee's weekly wage in circumstances where they are not required to work. Nor do awards provide employees with a general right to 'stand down' employees. This means that where an employee has been converted the employer will be faced with the prospect of either paying the employee for hours not actually performed or making their position redundant.

1580. There are however less obvious consequences. For example, casual employees can typically be engaged for hours that vary from week to week without the need to pay overtime penalties, provided that the employee does not work beyond the relevant award constraints regarding the structuring of ordinary working hours.

1581. Employers that currently engage a large proportion of their workforce on a casual basis may be forced to entirely overhaul the structure of their workforce, if the unions' claims were accepted. This would result in the loss of a large number of jobs.

1582. To the extent that the claim forces or encourages employers to reduce their use of casual labour it will also undermine their capacity to attract and retain those individual employees who prefer the flexibility of casual employment. There appears to be general acceptance between the parties that casual employment suits or may even be preferred by some employees. It is no answer to suggest that this will not arise as an employer will only have to

convert a casual employee if the individual wants this to occur. It is wildly unrealistic to assume that employers will accept that the engagement of casual employees on a long term and regular basis will be acceptable if they are faced with the uncertainty of the employee having an absolute right to convert after a set period. Many employers would adopt the approach of not engaging a casual beyond a period which falls just before the 6 or 12 month trigger point for the conversion entitlements.

1583. There will undoubtedly be cost implications for employers if the claims are granted. It is impossible to precisely quantify the impact based on the evidence before the Commission. It necessitates consideration of the employing practices and operational requirements of each industry that would be the subject of the unions' claims.

1584. In addition to other costs, there will of course be an administrative burden flowing from the claims given the necessity to analyse the work patterns of employees in order to assess whether they are eligible for conversion. Such an obligation would likely be particularly onerous for employers which engage large numbers of casuals. There will be resulting challenges that flow from altering the proportion of an organisation's workforce that is engaged on a permanent basis. This would include, for example, greatly complicating the rostering arrangements that the employer must implement in order to provide employees with sufficient guaranteed hours as well as access to various forms of leave. Ultimately, employers that currently engage large volumes of casual employees may be required to significantly restructure their workforces. The business models of thousands of employers would need to change markedly. There would be major consequential adverse impacts on employees and customers.

1585. Employers who perceive (rationally or otherwise) that the engagement of more permanent employees is not viable can be expected to adopt alternate means of engaging labour, such as through the use of fixed term or specific task contracts, or will seek to terminate the services of relevant casuals prior to conversion. In either instance there will be costs associated with the

resulting periodic turnover of labour, such as potentially increased recruitment and training costs. We note that many Joint Employer Survey respondents indicated an intent to utilise labour hire providers in response to any change.

1586. The above consequences are relevant to the following mandatory considerations in the modern awards objective:

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; (134(1)(f)); and

- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (134(1)(h).

1587. Both considerations weigh heavily against granting the claims. The burden lies entirely with the unions, as the architects of the claims before the Commission, to provide the Full Bench with sufficient evidence to enable it to be satisfied that the claims are consistent with the above mandatory considerations, and are necessary to enable the modern awards objective to be met (s.138). Clearly, they have failed to do so.

12. Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the *Fair Work Act 2009* and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?

1588. The answer is no.

1589. The unions have not established that the current clauses or dispute resolution clauses are not operating effectively. We have dealt with the deficiencies in the evidentiary case advanced by the unions earlier in this submission. Much of the unions' evidentiary case is comprised of a parade of a relatively small number of disgruntled employees engaged in a narrow range of industries who do not appear to be eligible to convert under the claims advanced; and a

selection of union officials who, while often making statements that were consistent with the publically stated concerns of their union, failed to demonstrate any direct knowledge of the actual hours work by their members.

1590. The key point, however, is that the evidentiary case advanced by the unions does not to establish that there is commonly disagreement over whether casual employees are eligible for conversion. This suggests that existing clauses are being applied in a satisfactory and reasonable manner. The right to request, the right of reasonable refusal, an obligation to discuss the issues, and an obligation to provide reasons for any refusal are key elements of the workable framework included in most existing casual conversion clauses.

13. Would changes to the part-time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part-time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?

1591. The answer to the first question is generally yes. However, implementing more flexible part-time provisions must not be achieved at the cost of implementing less flexible casual provisions. Employers and employees need flexibility in respect of both types of employment.

1592. More flexible part-time provisions would not remove the need for employers to engage employees on a casual basis. Nor would it meet the needs of employees who prefer the freedom and flexibility associated with casual employment. While many employers and employees would undoubtedly welcome greater flexibility in the regulation of part-time employment, a liberalisation of such matters should not be viewed as justifying greater restrictions on the use of casual employment.

1593. Ai Group would nonetheless support a move to reduce the overly restrictive nature of the part-time arrangements in many awards. This would include, for example, award clauses that:

- Require agreement in writing on the precise number of hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times, with any changes required to be agreed in writing (part-time employees should be able to be rostered within the confines of the hours of work provisions in the relevant award, in a similar manner to full-time employees);

- Require that hours worked outside of the initially agreed hours are overtime hours and/or are to be paid at overtime rates. (Overtime rates should not apply until the employee has worked 38 ordinary hours, as provided for in some awards, e.g. the Telecommunications Award and the Contract Call Centres Award).

1594. The current overly restrictive part-time provisions inhibit an employer's capacity to offer part-time employment. We note that such considerations were raised in the context of the Christie Tea dispute and accepted by Commissioner Hampton as relevant to any determination of whether refusal to convert would be reasonable.[872] During the course of his oral testimony Professor Markey accepted that award strictures relating to the use of part-time employment contributed to employer decisions to engage casual employees.[873] By logical extension, any move to make part-time employment more flexible would facilitate casual conversion.

1595. We nonetheless emphasis that making part-time provisions more flexible would not be a reason for concluding that the introduction or expansion of casual conversion clauses in awards is *necessary*. Instead, such changes should be viewed as an alternate means of addressing any perceived need to encourage the use of permanent employment arrangements.

1596. With regard to the second question - i.e. "Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part-time employees may not be rostered to work on hours which they

[872] *Australian Manufacturing Workers' Union (AMWU) v Christie Tea Pty Ltd* [2010] FWA 10121.

[873] Transcript of proceedings on 23 March 2016 at PN9059 – PN9057.

have previously indicated they are unavailable to work?" – the answer is no. This issue is currently addressed on an award by award basis. This approach needs to be retained due to the significant differences which exist between industries. The Commission should not remove the existing capacity of employers in some industries to potentially require part-time employees to work additional hours beyond those initially agreed.

1597. Under the NES and awards, full-time employees can be required to work reasonable additional hours. There is no logical reason why part-time employees should not similarly be required to work reasonable additional hours beyond their part-time hours. The "requirement to work reasonable overtime" clause that was inserted into awards in 2002 following the AIRC's *Reasonable Hours Case* applied to full-time and part-time employees.

Definition of irregular casual

14. Does the exclusionary expression "irregular casual employee" provide a workable basis for the operation of a casual conversion clause?

1598. It is trite to observe that the expression "*irregular casual employee*", as defined in current clauses and the unions' claims is imprecise and open to differing interpretations. Nonetheless, on balance, the expression appears to provide a sufficiently workable basis for the operation of current casual conversion clauses, because:

- Current casual conversion clauses essentially act as a catalyst for a discussion between the employer and the employee regarding conversion accompanied by a compulsion for the employer to be reasonable in assessing whether it will accommodate any conversion; and

- Any change in an employee's status and hours of work is ultimately implemented by consent or agreement;

1599. The current definition of *"irregular casual employee"* would not be workable for the unions' proposed clauses which incorporate an absolute right to convert.

However, the unions' proposed clauses would be very damaging and include numerous unworkable elements, not simply the definition of *"irregular casual employee".*

1600. The unworkable nature of the definition of *"irregular casual employee"* for the AMWU's deeming clause is obvious. The AMWU's clause provides that an employee who has been engaged for the relevant sequence of periods simply *"is deemed to be converted".* That is, the conversion occurs be force of the award and without any involvement by the parties. The limitation on this obligation is that it does not apply in relation to *"irregular casual employee".*

1601. An obvious problem with such an outcome is that an employee may, at law, be converted for the purposes of the award and FW Act but the parties would be entirely unaware. This could also result in an employer being in breach of the award or legislation in a multitude of ways and accruing liability for a raft of underpayments and as well as being exposed to a raft of penalties. This could occur where the parties are simply unaware of the provisions of the clause or as a consequence of a genuinely held, but incorrect, view by the parties that the employee is an *"irregular casual employee."*

1602. A further problem is that there are numerous casual employees whose work patterns would not meet the definition of an *"irregular casual employee"* but who would also not meet the definition or requirements related to permanent part-time or full-time employment under the relevant award. Indeed, some awards do not contain part-time provisions.

15. Should any casual conversion clause contain a more specific and certain definition of what is an "irregular casual employee"? If so, what should that definition be?

1603. The answer in no; the reason being that it is vital that the existing right of an employer to reasonably refuse a conversion request is retained.

1604. The retention of the right of reasonable refusal enables the current definition of *"irregular casual employee"* to be retained, despite its imprecision, for the reasons identified in our answer to question 14.

1605. No party has identified or called for a more specific definition.

1606. If the Commission finds that the proposed definition of *"irregular casual employee"* contained in the unions' proposed clauses is deficient, this is a further reason why the unions' unworkable claims should be rejected in their entirety.

16. Should the concepts of regular and irregular casual employment be understood, for the purpose of consideration of the casual conversion issue, in the same way as the concept of regular and systematic engagement referred to in s.11 of the *Workers Compensation Act 1951* (ACT) was interpreted in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 (In that decision Crispin P and Gray J stated at [65] that "*it is the 'engagement' that must be regular and systematic; not the hours worked pursuant to such engagement"* and at [69] that *"the concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required"* and Madgwick J said at [89] that *"It is clear from the examples that a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all."*

1607. The answer is no.

1608. The meaning of s.11 of the *Workers Compensation Act 1951* differs markedly from the concept of an *"irregular casual employee"* under casual conversion clauses.

1609. Section 11 expressly emphasises that it is the “engagement” that must be “regular and systematic” (emphasis added):

> Regular contractors and casuals
>
> (1) This section applies to the engagement of an individual by a person (the "principal") if—
>
> (a) the individual has been engaged by the principal—
>
> (i) under a contract for services to work for the principal (whether or not on a casual basis); or
>
> (ii) on a casual basis under a contract of service to perform work for the principal other than work that is for (or incidental to) the principal's trade or business (unless section 10 (2) applies, which deals with casual employment found through employment agencies); and
>
> (b) the individual personally does part or all of the work; and
>
> (c) if the principal is a corporation—the individual is not an executive officer of the corporation.
>
> *Note for par (a)(ii)* Section 10 (2) provides that if a casual worker employed other than for the employer's trade or business is engaged through an employment agent, the casual worker is a *worker* employed by the agent.
>
> (2) For this Act, the individual is taken to be a *worker* employed by the principal if—
>
> (a) the engagement, under the contract or similar contracts, has been on a regular and systematic basis; or
>
> (b) the individual has (or, apart from any injury, would have had) a reasonable expectation of the engagement continuing on a regular and systematic basis (under the contract or similar contracts), even if the engagement has not been on a regular or systematic basis.

1610. Paragraph 65 of the judgement of Crispin P and Gray J referred to in the Full Bench’s question states:

> 65. It should be noted that it is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement. Furthermore, the section applies to successive contracts and non-continuous periods of engagement. It is true that subs (3) provides that, in working out whether an engagement has been on a regular and systematic basis, a court must consider, inter alia, the frequency of work, the number of hours worked under the contract or similar contracts and the type of work. However, these statutory criteria relate to the decisive issue of whether the relevant engagement has been on a regular and systematic basis. The section contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent.

1611. Unlike the definition in s.11 above, the definition of *"irregular casual employee"* in awards expressly refers both to *"work"* (emphasis added):

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

1612. Inherent in a determination of whether an employee is an *"irregular casual employee"* for the purposes of the award clauses, is an assessment of whether the pattern of hours worked are occasional or non-systematic or irregular.

1613. It can be seen from the wording of casual conversion clauses that hours of work are intended to be a significant focus. If they were not, various elements of the clauses would be rendered unworkable. For example, there would be no way to apply the provisions dealing with the hours that an employee eligible to be converted to part-time employment would work: (emphasis added):

> (g) 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.

17. If the interpretation in *Yaraka Holdings* is to be applied, how does an employee/employer determine what hours are to be used in a right to convert to part-time employment?

1614. If the interpretation in *Yaraka Holdings* is to be applied there would be no clear way of determining what hours are to be used. This highlights why Ai Group's answer to question 16 is correct.

Response to the ACTU submissions

1615. In response to this question the ACTU contend that, "*the ACTU claim requires that the hours to of a converting employee are to be discussed by the employer and employee and determined by the agreement, with the broad*

objective that an employee would have a right to continue on similar hours to those of they have been working."[874]

1616. The ACTU appears to misunderstand their own claim. Their proposal does not provide that the hours of a converting employee are to be determined by agreement, although it does provide a capacity for this to occur. The ACTU claim provides as follows:

> X.3 An employee who has worked on a full-time basis throughout the period of casual employment has the right to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment has the right to convert to part-time employment, on the basis of the same number of hours and times of work as previously worked.

1617. The ACTU goes on to advance a new proposal that, in default of agreement, an employee would be entitled to, *"…at least the average hours worked in the preceding 13 week period, and a pattern of hours reasonably consistent with those worked over that period."*[875]

1618. The ACTU's further proposal would lead to further complications and a more onerous regulatory burden.

1619. Consideration of the unions' unworkable proposals, and their attempts to modify them in a futile attempt to make them workable, reinforces the wisdom of retaining the existing employer right of reasonable refusal which promotes discussion between the parties and agreement being reached.

Employer Notification

18. Having regard to a number of factors, including in particular the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?

[874] ACTU response to the Issues paper, paragraph 33.

[875] Ibid at paragraph 34.

1620. The answer in no. Ai Group has addressed this issue in detail in its submissions in support of the abolition of the requirement for an employer to notify employees of casual conversion rights.

1621. Nowadays employees do not need to rely on unions to inform them of their entitlements. Employers are required to make a copy of the relevant award available to each employee, awards are readily available on-line, and the FWO distributes an extensive amount of information to employers and employees about award entitlements and obligations.

19. Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for example, requiring all casual employees to be notified upon first being engaged, or by defining "irregular casual employee" in a way which provides clarity as to who is required to be notified)?

1622. Ai Group has made detailed submissions in support of the abolition of the requirement for an employer to notify employees of casual conversion rights.

1623. Technology and access to information has changed dramatically since 2000 when casual conversion clauses were devised.

1624. Today, employers are required to make a copy of the relevant award available to each employee, awards are readily available on-line, and the FWO distributes an extensive amount of information to employers and employees about award entitlements and obligations. Therefore, it is unnecessary and unwarranted for an employer to have a specific obligation to advise employees of their casual conversion rights.

Period prior to conversion right

20. Is a 6 month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?

1625. The making of any proper assessment of whether six months is sufficient to account for seasonal factors necessitates a thorough understanding of the operational requirements and labour demands in each industry covered by each award. This is a key reason why the Commission and its predecessors have to date only been prepared to determine applications for casual conversion provisions on an award by award basis, and why the Commission should not depart from this longstanding approach in these proceedings.

1626. In its *Decision re making of priority modern awards,* [876] the Award Modernisation Full Bench decided that casual conversion provisions:

- Should generally only be included in an award if there is an 'industry standard' for such provisions in that industry;[877] and
- Should only be extended to another industry if 'exceptional circumstances' apply to that industry.[878]

1627. When the Full Bench made the above decision, an 'industry standard' only existed in an industry if a specific application had been pursued seeking casual conversion provisions in a particular industry award.

1628. The paucity of material advanced by the unions in these proceedings simply does not enable the necessary award by award assessment to be made. For this reason alone, the proposed claims should not be granted.

1629. There is no 'science' behind the unions' common claim for conversion after 6 months. It is essentially a levelling up exercise given that: most awards do not

[876] [2008] AIRCFB 1000.

[877] [2008] AIRCFB 1000 at para [51].

[878] [2008] AIRCFB 1000 at para [51].

contain casual conversion provisions, some awards provide for conversion after six months, and some awards provide for conversion after 12 months.

1630. After the *Metal Industry Casual Employment Decision* was handed down in 2000, the AWU made application to vary the *Horticultural Industry (AWU) Award 2000* in 2003. The variation was ultimately made by consent between the AWU and Ai Group on the basis of a 12 month period for conversion, rather than 6 months.[879] The 12 month period reflected the seasonal nature of work in the horticulture industry. This highlights the reason why casual conversion provisions need to be determined on an industry by industry basis, rather than on a "one size fits all" basis.

1631. The mere fact that provisions with a 6 month conversion period have been included in a minority of current awards is not a justification for adopting similar provisions in other awards.

1632. The evidence advanced by employers establishes that a 6 month conversion period would be highly problematic for some industries. For example, the statements and oral testimony of both Benjamin Norman and Paula Colquhoun are illustrative of the challenges faced by employers that engage casuals for periods exceeding 6 months but have greatly reduced labour requirements at other types of times of the year.

1633. Even if a six month period is long enough to cover the seasonal peak/s in an industry sometimes employers engage employees after the peak for discrete purposes. For example, in his evidence Mr Norman refers to Viterra's practice of retaining some casuals who have been engaged to work on the 'harvest' to perform other duties following completion of the harvest but connected to it.[880]

1634. The right of refusal currently contained in conversion clauses reduces the adverse impacts of the relatively short 6 month qualifying period contained in some awards. This right enables legitimate industry and enterprise issues to

[879] PR933550

[880] PN5186 to PN5214

be taken into account in decisions regarding conversion. It is essential that the right of refusal is retained.

21. Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?

1635. The answer is that, unless any other period is identified in a particular award, the period is calculated from the first engagement of the casual.

1636. Clause 14.4 of the Manufacturing Award states:

> **14.4 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.
>
> - - -
>
> **(k)** For the purposes of clause 14.4, an **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis

1637. Under the above provisions, six months after the first engagement by the employer, a key question arises, i.e. does the employee meet the definition of an "irregular casual employee"?

1638. An employee is an "irregular casual employee" if

- The employee has been engaged to perform work occasionally; or
- The employee has been engaged to perform work other than on a systematic basis; or
- The employee has been engaged to perform work irregularly.

1639. Therefore, in order to have an entitlement to request conversion, an employee must have been engaged to perform work on a non-occasional and systematic and regular basis throughout the entire 6 month period.

1640. Any other approach would not be workable. It is hard enough for employers to implement systems to assess conversion rights and notify employees at a tangible point in time six months after the date on which the employee was first engaged. If there was not a specific date for the entitlement to be assessed, the regulatory burden and complications would be much greater.

1641. A key additional point inherent in the conversion provisions is that the employee right arises at a single point in time. If the right is not exercised, it is lost.

Response to the AMWU Submission

1642. The AMWU address the Full Bench's question, in part, by reference to decisions considering the construction of s.384(2) of the FW Act, the provision that specifies when a period of service as a casual employee will not count towards an employee's "period of employment" for the purposes of determining when a person is protected from unfair dismissal (the term "period of employment" has a special meaning in this context).[881] The AMWU's approach is entirely unhelpful in interpreting the provisions of current conversion clauses given s.384(2) is worded very differently to the awards and of course operates in a different context. The period of service, as contemplated under the FW Act, is also potential affected by the operation of s.22 of the Act.

1643. It is unclear why the AMWU seeks to conflate the notion of "continuous service" as referred to within the FW Act with the provisions of existing casual conversion clauses in awards.

[881] AMWU response to the issues paper 21.1 to 21.2

Response to ACTU Submission

1644. The ACTU's two word response of "The latter" to the Full Bench's question is of little assistance and should be disregarded.

1645. We do however reiterate that it is the ACTU that is seeking to vary a multitude of awards to include new casual conversion terms. The ACTU must shoulder the onus of establishing that every term of its claims is necessary, as contemplated by s.138. To the extent that it fails to provide an explanation, let alone justification, for any element of its claim, the claims should be rejected

22. Are existing or claimed casual conversion clauses intended to give a one-off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?

1646. They intended to give a one-off opportunity, as explained in our answer to question 21.

1647. The ACTU contends that the opportunity to convert will exist, *"…for so long as the employment remains regular and systematic."*[882] That is, they contend an employee that passes up conversion will while retain the right while the employee remains a "regular casual" and that the entitlement to conversion will only dissipate when the employment reverts to "true" casual employment. No support for this interpretation can be found in the wording of the existing casual conversion clauses or, it appears, the unions' proposed clauses.

1648. The AMWU contends that the operation of casual conversion provisions is intended to give casual employees a continuing entitlement.[883] Again, no support for this interpretation can be found in the wording of the existing casual conversion clauses or, it appears, the unions' proposed clauses.

1649. In response to the question the AMWU appear to be opportunistically seeking to amend their claim to purportedly "clarify" that that conversion is not a once of proposition. This proposal amounts to a new and substantively different

[882] ACTU Response to the Issues Paper at 41

[883] AMWU Response to the Issues Paper at 22.1

claim to that initially advanced by the union.

The importance of a right to convert only operating at a particular point in time

1650. It is very important that casual conversion clauses continue to operate so that they give a one-off opportunity to convert in order to afford employers some degree of certainty and control over the manner in which they operate their businesses and manage their workforces. Matters associated with the mix of casual and permanent employees within a workforce will be relevant to managerial decisions an employer has to make in relation to operational matters.

1651. This would include, but not be limited to, decisions related to the recruitment of staff, the granting or scheduling of leave, and making provision for contingent liabilities that only flow from the employment of permanent staff.

1652. There is a considerable regulatory burden associated with assessing eligibility for conversion, having discussions about conversion, and converting relevant casual employees. Employers need certainty about the date when this obligation arises. Under the existing clauses, the relevant date is six or 12 months after the date when the casual employee was first engaged.

1653. A clause which enables a casual employee to convert at any time would be very disruptive and problematic for employers.

1654. Neither the ACTU nor AMWU have made any attempt to set out merit based grounds for altering existing arrangements to provide for an ongoing opportunity for conversion, let alone establishing why this is necessary to meet the modern awards objective.

Employer capacity to refuse

23. Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?

1655. The answer to the first question is yes, and the answer to the second question is no.

1656. It is essential that casual conversion clauses permit employers to refuse conversion in circumstances where such refusal would be reasonable. We have dealt with this in detail in this submission. The arguments and evidence in support are compelling.

1657. We do not see a need for the Commission to give examples of circumstances where refusal would be reasonable. It would be impossible to identify all of the relevant circumstances and therefore any examples could cause uncertainty and confusion. Ultimately, any assessment of when it will be reasonable to refuse will be dependent upon the specific factual circumstances of a particular case.

1658. The existing provisions which give employers the right of reasonable refusal do not include examples and they have been operating effectively, as is demonstrated by the absence of disputation, and the unions' lack of any convincing evidence of problems arising.

1659. There is nothing unusual or inherently problematic with limiting an employee right or entitlement to that which is "reasonable" in particular circumstances. Indeed the notion of "reasonableness" is very commonly utilised within other aspects of the safety net and the legislative framework more broadly. This includes in the context of:

- Under the maximum weekly hours provisions of the NES an employee may refuse to work "unreasonable" additional hours (s.62);

- Casual employees are only entitled to parental leave if they have a "reasonable" expectation of continuing employment (s.67(2));

- Determining the day of placement for the purposes of adoption leave requires assessment of what travel is "reasonably" necessary (s.67(6));

- Employers may refuse a request to extend a period of unpaid parental leave on "reasonable" business grounds (s.76(4));

- A casual employee is only entitled to request flexible working arrangements if they have a "reasonable" expectation of continuing employment (s.65(2));

- An employer may require an employee to provide evidence of the need to access unpaid special maternity leave that would satisfy a "reasonable" person (s.80(4));

- In relation to unpaid no safe job leave an employer may require an employee to provide evidence of a pregnancy that would satisfy a "reasonable" person (s.82A(1)(c));

- An employer can only refuse a request for flexible working arrangements on "reasonable" business grounds (s.65);

- The legislative provisions dealing with consultation with employees on unpaid parental leave requires an employee to take all "reasonable" steps to give the employee information and an opportunity to discuss (s.83(1)(b));

- The evidence requirements relating to unpaid pre-adoption leave are based on a "reasonable" person test (s.85(6));

- An employer is prohibited from "unreasonably" refusing to agree to a request by an employee to take paid annual leave. (s.88(2));

- A modern award or enterprise agreement may only include terms requiring an employee or allowing an employee to be required to take

annual leave if the requirements are “reasonable” (s.93);

- An employer may require an award free employee to take annual leave if the requirement is “reasonable” (s.94);
- The evidence requirements associated with paid personal / carer’s leave, unpaid carer’s leave and compassionate leave are based on satisfying a “reasonable” person (s.107(3));
- The entitlement to be absent from employment for engaging in eligible community service activities is determined by reference to an assessment of what constitutes “reasonable travelling time”, “reasonable rest time” and consideration of whether the absence is “reasonable” in all the circumstances (s.108);
- The evidence requirements associated with community service leave are based on a “reasonable” person test (s.110(3) and (s.111(3));
- An employer may make request an employee to work on a public holiday if the request is “reasonable” (s.114(2));
- An employee may refuse a request to work on a public holiday if the request is not reasonable and the refusal is reasonable (s.114(3))

1660. The AMWU’s argument that the removal of the right of reasonable refusal is necessary in order to combat what they allege to be employee reluctance to request conversion, is not convincing. Similarly, the evidence which the unions are relying upon is not convincing as we have highlighted in this submission.

1661. There are of course avenues that employees have if an employer took any adverse action because an employee sought to exercise a workplace right.

24. If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:

1662. Before seeking to address each of the specific scenarios identified, we reiterate that any assessment of whether it would be reasonable or unreasonable will be dependent upon the specific factual context in a particular case.

24.1 Where an employee has been working close to full time hours over a 6 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?

1663. The pattern of hours that have been worked in the past is only one of many issues that are relevant to whether refusal is reasonable. Of course where the award does not allow permanent employment under a similar pattern of hours, conversion would not be reasonable (e.g. where a casual employee works on a part-time basis and the award does not include part-time provisions).

1664. The pattern of hours is relevant to whether the employee has a right to request. It is not determinative of the reasonableness of refusal. If regular and systematic work for a specified period was deemed to prevent employer refusal of a request to convert, the employer right could be negated because a right to request only arises if the casual has worked on a regular and systematic basis for the specified period.

1665. Also, "full time hours" should not be given more weight than "part-time hours".

1666. The past is not always a reliable indicator of the future. Just because an employer has had a need to engage a casual for six months does not mean that there is a full-time position going forward. Consideration would have to be given to matters such as the reason why the employee has been engaged to perform such hours and the needs of the employer going forward.

1667. Refusal would be reasonable if the conversion caused a, "clear and significant problem" for the employer, as contemplated in *AMWU v SPC Ardmona Operations Limited*.[884]

1668. It is too simplistic to suggest, as the ACTU does, that refusal in such circumstances would be "unreasonable."[885]

24.2 Where an employee has been working close to full time hours over a 12 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?

1669. See answer for question 24.1. The same answer applies here.

24.3 Where the employer can demonstrate that the work requirement which has been met by the casual employee will not be continuing over the next 6 months and adjustment to the remaining casual pool is unable to meet normal or likely fluctuation in work demand?

1670. These circumstances would weigh heavily in favour of a refusal being reasonable although the inclusion of a specific example like this in the award would most likely lead to uncertainties and disputation. The right of refusal is best left undefined given the large number of different factual scenarios that could lead to the refusal or acceptance of a request being reasonable or unreasonable.

1671. The scenario demonstrates an example of the problematic outcomes that would flow from the imposition of mandatory conversion. In such circumstances, under the unions' proposed clauses an employer would have to convert the employee and then, as a consequence of not have sufficient work for them, terminate their employment. This is not in either party's interest.

1672. The question also raises the important point that many employers will legitimately seek to retain a pool of experienced casual employees in order to

[884] [2011] FWC 4405 paragraph 24-27

[885] See the ACTU one word answers to questions 24

ensure that they are able to meet fluctuating labour needs. This may be necessary in order to meet either fluctuating operational requirements or the inevitable (but often unplanned) absences of permanent staff.

24.4 Where the pattern of on-going part-time hours required to meet business needs is able to be accommodated by the part-time provisions of the relevant award?

1673. This would be a relevant consideration, but numerous other issues would need to be considered. The inclusion of a specific example like this in the award would most likely lead to uncertainties and disputation. The right of refusal is best left undefined given the large number of different factual scenarios that could lead to the refusal or acceptance of a request being reasonable or unreasonable.

1674. It would be reasonable to refuse a conversion request where the award does not allow permanent employment under a similar pattern of hours to those which the employee has been working a casual.

1675. In the Christie Tea dispute the employer pointed to the restrictive nature of the part-time provisions in the relevant industrial instrument as a barrier to converting the relevant employees. In considering what was reasonable in the circumstances, Commissioner Hampton there noted that:

> … the operation of the part-time provisions of the modern award is a factor to be considered, depending upon the extent of variation in the actual work demands from week to week. This would also become more of an issue if a significant number of employees were to convert to part-time employment and could also lead to the number of hours being specified for any part-time employees being less than might otherwise have been the case.

24.5 Where the pattern of on-going part-time hours required to meet business needs is unable to be accommodated by the part-time provisions of the relevant award?

1676. It would plainly be unreasonable to refuse to convert a casual employee in circumstances where the pattern of work cannot be accommodated by the part-time provisions of the relevant award.

1677. It is unclear why the ACTU believes that refusal in these circumstance would be "unreasonable." The one word answer provided offers the Full Bench little assistance. The failure of the ACTU to even attempt to seriously deal with this question is reflective of the unworkable nature of the unions' proposals, with no serious attempt made to satisfy the Commission that the proposals are consistent with the statutory criteria in ss.134 and 138 of the Act.

25. If there were to be an absolute right to convert, or a right subject to an exemption mechanism, should that right be limited or defined by reference to the circumstances in (24) above?

1678. We very strongly oppose an absolute right being included in any award, even if an exemption mechanism was included. Such an approach would inflict widespread damage on industry and harmful consequences on a significant proportion of the more than 2 million casual employees in the Australian workforce.

1679. The idea than employers would need to apply to the Commission for an exemption in order to continue to employ a casual on an ongoing basis is unworkable. The approach harks back to a bygone era where the Commission had a central role in determining the minutiae of working conditions in individual workplaces. Such an approach would impose an extreme red tape burden and is inconsistent with the needs of employers and employees in modern workplaces.

1680. The unions have failed to mount a convincing case or satisfy the statutory criteria that the award provisions that they are proposing are necessary to meet the modern awards objective. Hence, their claims should be dismissed and the flexibility contained within the existing provisions should not be disturbed.

27. Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?

1681. See answer to question 26 which is equally relevant to this question.

1682. Ai Group has not identified any provision of the FW Act that enables the Commission to grant an exemption from award derived obligations. We do not see how the Commission would have that power. If such a power exists, it is not appropriate that it be used in this context.

1683. The Commission should ensure that awards operate in a sufficiently flexible manner so as to represent a "fair and relevant" safety net in the context of the diverse range of employers and employees that each award covers.

Response to the AMWU and ACTU Submission

1684. The answer provided by the AMWU at paragraph 27.1 is irrelevant to the question asked. The union contends that, *"…where an employee elected to convert and the employer opposed the election the employer could apply to a court of competent jurisdiction challenging the eligibility of the employee to convert.*" We do not understand the basis for this submission.

1685. An employer will not have capacity to apply to a court to seek an exemption from an award obligation.

1686. The ACTU have not offered any meaningful reply, merely submitted "possibly yes".

Small business

28. Is there a case for excluding small business employers from a casual conversion clause in the same way as for redundancy entitlements?

1687. Casual provisions in awards should apply equally to large and small businesses.

1688. For businesses of all sizes, the flexibility to engage casuals as needed is vital.

1689. Any relevant differences that relate to the size of the employer can be taken into account in determining whether refusal is reasonable in the circumstances.

29. Alternatively, is there a case for a longer than standard period of employment before casuals employed by a small business employer may exercise any conversion rights?

1690. Casual provisions in awards should apply equally to large and small businesses.

1691. For businesses of all sizes, the flexibility to engage casuals as needed is vital.

Labour hire

30. Have casual conversion clauses encouraged, or will they encourage, employers to source casual labour from labour hire businesses?

1692. It is difficult to provide a definitive answer, on the evidence before the Commission, as to the extent to which existing casual conversion clauses have encouraged employers to source casual labour from labour hire businesses.

1693. There are a number of factors that contribute to fluctuations in the use of labour hire over time the most prominent being the general business environment.

1694. There can however be no doubt that the casual conversion clauses advanced by the unions will encourage some employers to source casual labour from labour hire businesses. As the AMWU in effect concedes, when Joint Employer Survey respondents were asked about the impact of a casual

conversion clause that did not provide for a right of refusal, many indicated that they would either terminate casuals or engage a labour hire provider.[886]

1695. There is no reason for the Full Bench to believe that these responses in the Joint Employer Survey are not genuinely advanced or reflective of the action that survey participants would take.

1696. The unions' claims would create a barrier to the direct employment of casual employees. Although casuals could continue to work on a casual basis if they so desire, many employers would not risk facing such uncertainty and would instead terminate casual employees before a right to conversion arises or implement other strategies. The most obvious of these strategies would be utilising labour hire.

1697. As the AMWU rightly points out at paragraph 30.2, concern that the proposed casual conversion clause advanced in the 2000 *Metal Industry Casual Employment Case* would result in the termination of casuals and the use of outsourcing arrangements was raised by Ai Group in the context of those proceedings. Such concerns led the AIRC to implement a right of reasonable refusal. This right is now well-established and working effectively for businesses and their employees

1698. At paragraphs 50 and 51 of their response to the Issues Paper the ACTU assert, in effect, that given the claim applies to labour hire it will *"…simply shift the obligation to the labour hire provider to engage that person on a permanent basis with the cost presumptively being returned to the host."* The ACTU contention is simplistic and naïve.

1699. On the evidence before the Full Bench it cannot be satisfied that all labour hire providers will generally have the capacity to pass on such costs and as such the assertion should be given no weight. The ACTU also underestimates the complexities and diversity of the labour hire sector. It cannot be assumed that a labour hire provider will have the capacity to determine, in advance,

[886] AMWU response to issues paper, paragraph 30.2

whether a client will require the services of an employee on an ongoing basis or on a regular and systematic basis.

1700. The cavalier approach to the needs of the labour hire sector reflected in the ACTU's submissions should not be accepted by the Full Bench. The sector is an important component of the Australian economy and it provides an important avenue for many employees to access employment. The needs of employers in the sector should not be afforded any less weight than the interests of employers in other sectors.

D. ALLOCATION OF ADDITIONAL WORK

31. In relation to the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?

1701. We refer the Commission to chapter 25 of this submission, where we have given detailed consideration to the process that, as we would understand it, would be required to be taken by the proposed provision.

1702. In summary, iwould appear to us that the provision requires that the following steps be undertaken by an employer:

- Identify the specific work that will be performed by the new casual or part-time employee that it seeks to employ;
- Identify existing casual or part-time employees that are performing 'similar work' (noting the difficulties associated with making this assessment, as explained below);
- Ascertain which of those employees' 'normal working hours' are less than 38; a matter to which we return later in this submission;

- Communicate the availability of additional hours of work to such existing casual or part-time employees (we later deal with the difficulties associated with selecting existing employees for this purpose);

- Allow time for the relevant employees to respond to the employer;

- Consider the responses received and assess which if any of those employees requests can be accommodated;

- Advise the relevant employees of the outcome;

- Deal with employee queries or concerns regarding the outcome, as well as dealing with any disputes that might arise (see section below regarding the dispute settlement procedure);

- Implement changes as necessary to working arrangements or rosters; and

- Make an assessment as to whether the need for an additional part-time or casual employee has been alleviated and if not, undertake the entire process once again given that the clause is cast so as to impose the relevant obligation in each instance that an employer seeks to engage a new casual or part-time employee.

1703. The ACTU and AMWU's abbreviated explanation as to how the clause would in fact operate disregards the practical reality of that which it has proposed. The process that would necessarily need to be undertaken is self-evidently a lengthy, resource intensive and cumbersome one. The unions seek to gloss over the administrative burden that would in fact be imposed by the provision, which we address in greater detail below.

32. Is there anything in the modern awards objective in s.134(1) of the *Fair Work Act* which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?

1704. Section 134(1)(c) of the Act relevantly requires that the Commission must take into account the need to promote social inclusion through increased workforce participation. That is, the Commission must take into account the need to promote increased employment.[887] This is one factor that must be weighed against other elements of the modern awards objective:

> [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.[888]

E. CASUAL MINIMUM ENGAGEMENT

33. Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?

1705. We strongly submit that the implementation of a one-size-fits-all minimum engagement/payment period in all or most awards is not appropriate. We have given detailed consideration to this issue at section 23.2 of this submission.

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[887] *4 yearly review of modern awards – Common issue – Award flexibility* [2015] FWCFB 4466 at [166].

[888] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

34. Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?

1706. A detailed response to this question can be found at section 23.8.

1707. It is our view that facilitative provisions, where they currently exist, should not be deleted as proposed by the ACTU. Further, we have advanced a claim to introduce a facilitative provision in respect of the casual minimum engagement in the Fast Food Award for the reasons set out in our submissions of 13 June 2016. The introduction of a facilitative clause in the terms there proposed in respect of *current* casual and part-time minimum engagement/payment periods would serve to increase the flexibility available to employers and employees covered by those modern awards and so we have not identified a concern arising from such an approach.

1708. It cannot be assumed, however, that the implementation of a facilitative provision would mitigate the difficulties that we have identified as arising from the grant of the ACTU and its affiliates' claims. That is, the impact that would be felt by businesses as a result of the introduction of a four hour minimum engagement as proposed cannot be circumvented by simply inserting a facilitative provision that enables agreement to deviate from it.

1709. We make this submission on the following bases. Firstly, a facilitative provision, by its very nature, operates by agreement between the employer and employee. Where such agreement is not forthcoming, the employer would be subject to the consequences we have here identified. There is no evidence before the Commission that might enable to it to make findings as to the projected utilisation of such facilitative provisions in the various awards that are sought to be varied by the ACTU and its affiliates. Accordingly, a considered assessment as to the extent to which it would alleviate the concerns we have raised in respect of the claims cannot be made.

1710. Secondly, the grant of the claims would disrupt existing working arrangements. That is, an employer may have engaged casual and part-time employees on the basis that they will be engaged to perform less than four hours of work on certain shifts. The imposition of a new award obligation to provide at least four hours of work/payment would disturb this arrangement. A facilitative provision cannot necessarily sidestep the consequences that would flow. This is because an employer's ability to maintain existing arrangements is entirely contingent upon an employee's consent to do so.

1711. Accordingly, whilst we do not oppose, in general terms, the notion of introducing facilitative provisions that enable an employer and employee to agree to a reduced minimum engagement/payment period, we do not consider that it would provide an appropriate remedy to the raft of concerns we have identified as arising from the unions' claims. It remains our position that the changes they seek should not be granted.

1712. Should the Commission determine that it is appropriate to introduce facilitative provisions of this nature, they should be inserted in the terms similar to that which we have proposed in respect of the Fast Food Award:

> An employer and employee may agree to an engagement for less than the minimum of [insert number] hours.

1713. It is our view that such a clause contains adequate protections and that the imposition of additional hurdles is not necessary. A case has not been made out for confining the operation of any such provision to circumstances in which, for instance, the clause operates only at the employee's election.

1714. Furthermore, as is demonstrated by the evidence, there are legitimate operational reasons that may motivate an employer to require the performance of work by a casual or part-time employee for a period of less than three hours. Such an employer should not be precluded from approaching its employees with an offer for a shorter shift.

1715. The Commission should not proceed on the basis that a facilitative provision of the nature proposed will be subject to abuse. The material advanced by the

proponents in these proceedings, who seek the deletion of existing facilitative clauses, does not establish such occurrences.

1716. Ultimately, if the Commission determines that facilitative provisions are to be inserted and that despite our submissions, additional safeguards are necessary, we respectfully submit that interested parties should be given an opportunity to consider and provide comment in this regard.

35. Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?

1717. We respond to this question in a similar vein to the response we earlier provided regarding question 34. Whilst the separate treatment of school students would better enable an employer to engage such employees, we do not consider that it would serve to alleviate the various other implications of the proposed claims.

36. Should a casual minimum engagement period be introduced in awards which do not currently have one (such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*) of where the current minimum period is only nominal (such as for home care employees under the *Social, Community, Home Care and Disability Services Industry Award 2010*)? If so, what should the length of the minimum period be?

1718. For all of the reasons set out in chapter 23 of this submission, the unions' have not made out a case for introducing new minimum engagement/payment periods in those awards that do not contain one, or to increase pre-existing minimum engagement/payment periods (whether 'nominal' in length or otherwise) for casual or part-time employees. No award variations in this regard are warranted.

Attachments to submissions

Attachment 4A

Attachment 16A

Attachment 20A

Attachment 20B

Attachment 20C

Attachment 20D

Attachment 20E

Attachment 20F

Attachment 20G

Attachment 20H

Attachment 20I

Attachment 20J

Attachment 20K

Attachment 20L

Attachment 20M

Attachment 20N

Attachment 20P

Attachment 20O

Attachment 20Q

Attachment 20R

Attachment 20S

Attachment 20T

Attachment 20U

Attachment 20V

Attachment 20W

Attachment 20X

Attachment 20Y

Attachment 20Z

Attachment 20ZA

Attachment 20ZB

Attachment 23A

Attachment 23B