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Issues Paper Response 4 yearly review of modern awards – Casual and Part-time Employment

8 August 2016

Australian
Chamber of Commerce
and Industry

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On 11 April 2016, the Fair Work Commission released an 'Issues Paper' posing 36 questions.

This paper sets out the answers from the Australian Chamber of Commerce and Industry (**Australian Chamber**) as they relate to the 'common claims' made by the Australian Council of Trade Unions (**ACTU**).

The answers to these questions should not be taken to qualify the opposition of the Australian Chamber to the common claims.

1. WHAT, APART FROM THE DIFFERENCE IN THE MODE OF REMUNERATION, IS THE CONCEPTUAL DIFFERENCE BETWEEN CASUAL AND PART-TIME EMPLOYMENT?

1.1 The two forms of employment have been distinguished in industrial awards generally and now modern awards by certain conceptual features.

1.2 Conceptually one is contractually permanent and one is contractually non-permanent and as such an employee in one has a legitimate expectation of on-going employment and not in the other (although this distinction has been conditioned to an extent by the *Fair Work Act 2009* (Cth) (**the FW Act**); refer Chapter 3, Part 3-2).

1.3 It is questionable whether there are any other conceptual differences although if there was one it is that one type is to varying degrees more flexible and one is to varying degrees less flexible (although the degree is largely a construct of modern awards and industrial awards before them).

1.4 In this regard, casual employment has placed upon it fewer constraints, conditions and fetters when compared to part-time employment and as such it is able to be deployed by an employer more flexibly, efficiently and cost effectively than may sometimes be the case for a part-time employee.

1.5 Subject usually (but not always) to the general regulation of working hours (ordinary hours of work, shift patterns etc) in a given modern award , casual employees may be worked as and when an employer requires them to be worked and/or as and when the casual employee concerned agrees to work from time to time.

1.6 By contrast part-time employees usually have constraints on the days they work each week and the hours they work in those days.

1.7 These constraints are effectively 'contractually locked-in'. To change this usually requires what amounts to a 'contractual variation'.

1.8 Furthermore, in many modern awards, to work a part-time employee outside of these hours absent such a 'contractual variation' requires the employer to pay the employee overtime.

1.9 This flexibility also operates at a more macro level in that casual employees do not carry any redundancy cost if an employer is forced to reduce their workforce due to market or other conditions.

1.10 From an employer perspective therefore, the conceptual features of one are likely only fully understood by considering the conceptual features of the other in the context of a given industry and its modern award.

1.11 An employer (subject to the overall capability through its management) will always seek to rationally adopt the optimum labour mix for their business balancing as we have set out in our earlier submissions such factors as customer demand, cost, attraction of labour, retention, culture etc.

1.12 Most if not all employers, in all industries will need a balance of labour; permanent and non-permanent.

1.13 In a modern award context the Commission can encourage a greater take up of part-time employment by reducing the level of constraint on it. Conversely it will encourage employers to move more to outsourcing (labour hire etc) if it maintains the current level of constraint on part-time employment and moves to place additional constraints on casual employment.

2. WHAT ARE THE FUNDAMENTAL ELEMENTS OF PART-TIME AND CASUAL EMPLOYMENT?

2.1 In answering this question we need to be conscious of the term "fundamental". Many elements of part-time employment are not fundamental to the conceptual differences above but are constructs of modern award drafting.

2.2 The following features are "fundamental" to part-time employment.

2.3 An expectation that the:

(a) employment is on-going and if terminated attracts all of the entitlements that a full-time job attracts (notice, redundancy);

(b) employee receives proportionally all of the benefits that a full-time employee receives (sick leave, annual leave etc);

(c) employee will not work 38 ordinary hours a week but will work some minimum amount of hours over a given period; and

(d) employee will receive overtime if they work more than 38 hours a week or works outside of the spread of ordinary hours in the modern award concerned.

2.4 The following features are fundamental to casual employment.

2.5 An expectation that the:

(a) employment is not on-going and may be terminated on short notice and if terminated does not attract all of the entitlements that a full-time job attracts (notice, redundancy);

(b) employee receives a casual loading to pay them in advance for the benefits that a permanent employee receives (sick leave, annual leave etc).

3. WHAT FACTORS LEAD EMPLOYERS TO ENGAGE CASUALS?

3.1 As previously submitted, employers will seek to organise labour in their business in a rational way. In doing this employers will consider such factors as demand, cost to produce or serve, customer needs and preferences, the labour markets they attract labour from, the skills, experience etc they need employees to hold to be competent and/or proficient, the culture they are developing in their business and how they utilise leadership to motivate and engage employees etc.

3.2 In this setting employers may decide that engaging parts of their workforce as casual employees is optimum when balancing these factors together.

3.3 Separate to this an employer will be cognisant of the alternatives; full-time, part-time, labour hire and contractors. There will be occasions where the sub-optimal nature of some of these options may lead an employer to utilise casual employees as well.

3.4 This is consistent with all of the lay evidence in the proceedings with perhaps the exception of Westend Pallets for which it is unclear why casual employment was chosen.

3.5 The role of casual employment in meeting labour requirements during seasonal or demand related fluctuation is also highlighted in the submissions of other employer representatives and witnesses directly. For example:

(a) The South Australian Wine Industry Association submissions dated 12 October 2015 note that "*during peak operational periods, including vintage (harvest) and pruning the industry relies on a large number of casual employees. Wineries have reported that their casual workforce in vineyard commonly increases by a tenfold during these periods*";[2]

(b) The evidence of Ms Colquhoun is that her organisation employed casuals to undertake seasonal based activities such as the harvest (which generally involves three to six months'

[2] p.10.

work) and land management and planting (which may involve more than six but less than 12 months work).[3]

(c) Mr Norman's oral evidence is that there is work connected with the harvest that continues beyond the harvest and that some employees stay on beyond the end of the harvest and may be engaged for longer than six months.[4] Mr Norman's evidence is that there are periods, normally between June and August, where the need for casual employees declines dramatically such that there may be no work available.[5] The evidence suggests that the variability in the size of the harvest will impact the duration of work available.[6]

(d) The evidence of Mr Smith is that the level of activity at a university campus fluctuates over the course of the year, with Mr Smith explaining in his oral evidence that "*during the non-peak periods, such as in the library, there is less activity by users of the library, so the activity is less, the need for staffing is less. Same as the bookshop. The bookshop doesn't have as many customers coming through the doors in non-peak periods.*"[7] Mr Smith provided other areas in which the level of staffing fluctuated at the university campus stating in oral evidence:

> *An example may be in the sports area, in the swimming pool, for example. Some swimming programs are only run during the primary and secondary school terms, so they don't align to the university semesters, they are only specific periods of time. Another area may be in our performing arts area where there are concerts or presentations being made throughout the year. A typical period may be from November onwards and during the winter months, it may be very much reduced compared to the busy months and the staffing fluctuates accordingly.*[8]

(e) Mr Ward also provided evidence establishing that external funding received by a university for research grants can impact on the availability of work such that it is more intermittent in nature and may only be available for a period of time.[9]

[3] Transcript dated 16 March 2016, PN 2722.
[4] Transcript dated 18 March 2016, PNs 5186-5192.
[5] Transcript dated 18 March 2016, PNs 5195-5198.
[6] Transcript dated 18 March 2016, PNs 5202-5210.
[7] Transcript dated 17 March 2016, PN 4281.
[8] Transcript dated 17 March 2016, PN 4289.
[9] Transcript dated 17 March 2016, PN s 4342-4345.

(f) The evidence of Ms Neill highlights fluctuations in work due to client demand, using flu season as an example where casual employees are engaged to administer flu injections.[10] The role of casuals in meeting work of a transactional nature is also highlighted by Ms Neill who stated in her oral evidence:

> *…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.*[11]

(g) Government recruitment campaigns that involve pre-employment examinations also contributed to "peaks and troughs" of the work of the organisation with Ms Neill explaining

> *…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 occur all year around but then there are certain activities that are driven by the client.*[12]

(h) Ms Neill's evidence also demonstrates that casual employment for the purposes of undertaking specialised transactions requiring particular skills may also better meet the needs of the business, client and employee.[13]

(i) The evidence of registered nurse Ms Paulsen is that it was not uncommon for casuals in her former workplace to be sent home early because "[t]*he operation list might not be large as expected when they made the rosters*".[14] Ms Paulsen explained in her evidence "*they do the rosters a week ahead so they don't always know how many patients are on and patients get added and patients get deleted*" for reasons that include a patient cancelling.[15]

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[10] Transcript dated 16 March 2016, PN 2919.
[11] Transcript dated 16 March 2016, PN 2920.
[12] Transcript dated 16 March 2016, PN2928.
[13] Transcript dated 16 March 2016, PNs 2922-2924.
[14] Transcript dated 17 March 2016, PN3795.
[15] Transcript dated 17 March 2016, PNs3795-3798.

Australian Chamber of Commerce and Industry

4. WHAT ARE THE POSITIVE/NEGATIVE IMPACTS OF CASUAL WORK ON EMPLOYEES?

4.1 There needs to be caution exercised in answering this question because the answer could be seen as largely subjective to the person and circumstances applicable at the time or a more objective test being applied.

4.2 At an entirely conceptual level, assuming the continuation of the employee's employment, the answer must be a "greater or lesser certainty" of ongoing income. That is to say, a casual employee may have lesser certainty of ongoing income to a permanent employee, assuming both employees maintain their employment.

4.3 If the employee concerned was the/a primary income earner, then this certainty may (but not necessarily will) be relevant where a greater level of certainty around an income stream is relevant.

4.4 For instance, while there is no evidence that obtaining credit is an issue for casual employees generally, there is (limited) evidence that some employees employed on a casual basis may find obtaining a mortgage challenging.

4.5 Obviously in many other circumstances the ability to balance working hours with other equally important (or more important life choices) will mean that casual employment introduces many positive elements.

4.6 The ability to work certain shifts, change shifts, decline work or pick up extra work when available are all positives for many employees who are studying or have carers responsibilities of one form or another or are 'winding down' in their working life.

4.7 Many of the lay witnesses called by the ACTU showed this through their cross examination.

4.8 Casual employment also provides many persons with an opportunity to build a reservoir of work and life skills early (while still studying) which allow them to move into more permanent work while being more "work ready".

4.9 Evidence tendered by Australian Chamber members in these proceedings has explained that employees themselves seek out casual employment with short engagements for a broad range of reasons that suggest this type of employment best meets their circumstances

4.10 For example, witness statements attached to the submission of the Australian Public Transport Industrial Association dated 10 October 2015 identify that employees who seek to work as casuals may do so due to:

(a) semi-retired status;

(b) freedom offered by casual employment and a desire to take leave at times of their choosing;

(c) impacts on benefits such as pension and health care cards;

(d) a desire to have a higher wage instead of paid personal leave;

(e) other employment;

(f) a desire for flexibility to compliment lifestyle;[16]

(g) self-employment in a seasonal business;

(h) ill health;

(i) a desire to supplement a carer's allowance;[17]

(j) study commitments.[18]

4.11 Service sector industries with high levels of casual employment make a significant contribution to youth employment.[19] By way of example, the NRA has explained that:

> *The retail sector in Australia employs in excess of 1.2 million people. As well as being one of the nation's largest employers, the retail sector is also the first port of call for many young people beginning their working career. And it is the major employer of low-skilled, part-time and casual personnel.*
>
> *…*
>
> *A strong retail sector has economy-wide benefits, not the least of which is generation of job opportunities for those people on the margins of skills demand – unskilled or non-qualified workers, those entering the workforce for the first time, and single parents or students balancing work with other lifestyle demands. Federal Government policy making that is targeting towards supporting the retail sector will boost employment opportunities for these groups of workers – delivering fiscal and social dividends to the government and nation.*[20]

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[16] See paragraph 19 of statement of Benjamin James Doolan dated 9 October 2015.
[17] See paragraph 21 of statement of Ben Adam Campbell Romanowski dated 9 October 2015.
[18] See paragraph 18 of statement of Shane Dewsbury dated 9 October 2015.
[19] See for example '*Sunday Trading in Australia Research Report*', Australian Centre for Retail Studies, August 2012, p 12, which highlights the contribution of the retail sector to youth employment with 72.5% of the workforce aged under 45 years (compared to 61.5% for all industries).
[20] National Retail Association, '*Generating jobs growth in a constrained economy: Longer-term priorities for the retail sector*', October 2013.

4.12 During the course of the proceedings evidence emerged that demonstrated that:

(a) Flexible forms of engagement complimented an employee's personal needs. For example, under cross examination the ACTU's witness Ms Kemp:

(i) described her experience working as a contractor for Undercoverwear for 12 years.[21] When asked whether she undertook this work for 12 years because it allowed her to fit in her responsibilities wither children she replied "*Yes. I also liked doing it. It became very lucrative. I was good at it and I rose up through the ranks*". This suggests that although taking on a form other than permanent employment, Ms Kemp's independent contracting arrangement provided her with the capacity to balance family and personal commitments, satisfied her needs financially and provided her with opportunity for career development;

(ii) provided evidence which demonstrated that at a particular juncture in her life she left her full-time employment to take up casual employment because it fitted the circumstances of her life at that time;[22]

(iii) provided evidence that while employed as a casual she would at times "*knock shifts back*", for reasons that included personal commitments;[23]

(b) The evidence of ACTU witness Ms Campbell was that her casual night-fill role at Coles enabled her to share the responsibility of caring for her children with her husband who works full-time because she "*can be able to drop them off, pick them up and hand them over to* [her] *husband and go to work*".[24]

(c) The evidence of witness Ms Jenks established that she left a part-time role to take on a casual role because it better enabled her to balance her study and care for her child.[25]

(d) **Some employees prefer the higher rate of pay associated with working as a casual**. The oral evidence of Ms Limbrey described how McDonald's was actively trying to increase the number of part-time employees but that many casual employees were not interested in converting their employment to permanent due to the loss of casual loading. Ms Limbrey stated "*So whilst there had been an increase, a huge proportion of young employees if you*

[21] Transcript dated 14 March 2016, PNs 411-417.
[22] Transcript dated 14 March 2016, PNs 429-430.
[23] Transcript dated 14 March 2016, PN 518.
[24] Transcript dated 17 March 2016, PNs 3848-3850.
[25] Transcript dated 21 March 2016, PNs 7540-7544.

were to have that discussion with them would straight away "no way, not interested", because of that significant difference."[26]

(e) **Casual employment complimented other sources of household income.** The oral evidence of Ms Campbell was that her and her husband had worked out the income required to support her household (including two children) and that her casual employment as a night-fill employee at Coles assisted in achieving the desired level of household income;[27]

(f) **Casual employment could provide a pathway to training opportunities.** Ms Kemp's evidence was that while employed as a casual her employer facilitated her attainment of a Certificate III in Disability Services.[28] The evidence of Mr Ferris is that his employee bus drivers, regardless as to casual or permanent status, have access to extensive training which includes 13 modules that traverse "*everything from WH&S to collecting fares, checking passes, punctuality, customer service, accident procedures, flood procedures, the whole gamut of being a bus driver*".[29]

(g) Casual employment was often undertaken in circumstances where employees had multiple sources of employment.[30]

(h) ACTU witness evidence put forward in support of its claims for those who "*prefer weekly work for security, consistency of pay and peace of mind*"[31] suggest that there are employees who actually secure this through other forms of employment that supplement their casual employment. For example, the evidence of Ms Potoi is that she took on casual employment in 1997 to enable her to balance work with study across two undergraduate degrees before continuing that casual employment when securing full-time work until the arrangement changed to part-time employment.[32]

(i) In the case of one of the ACTU witnesses, her casual employment was intended to be balanced with full-time caring responsibilities and study commitments.[33] Another witness, Ms Paulsen, who left her part-time employment to take a job as a casual employee, described

[26] Transcript dated 21 March 2016, PNs 7255-7256.
[27] Transcript dated 17 March 2016, PNs 3856, 3870.
[28] Transcript dated 14 March 2016, PNs 521-526.
[29] Transcript dated 24 March 2016, PN 11586-11587.
[30] See for example transcript dated 15 March 2016, PNs 1890-1896, 1298-1312.
[31] Transcript dated 14 March 2016, PN 108.
[32] Transcript dated 15 March 2016, PNs 1296-1312, 1317
[33] Transcript dated 15 March 2016, PNs 2260-2263.

the challenges that permanent part-time employment presented for her in holding more than one job due to the requirement to work at very specific hours.[34]

(j) **It was the work itself that was most important to employees rather that the type of engagement**. For example, the evidence of Mr Perry is that he would have taken on a particular casual role involving working with disabled people regardless as to whether there was opportunity for that role to become permanent.[35] Mr Perry's casual employment also provided opportunity for him to pick up additional shifts over and above his regular hours[36] with the effect that his hours would vary from week to week.[37]

5. DOES THE EVIDENCE DEMONSTRATE ANY CHANGE OVER TIME IN THE PROPORTION OF CASUAL EMPLOYEES ENGAGED INCLUDING VIA LABOUR HIRE BUSINESSES?

5.1 It was uncontroversial that casual employment rose from the 1970's through to 2000s and then plateaued.

5.2 It is also uncontroversial that this growth "correlated" to:

(a) a substantial growth in female participation in the workforce;

(b) a reduction of male participation in the workforce;

(c) a dramatic increase in year 12 retention;

(d) an increase in persons undertaking tertiary study; and

(e) the demise of the manufacturing sector in Australia offset by a dramatic rise in the services sector as an employing sector.

5.3 The nature of evidence relating to the role of the labour hire sector in this is less clear.

5.4 The ABS categories make it difficult to quantify the prevalence of labour hire and people engaged via labour hire arrangements. However, the Productivity Commission has made reference to a recent estimate suggesting that labour hire employees make up around one per cent of the workforce.[38] Recent ABS data suggests that the number of labour hire workers paid by a labour hire firm or

[34] Transcript dated 17 March 2016, PNs 3802-3809.
[35] Transcript dated 16 March 2016, PNs 3292-3293.
[36] Transcript dated 16 March 2016, PNs 3295.
[37] Transcript dated 16 March 2016, PNs 3295.
[38] Productivity Commission Draft Report 714, citing Shomos, Turner and Will 2013.

employment agency is approximately 124,400, only approximately one per cent of the total number of persons employed, regardless as to their status as a casual employee.[39]

Fixed term contracts and labour hire

Employment category	*Number*	*Share of employed*
Fixed term contract prevalence	('000s)	(per cent)
Employees on fixed term contracts	367.2	3.2
Employees not on fixed term contractors	9 267.8	80.1
Non-employees	1 931.6	16.7
Labour hire prevalence		
Employed people who are in labour hire	144.4	1.2
Employed people who are not in labour hire	11 429.3	98.8

a From ABS 2013, *Forms of Employment, Australia,* Cat. No. 6359.0. **b** The share of total employment was obtained from ABS 2011, *Forms of Employment,* Cat. No. 6359.0 and applied to total employment for November 2013.Sourced from Productivity Commission, Draft Report, March 2015, p. 100.

6. IS IT APPROPRIATE TO ESTABLISH A MODEL CASUAL CONVERSION CLAUSE FOR ALL MODERN AWARDS?

6.1 This question is respectfully presumptuous. There is no evidence so far presented to support the inclusion of a casual conversion clause in any modern award let alone a model one.

6.2 Ultimately the notion of a "model clause" is more likely an attraction to the regulatory body rather than the 'end user'.

6.3 We acknowledge that the attraction of a model clause would provide the Commission with some level of administrative comfort in circumstances where disputes arose concerning interpretation of that clause which in turn might also be supported by judicial bodies and enforcement agencies (such as the Fair Work Ombudsman).

6.4 Absent this 'macro administrative element' the employer is likely to see no benefit (or little benefit) from a "model".

6.5 Absent a small number of large employers who have broad portfolio businesses (involving a number of modern awards) most employers are small to medium in size, operating in one State and a

[39] ABS, Characteristics of Employment, cat. no. 6333.0.

defined sector. By way of example, the fact that a "model clause" applies equally to a restaurant as to a child care centre, is of little relevance to the proprietors of those businesses.

6.6 The notion of a "model clause" also sits uncomfortably with the setting of a fair and relevant minimum safety net for a given industry and/or occupation.

6.7 It also sits uncomfortably with the hurdles established by the decision - *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* AM2014/1 FWCFB 1788 dated 17 March 2014 (**Preliminary Issues Decision**) where it was found, at paragraph 60, that the reference to stable modern award system in section 134(g) of the *Fair Work Act 2009* (Cth):

> *suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*.

6.8 This is reinforced in the matter of *Re Security Services Industry Award 2010* [2015] FWCFB 620 (2 March 2015) in which the Commission stated that "*the more significant the change, the more detailed the case must be*."

6.9 For these reasons the Australian Chamber does not support the notion of a "model clause".

6.10 As was noted by the Full Bench (see PN 33-34 [2014] FWCFB 1788):

> *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.*
>
> *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.

6.11 In the 4 Yearly Review of Modern Awards Transitional Provisions Decision [2015] FWCFB 3523 (18 August 2015) the Commission stated that "*the characteristics and circumstances of the industries and parties covered by modern awards vary and the application of the modern awards objective may result in different outcomes between different awards*."

6.12 Fundamentally, section 156 of the FW Act provides:

Each modern award to be reviewed in its own right

(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

6.13 The Australian Chamber submits that while this provision contemplates a review of modern awards concurrently on an administrative basis, the Commission's decision regarding the manner of review does not relieve a party seeking a variation from the obligation to support its claim with "*a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*".[40]

6.14 For each modern award to be reviewed in its own right, this evidence must be directed at the modern award subject of the claim, particularly considering the diversity in the nature of provisions impacted by the claims in the matter at hand.

6.15 As highlighted by the employer respondents in this case there is considerable diversity and dynamism in the mix of labour arrangements between industries. However the ACTU claim has no regard for the unique circumstances of particular industries. In fact there are a large number of awards for which no evidence has been led at all (refer the Australian Chamber Reply Submission).

6.16 Many employers have echoed these concerns, for example and without limitation:

(a) Fitness Australia in its submission dated 10 November 2014 stated at paragraphs 2.2 and 2.3 expressed its acknowledgment of "*the special and unique circumstances of the fitness industry and it's subsector being the swim education and coaching field in having an imperative need for a flexible environment for the engagement of all staff but in particular casual employees within the ambit of the Fitness Industry Award*" and submitted that "*there*

[40] *Four Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* AM2014/1 FWCFB 1788 ,17 March 2014, para 60.

is a need to have Clause 13.5 of the Award remain undisturbed as it relates to casual employees undertaking or conducting fitness and/or swim and/or related classes or training sessions."

(b) Live Performance Australia in its submission dated 10 November 2014 stated at paragraph 5 "*any changes sought to the current part time and casual employment provisions in Modern Awards should be considered on an award-by-award basis to reflect the different working relationships found in each industry's modern award*". It also stated at paragraph 6 "[a] *change in part time and casual employment provisions without proper identification of the particular working relationships within an industry (and therefore the industry modern award) may have a detrimental effect on the productivity, employment costs and the regulatory burden on business (s.134(f) of the Fair Work Act 2009 – The Modern Awards Objective)."*

(c) Clubs Australia Industrial in its submission dated 11 November 2014 submitted at paragraph 3 "*that the issues of part-time and employment have developed around the needs of the industry involved and these needs have led to unique and industry specific provisions which differ dramatically from award to award*". It submitted at paragraph 10 that "[p]*art-time and casual work need to be determined in the context of specific industries where employer and employees will require conditions suited to their industry*" and raised concern that part-time and casual work conditions determined without appropriate consideration of an industries have the potential to violate the modern awards objective as contained within 134 of the FW Act.

(d) The Australian Hotels Association in its submission dated 14 November 2014 expressed the view at paragraph 6 that "*a type of employment provided for in a modern award must have utility for the industry or occupation covered by that modern award*". It expressed concerns with the part-time provisions within its award that operate as a barrier to part-time employment (see paragraph 5). In its oral submissions dated 14 March 2016 it submitted that "*the cause in terms of the under-utilisation of part-time employment in the hospitality award is the existing provision which is rigid and inflexible*" and that the "*more effective way*" to address this is to "*incorporate a more flexible part-time provision*" as proposed to more rigid and prescriptive provisions.[41]

[41] Transcript dated 14 March 2016, PNs 264-.266.

(e) The Real Estate Employers' Federation in its submission dated 11 November 2014 stated at paragraph 7 "[t]*he fundamental structure of the REI Award (and the pre-modern awards in the real estate industry) in many ways reflects the unique nature, circumstances and history of the real estate industry. This real estate industry is unique in a number of respects including the fact that it is highly regulated, competitive and heavily incentive-driven. This has historically led to the development of flexible part-time and casual provisions that suit the needs of the industry and which help promote efficiency and productivity*".

(f) The Horticulture Taskforce in its submission dated 11 November 2014 identified a number of reasons why casual conversion provisions are incongruous with industry circumstances including the seasonal nature of the industry which demands flexibility in employment (see paragraph 13) and the perishable nature of produce which affects scheduling of work and the method of employment (see paragraph 17).

(g) The Housing Industry Association stated at page 8 of its submission dated 12 October 2015 that "[t]*he cyclical nature of the residential construction industry demands flexible work arrangements, businesses, particularly small business must be agile to respond to external market forces*". In oral submissions on 14 March 2016, it drew attention to the prevalence of three hour minimum engagement periods for part-time employees under pre-modern in the timber industry and the lack of evidence provided by the ACTU that would demonstrate a need to disturb the existing three hour minimum engagement in this award.[42]

(h) The Australian Public Transport Industrial Association (APTIA) noted at paragraph 38 of its submissions dated 10 October 2015 that "*the nature of bus driving, which is substantially to provide transport to and from schools for students is only casual work and predominantly no more than 4 hours a day or 20 hours a week for the total number of school days a year, which is traditionally 201 days a year*". It would clearly be very difficult for employers to maintain permanent part-time employment in these conditions. As APTIA explained in its oral submissions on 14 March 2016 there are circumstances where school bus operators work an hour in the morning and an hour in the afternoon driving school students to school in isolated areas and that "[i]*f four hours was granted per engagement…it would mean that a school bus operator would get eight hours a day and get paid a full 40 hours a week*".[43] Requiring payment for more than a full-time week for a person who is working two hours per

[42] Transcript dated 14 March 2016, PN 257.
[43] Transcript dated 14 March 2016, PNs 286-287.

day is clearly problematic and relevant to the Commission's consideration of "the likely impact of modern award powers on business, including on productivity, employment costs and the regulatory burden" as required by section 134(1)(f).

(i) The Australian Meat Industry Council highlighted in oral submissions on 14 March 2016 the unique nature of the meat industry and that since the early 1960s it "*has operated very substantially on the basis of daily-hire employment*".[44] It explained how this unique industry structure sits awkwardly alongside notions of casual conversion to permanent employment.[45]

6.17 Beyond materials filed by employer parties, witness evidence emerging during the course of proceedings also highlights the peculiarities of particular industries that support a need for casual employment. For example:

(a) the evidence of ACTU witness Ms Kemp draws attention to the fact that the changing needs of clients in the disability services sector impacts the scheduling of work;[46]

(b) the evidence of Australian Chamber witness Mr Hill highlighted the cultural considerations in remote communities impacting the scheduling of work;[47]

(c) the evidence of ACTU witness and disability support worker Ms Potoi who services a client for an extended period across a 7pm to 9.30 pm night shift and morning shift between 7am and 10.30am. This evidence highlights the need to schedule work in line with client needs.[48] When queried about the nature of support provided across the night shift Ms Potoi confirmed that this involved providing support to the primary carer during a difficult period[49] which she described as follows:

> *Usually the client should be in his wheelchair. So when I come home for the shift, it's getting him ready for the shower routine – the routine – the shower and also involves exercise. Also, after that, there's a lot of creams and medications that needs to be given and then he needs to go back into the commode chair and he needs to go- be transferred back into bed and then we need to get him ready for the*

[44] Transcript dated 14 March 2016, PNs 239-248.
[45] Transcript dated 14 March 2016, PNs 239-248.
[46] Transcript dated 14 March 2016, PNs 535-541.
[47] Transcript dated 14 March 2016, PNs 865-877. See also Exhibit #3 Statement of Andrew Hill dated 22 February 2016.
[48] Transcript dated 15 March 2016, PNs1327-1336.
[49] Transcript dated 15 March 2016, PN 1328.

best, comfortable position that he can be in while he is sleeping until the morning carer comes and starts the next shift.[50]

In responding to a request for clarification from Hatcher VP, Ms Potoi confirmed that there was a one and a half hour shift in between her two shifts that she did not personally take on;[51]

(d) the evidence of ACTU witness and support worker Mr Quinn indicates that the length of an employee's engagement for a particular shift will be determined by the level of support required by the client;[52]

(e) the evidence of ACTU witness Ms Colquhoun explains why people may not be able to be productively employed for a four hour minimum engagement during a potato harvest for reasons that include a change in weather conditions[53] and other reasons relating to demand for particular quality or quantity of potatoes and logistics;[54]

(f) the evidence of Mr Norman demonstrates the impact of weather on his business operations. In his oral evidence, when asked about the impact of weather on harvesting operations Mr Norman explained:

Rain, as an example, will stop harvesting from occurring, therefore there'll be no deliveries to our sites; extremely hot weather will stop harvesting from occurring, therefore there'll be no deliveries to our sites, and strong winds close our sites down on our bunker operations due to the safety risk of bunker operations and tarps in strong winds is very unsafe.[55]

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?

7.1 The Australian Chamber reaffirms its opposition to the establishment of a model clause with regard to casual conversion.

[50] Transcript dated 15 March 2016, PN 1328.
[51] Transcript dated 15 March 2016, PN 1336.
[52] Transcript dated 15 March 2016, PNs 1680-1682.
[53] Transcript dated 15 March 2016, PN 2750.
[54] Transcript dated 16 March 2016, PNs 2750-2755.
[55] Transcript dated 18 March 2016, PN 5138.

7.2 Notwithstanding this, if the Commission is persuaded to take the significant step of formulating a model clause of this nature, the Australian Chamber considers it crucial (and likely jurisdictionally necessary) that persons with an interest in particular modern awards be afforded opportunity to seek to exempt their modern award from the clause.

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?

8.1 This brings to the fore the Australian Chamber's overarching issue with the ACTU's proposal.

8.2 In effect what is being created is a new employment contract which is different in a material sense to the one offered and accepted. As such, a necessary result of the claim would be to allow an employee to unilaterally elect to change the employment contract offered by their employer and accepted by them.

8.3 Such a proposition cannot find any warrant in the notion of a fair and relevant minimum safety net.

8.4 The FW Act and in particular section 134 operate on the assumption that the employer is still empowered to organise who they employ and how they deploy them (subject to conditions relating to unfair conduct like unfair dismissal).

8.5 There is no warrant in section 139 or the FW Act as a whole to convey to one class of employee a statutory imperative over others to invade the right to contract.

8.6 There is certainly no evidence to support such a proposition in this case.

8.7 To allow an employee to unilaterally change an agreed employment contract and arrangement (simply because of some perceived similarity of working hours pattern) strikes at the heart of an employer's right to rationally organise labour in the interests of their business.

8.8 It begs the question why employers don't have a right to do the same thing unilaterally. The answer to this is that it would be fundamentally unfair to the other contracting party.

8.9 Rather than create such an unnatural contractual construct, if the Commission wishes to encourage greater part-time employment (for reasons not immediately clear in the context of section 134 or the evidence in this case) then making part-time employment more accessible would be a far more preferable approach.

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?

9.1 The question asked by the Commission in this context raises a number of questions regarding the practicality of the ACTU application. To enable an employee to convert a permanent position with a pattern of hours which is different to that which currently exists would not only have implications for the employer generally but for others in the workplace who may need to have their arrangements changed to accommodate the hours of the converted employee.

9.2 This also goes even further than changing the nature of the employment contract as discussed in question 8. The variation would allow an employee to unilaterally elect to change the nature of the employment contract and then allow them to elect when they work (or force an employer to make this adjustment because of the arbitrary rules in a modern award associated with part-time employment).

9.3 In effect the employee (or indirectly the Commission) is removing the employer and standing in their shoes to run their business in so far as this managerial decision is concerned.

9.4 If an employer was required to convert a casual employee to a permanent employment at the employee's election, this cannot occur through any automated process unless the employee was working the same days and hours each week.

9.5 Witness evidence also referred to circumstances where employees work in casual roles concurrently with the same employer. This raises practical difficulties regarding the operation of the ACTU's proposed provisions. Ms Dalton provided the following example in her oral evidence relating to university employees:

> *…so we might have someone who works in a student centre, assisting with student inquiries and then they might also – so they might concurrently also work in a faculty, in one of the professional support areas, for example, or they might have worked at a particular part of the university and then once they finish that work they might pick up another role somewhere else in a faculty, for example.*[56]

9.6 A casual conversion clause in this context would give rise to confusion and impracticality.

[56] Transcript dated 17 March 2016, PNs 4574-4575.

9.7 It should also be noted that under cross examination AMWU witness Dr Skladizen confirmed his understanding that the AMWU claim only applies to employees who are working the same hours and the same days for the full 6 months.[57]

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?

10.1 This question builds on question 8 and 9 and we rely on the answers given to those questions.

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)?

11.1 The evidence in this case has highlighted a variety of "consequences". Some being more direct others more indirect.

11.2 The direct consequences will depend on the industry specific context however by way of example, evidence tendered during the proceedings establishes negative impacts upon employers who:

(a) operate in the services sector with fluctuating periods of demand during a day, a week or over the year (retail, restaurants, pubs etc);

(b) operate on the basis of seasonal demand (pastoral, horticulture etc); and

(c) who are exposed to regulatory constraints and fluctuating demand patterns (child care, social and community etc).

11.3 Indirectly, maintaining restrictive part-time employment conditions and adding fetters to casual employment will likely drive some employers to outsource labour to labour hire or other out-sourced arrangements.

[57] Transcript dated 24 March 2016, PNs 11758.

12. SHOULD ANY CASUAL CONVERSION CLAUSE PROVIDE GREATER CERTAINTY AS TO WHEN AN EMPLOYER IS AND IS NOT REQUIRED TO CONVERT TO 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?

12.1 This reinforces some of the practical issues associated with creating a set of rights and obligations that are in contractual law terms so unnatural.

12.2 Obviously any regulatory clause needs to be sufficiently clear to avoid placing the parties who have to comply with it at increased risk of breach through confusion.

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?

13.1 With respect this question could be posed in a different way. If the Commission formed the view that it was desirable in the context of section 134 to encourage part-time employment, how could it do this?

13.2 This question does not in the context of a "review" need to be predicated on the basis of facilitating casual conversion in the sense of the ACTU claims.

13.3 A review of the evidence would likely lead the Commission to arrive at some relatively simple conclusions. In order to encourage part-time employment, modern awards could:

(a) allow the guarantee of hours afforded to part-time employees to be more broadly described, such as X hours in Y period rather than a static hours of the day and days of the week proposition;

(b) allow employers and employees to change these arrangements without formal written agreement; and

(c) allow additional hours to be worked without the payment of overtime unless the hours exceed 38 etc.

13.4 As to the last part of the question the question appears largely aligned to the evidence. Employees usually explain when they are available and unavailable. This seems to be a common feature of casual employment. It would seem uncontroversial for an employee to say when they cannot work. Obviously the availability of the employee may be so restrictive so as to bring into question whether the employer maintains their employment and any provision would need to be drafted with this scenario in mind.

13.5 In making these submissions we note the following.

13.6 As noted by Live Performance Australia stated at paragraph 4 of its submission dated 10 November 2014 "[t]*he issue of a model part time clause was considered by a Full Bench of the Queensland Industrial Relations Commission in a Decision dated 10 May 2002 – Review of Awards (No. B1733 of 1999). The Full Bench was not prepared to include model part time provisions in Queensland Awards citing different working patterns and the requirements for part time employees will differ from industry to industry and that working hours for part time employees should be determined on an award by award basis*."

13.7 In its submission dated 11 November 2014 the Australian Hotels Association expressed the view at paragraph 4 that that the current part-time provisions in the Hospitality Industry (General) Award 2010 "*operate as a barrier to part-time employment in the hospitality industry due to its rigid and inflexible nature*". It suggested at paragraph 5 that "*a type of employment in a modern award must have utility for the industry or occupation covered by that modern award*". Such rationale underpins the Australian Hotels Association application to vary the part-time employment provisions in the Hospitality Industry (General) Award 2010.

13.8 Restaurant and Catering Industrial filed draft determinations dated 17 July 2015 seeking to vary clause 12.3 of the award. Such application was made on the basis that the current clause was highly prescriptive and requires employers and part-time employees to "*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 each day*". The proposed clause sought to enable an employer and employee to agree "*on the employee's availability of hours and specifying in writing at least the hours of availability for each day of week*".

13.9 Australian Business Industrial filed an Amended Draft Determination on 5 July 2016 seeking to vary clause 10.3 of the Social, Community, Home Care and Disability Services Industry Award 2010 to remove the prescriptive requirements in clause 10.3 that require an employer and part-time

employee to agree on the days the employee will work and the starting and finishing times of such work. The proposed variations retain the requirement to agree on the number of hours to be worked, but allow for a degree of flexibility as to when those hours are worked, having regard to the employee's availability.

13.10 The need for flexibility in part-time rostering in particular industries is exemplified by the evidence of ACTU witness Ms Potoi who works as a part-time disability support worker and, in cross examination, explained:

> *…even though we've got about five or six regular carers, there are still unfilled shifts, and it's very difficult to get someone who is well-trained. This particular client has quite a lot of complex needs. So at the moment, I only work Tuesday night, Wednesday night, Thursday nights. Often I will still be called in either a Friday night of Monday night, because for whatever reason the other carers haven't come in or someone has fallen sick and they have been unable to fill the shift. Because I have been there 18 years, I am very familiar with this routine and, and I know – I Understand how difficult it is to get someone trained. So sometimes I will – on a regular basis I will fill those shifts. I know when I don't fill those shifts and someone inexperienced come in and does the shifts, he often end up with pressure sores, and pressure sores usually takes months sometimes to heal. So I just – just thinking long-term, it's a lot easier for me to go in and do the shift to try and avoid that happening.*[58]

14. DOES THE EXCLUSIONARY EXPRESSION "IRREGULAR CASUAL EMPLOYEE" PROVIDE A WORKABLE BASIS FOR THE OPERATION OF A CASUAL CONVERSION CLAUSE?

14.1 In relation to the exclusionary expression "irregular casual employee", the Australian Chamber's previous submissions have contended that the expression has been superseded, noting that in 2001 a five member Full Bench of the Australian Industrial Relation Commission (AIRC) extended the right to parental leave to 'eligible casual employees'.[59] These employees were described as those with ongoing associations with their employers and whose employment is not limited to short periods.

14.2 Such casual employees must also have reasonably predictable working patterns and regular earnings with expectations of ongoing employment.

14.3 The Commission is encouraged to consider the formulation in section 65 of the FW Act in this regard.

[58] Transcript dated 15 March 2016, PN 1340.
[59] PR904631 (http://www.airc.gov.au/kirbyarchives/decisions/2001parentalleavecasuals.pdf)

14.4 The Australian Chamber also encourages the Commission to exercise caution in considering changes to the basis of existing casual conversion clauses or extending their reach to all modern awards based on the idea that unless a casual employee is able to be defined as an "irregular employee" the conversion process is able to be triggered by "a sequence of periods of employment for a period of six months" per the draft determinations proposed by the ACTU.

14.5 Notwithstanding this, where such clauses do exist, broad exclusionary terms such as "irregular casual employee" can be a source of confusion in their operation. If the intention of casual conversion clauses is to convert employment arrangements from casual to part-time or full-time employment in circumstances where a person is working hours consistent with a part-time of full-time employee, this should be required to be established as precursor to the conversion right being triggered.

14.6 In other words, if the pattern of hours worked by the casual employee over the prescribed time frame would, if the casual employee had been instead been employed on a part-time or full-time basis, offend the modern award provisions prescribing working hours for a part-time or full-time employee, the arrangement should not be capable of conversion.

14.7 For example, during the course of proceedings evidence was tendered by the AMWU relating to an employee, Mr Hynes, who made a request for conversion which was refused by his employer, Christie Tea, on a number of grounds[60]. The evidence established that Mr Hynes' working hours were subject to some variation and that the prescriptive provisions of the award existed as one of a number of obstacles to conversion. It is apparent from the response letter from Christie Tea to Mr Hynes that:

(a) Mr Hynes was provided with "*almost ongoing work*" but his hours were subject to some variation.

(b) The modern award contained more prescriptive provisions around the scheduling of part-time hours when compared to the previous state award and in particular, "*no longer allows for Pro rata Permanent Part-time positions which gave both employees and employers the opportunity to agree on a minimum amount of work hours with the flexibility of adjusting work hours and times by mutual agreement between the employee and employer without incurring large penalties*".

[60] Exhibit #35 Witness Statement of Peter Richard Bauer dated 8 October 2015, see evidence with respect to Mr Hynes.

(c) Accommodating the request would impact other team members.[61]

14.8 The response of Christie Tea highlights the problems associated with casual conversion including on account of the existing prescription regarding part-time employment provisions in the award which hamper flexibility in scheduling.

14.9 Where part-time and full-time clauses require agreement on the days on which the employee will work and the commencing and finishing times of the work and casual working hours worked over a prescribed period vary in this regard, the arrangement should not be capable of conversion as it would be unclear what set part-time or full-time hours the employee would convert to.

14.10 Casual conversion clauses may also have negative unintended consequences for the employee and others in the workplace where the conversion results in a lack of flexibility in scheduling. For example, in the case of Mr Hynes, Christie Tea had made concerted efforts to source him work in other areas during off peak times to provide more regular income for him.[62] Prescriptive provisions relating to part-time and full time hours operate in such a way that it is possible that conversion may make it more difficult for employers who will be constrained in their capacity to provide alternative work for employees during off-peak times where the work is not offering the same hours, days and the commencing and finishing times. This creates a heightened risk of employee redundancy. Where persons previously working with a degree of flexibility in scheduling of hours are locked into fixed days and hours this may have implications for the scheduling of the working hours of others in the workplace.

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?

15.1 If the intention of a casual conversion clause is to convert employment arrangements from casual to part-time or full-time employment in circumstances where a person is working hours consistent with a part-time of full-time employee, this should be required to be established as precursor to the conversion.

15.2 The practical effect of this is that where the modern award requires permanent employees to agree upon set days of work and starting and finishing times, there should be no obligation to convert a

[61] Exhibit #35 Witness Statement of Peter Richard Bauer dated 8 October 2015, see attached letter in response from Christie Tea.
[62] Exhibit #35 Witness Statement of Peter Richard Bauer dated 8 October 2015, see attached letter in response from Christie Tea

casual employment arrangement to a permanent arrangement unless the hours worked, over the prescribed period, have been characterised by set starting and finishing times and days of the week.

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.")

16.1 No. It is important to identify that this decision was concerned with a person's access to workers' compensation in the event of injury pursuant to the *Workers Compensation Act 1951* (ACT) which is underpinned by objects that are significantly distinguishable from those expressed within the FW Act.

16.2 Whether a person should be provided with access to compensation in the context of work related illness or injury is a very different question from one involving whether modern awards should include casual conversion clauses that would have the effect of imposing an employment contract on an employer contrary to the nature that was agreed between the parties.

16.3 This case is not concerned with who is a "worker". A casual employee will not be prevented from being a worker pursuant to section 8 of the *Workers Compensation Act 1951* (ACT) on account of their casual status. That is not in dispute in these proceedings and the Australian Chamber submits that the case is not a relevant authority in the context of the current matter.

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?

17.1 The need to ask this question highlights the problems with the application of the principles in Yaraka Holdings. Where there is flexibility in the scheduling of hours, it is highly uncertain as to what hours the employee would convert to.

17.2 As noted elsewhere in this submission, where part-time and full-time clauses in an award require agreement on the days and times of work, and the casual work performed varies from these hours, the arrangement should not be capable of conversion as it would be unclear what set part-time or full-time hours the employee would convert to.

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?

18.1 No. Employers are already obliged to provide employees with access to a copy of the modern award so this requirement is superfluous.

18.2 It is worth noting that Recruitment and Consulting Services Association (**RCSA**) filed draft determinations dated 17 June 2016 which seek to remove the onus upon the employer to notify eligible employees in writing of their entitlement to convert to permanent employment with regard to the 20 modern awards that contain casual conversion clauses. The awards identified by the RCSA as containing such clauses include:

- Alpine Resorts Award 2010 [MA000092]
- Building and Construction General On-site Award 2010 [MA000020]
- Cement and Lime Award 2010 [MA000055]
- Concrete Products Award 2010 [MA000056]
- Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
- Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]
- Graphic Arts, Printing and Publishing Award 2010 [MA000026]
- Joinery and Building Trades Award 2010 [MA000029]

- Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]
- Mobile Crane Hiring Award 2010 [MA000032]
- Plumbing and Fire Sprinklers Award 2010 [MA000036]
- Quarrying Award 2010 [MA000037]
- Road Transport and Distribution Award 2010 [MA000038]
- Sugar Industry Award 2010 [MA000087]
- Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]
- Timber Industry Award 2010 [MA000071]
- Transport (Cash in Transit) Award 2010 [MA000042]
- Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
- Waste Management Award 2010 [MA000043]
- Wine Industry Award 2010 [MA000090]

18.3 Given the question posed would seem to associate union membership with awareness of the right to convert to casual employment (there is very limited evidence supporting this) the awards that the RCSA has identified as containing such clauses are of interest. Specifically, many of the awards listed above are in the construction and manufacturing industries where union membership is higher than in other industries.[63] Consequently a decline in union membership should not be considered as a relevant factor in determining whether modern awards should contain a requirement for the employer to notify employees of any casual conversion rights.

18.4 In any event the demise of union density in the workforce has occurred at a time when the Commonwealth has injected very substantial funding into the regulatory body, the Fair Work Ombudsman, who now provides a broad range of 'awareness' services for employees.

[63] ABS Cat. No. 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013.

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)?

19.1 No. As noted above, employers are already obliged to provide employees with access to a copy of the modern award so where notification clauses are included in awards any additional award regulation requiring 'additional notification' would be superfluous.

19.2 Witness evidence tendered by the RCSA in these proceedings establishes that notification processes currently required to be implemented by employers in order to ensure compliance with casual conversion clauses are onerous and impose time and cost burdens on employers without significant take up by employees.[64]

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?

20.1 Evidence tendered during proceeding demonstrates that conversion after a six month period will create difficulties on the basis that the job to which an employee would convert to may not be ongoing or where the entitlement has been triggered by multiple engagements.

20.2 AMWU witness Dr Skladzien agreed under cross examination that there are some businesses in the manufacturing industry that have peaks in their production requirements that means that there is an increase in their need for labour for periods of more than 6 months.[65]

20.3 Dr Skladzien also agreed that it would logically arise that casual employees are sometimes used to cover injured or absent workers (such as those in receipt of workers' compensation).[66]

20.4 In cross examination when it was put to Dr Skladzien "*that that there may be a variety of reasons why there is a need for a casual in a business that could coincide with that individual, or result in that individual then being employed for longer than 6 months, on a regular basis?*" to which he replied

[64] See for example Exhibit #67 Witness Statement of Adele Last dated 6 October 2016 and Exhibit #69 Statement of Stephen Nobel dated 7 October 2015.
[65] Transcript dated 24 March 2016, PNs 11708 -11711.
[66] Transcript dated 24 March 2016, PNs 11722 -11723

"*Yes, it may. I would say that if you sit down and you think hard enough, you could think of scenarios that that would happen, yes they would exist*".[67]

20.5 The evidence of Mr Ward was that "*in a number of cases staff may be engaged in a casual role or casual roles for a period of six months or more but are not required on an ongoing basis*" and that employees may move from one casual role to another within the same employer.[68]

20.6 Mr Ward also provided evidence which established that external funding received by a university for research grants can impact the availability of work such that it is more intermittent in nature and may only be available for period of time.[69] In providing examples where there might be a requirement for six months of casual employment that is not ongoing, Mr Ward explained:

> *So principally, when we talk about projects in the university we're talking about research projects. Now, these projects can come up either through grants, so direct funding, or they can be projects that can emerge out of an academics particular work that they do, as a part of their teaching and research obligations to the university. By its nature, research is exploring the boundaries and pushing off in a particular direction that you don't necessarily know where its going to end up. Sometimes it ends up nowhere, sometimes it ends up in quite a significant research project. As a part of that work academics involve lots of other people to support them and that can range from, "Go out and gather a bit of data and see what that throws up because that might take us down a particular direction to analysing stuff that comes out of experiments", and things like that.*[70]

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?

21.1 The period before the conversion entitlement arises should be calculated by reference to the period over which the employee was working the same days and same hours. To interpret the clause otherwise would have the effect that an employee employed on an irregular basis would trigger a right based on tenure if their hours at any point in the engagement took on a certain pattern.

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[67] Transcript dated 24 March 2016, PNs 11722 -11723
[68] Transcript dated 17 March 2016., PNs 4325-4342.
[69] Transcript dated 17 March 2016, PNs 4342-4345.
[70] Transcript dated 17 March 2016, PN 4396.

21.2 When viewed across the engagement it may be that it is the period of regularity that is an anomaly over the course of the engagement and the triggering of the conversion right would give rise to an absurdity.

21.3 It is often the case that employers and employees will work out rostering arrangements based on availability for a period. However calculating the period from the first engagement as a casual may also have the effect that employers engaging casuals working on an irregular basis would refrain from giving employees their preferred shifts out of concern that a pattern would emerge that would trigger the entitlement.

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?

22.1 This question may be best considered through a practical lens. While it is feasible that an employee's preference for conversion may change between the time of a right to request conversion being triggered and a later date, the possibility of an employee being refused a request in accordance with the clause and then embarking on the process of making multiple subsequent requests triggering administration obligations for the employer should also be considered.

22.2 In the Australian Chamber's submission, an interpretation of the provisions that restrains multiple, repetitive requests post refusal should be favoured.

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?

23.1 Where casual conversion clauses exist they should be capable of being refused on reasonable grounds.

23.2 There seems little warrant from creating an exhaustive definition for "reasonable grounds" and again the Commission should consider the framework already established by the FW Act in section 65.

23.3 Should the Commission be moved to give employees the right (in certain circumstances) to unilaterally change the form and nature of their employment contract then:

(a) it must be based on seeking to cure an evil not simply to satisfy a preference not based on merit; and

(b) an employer must have the right to refuse on reasonable grounds.

23.4 To do otherwise would usurp the role of the employer completely and create a safety net that is anything but fair and relevant to the employer.

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:

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)?

24.1 There may be reasonable grounds for refusal despite the employee working close to full time hours over a 6 month period. Evidence of this was tendered during the course of proceedings.

24.2 Dr Skladzien agreed under cross examination that there are some businesses in the manufacturing industry that have peaks in their production authorisation requirements that means that there is an increase in their need for labour for periods of more than 6 months.[71] Dr Skladzien also agreed that it would logically arise that casual employees are sometimes used to cover injured or absent workers (such as those in receipt of workers' compensation).[72]

24.3 In cross examination when it was put to Dr Skladzien that "*there may be a variety of reasons why there is a need for a casual in a business that could coincide with that individual, or result in that individual then being employed for longer than 6 months, on a regular basis?*" to which he replied "*Yes, it may. I would say that if you sit down and you think hard enough, you could think of scenarios that that would happen, yes they would exist*".[73]

24.4 In cross examination Dr Skladizen confirmed his understanding that the AMWU claim only applies to employees who are working the same hours and the same days for the full 6 months[74] and his evidence should be interpreted on the basis of that understanding.

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

[71] Transcript dated 24 March 2016, PNs 11708 -11711.
[72] Transcript dated 24 March 2016, PNs 11722 -11723.
[73] Transcript dated 24 March 2016, PNs 11722 -11723.
[74] Transcript dated 24 March 2016, PNs 11758 -11766.

ACCESSIBLE TO A FULL TIME EMPLOYEE AND THE CAPACITY TO AVERAGE FULL TIME HOURS TO THE EXTENT PROVIDED FOR IN THE RELEVANT AWARD)?

24.5 There may be reasonable grounds for refusal despite the employee working close to full time hours over a 12 month period.

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?

24.6 This constitutes reasonable grounds for refusal.

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?

24.7 This could still constitute reasonable grounds in a particular case. What if the employer has cause to believe that they would lose a major contract at the beginning of the following year and as such did not want to increase their exposure to redundancy costs? What if an employer was exploring to buy another business and wanted to wait and see what synergies the integrated business might yield? These would be reasonable grounds.

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?

24.8 This constitutes reasonable grounds for refusal.

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?

25.1 Yes but not as an exhaustive list.

26. IF EMPLOYERS RETAIN THE CAPACITY TO REFUSE TO CONVERT EMPLOYEES TO NON-CASUAL WORK SUBJECT ON REASONABLE GROUNDS, SHOULD THE EMPLOYER BE REQUIRED TO ENGAGE IN A DISCUSSION WITH THE EMPLOYEE ABOUT THE ISSUE BEFORE MAKING A DECISION ABOUT CONVERSION?

26.1 Provided that this could be done in a manner relevant to the size and sophistication of the employer we would expect any reasonable employer to explain (subject to any commercial sensitivity) the decision to their employee.

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?

27.1 This introduces a substantial level of cost and administrative burden which is at odds with section 134.

28. IS THERE A CASE FOR EXCLUDING SMALL BUSINESS EMPLOYERS FROM A CASUAL CONVERSION CLAUSE IN THE SAME WAY AS FOR REDUNDANCY ENTITLEMENTS?

28.1 Small businesses are by their nature more personal than other sizes of business often involving an owner/manager.

28.2 This tends to introduce a level of 'intimacy' in employee/employer understanding and relationships.

28.3 This simple sophistication is balanced against such businesses being more exposed to issues of cash flow management, credit sourcing etc and as such are more exposed to shifts in demand and trading.

28.4 As a primary (if not statistically "the") creator of employment in Australia in recent years, any capacity to mitigate additional burdens on small employers is encouraged.

28.5 Accordingly, where conversion clauses do exist a small business exemption would help mitigate negative impacts of the clause.

28.6 The attachment to the Australian Government submission uploaded 20 November 2014 notes that nearly on third (32.5 per cent) of casuals in 2012 worked in small businesses with fewer than 20 employees.

28.7 The Australian Chamber's submissions filed during these proceedings have referenced the evidence of Professor Wooden provided in the SA Casual Clerks Case:[75]

> *Professor Wooden thought that if a number of casual employees were made permanent part-time or permanent full-time arising out of this application, that would not necessarily add a great deal to their potential job security. If the Union's claim was granted he could see the possibility of employers relying more heavily on their existing workforce, and working them for longer hours, or in the case of small businesses working those longer hours themselves, and not taking on additional employees. He stated "the reason why casuals are attractive is there's a perception that they're a little bit easier to get rid of if they don't work out. If you think `once I've got them they're there for life' or `it's going to be difficult and costly to get rid of them', it's a little bit bigger decision". Small businesses are traditionally cautious about making employment decisions, and they think very carefully before taking on additional employees that might be costly to terminate if the business does not go well.*

28.8 The inclusion of casual conversion clauses has negative employment impacts which may be compounded in small business environments.

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?

29.1 It would be preferable to adopt the approach set out to our answer to question 28.

30. HAVE CASUAL CONVERSION CLAUSES ENCOURAGED, OR WILL THEY ENCOURAGE, EMPLOYERS TO SOURCE CASUAL LABOUR FROM LABOUR HIRE BUSINESSES?

30.1 The Commission should exercise some care in answering this question. For some employers labour hire is clearly how they source variable demand for labour and there is clear evidence of this in the case. Such a decision will be made on cost, operational flexibility, recruitment difficulties etc.

30.2 Sourcing such labour comes at a cost (the labour hire margin) but force of logic would allow the Commission to accept that there is a tipping point where some employers will use labour hire rather than casual employees if they will become permanent contrary to the employer's business decisions.

30.3 Evidence emerging throughout the course of the proceedings suggests that the complexity of modern award provisions relating to non-casual employment has resulted in employers employing

[75] [2000] SAIRComm 4, para 99 and 100

people on a casual basis.[76] Applying this logic, the more complex the award provisions relating to casual employment become, the more likely employers will be to explore alternative forms of labour engagement and this may extend to engagement through labour hire firms.

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)?

31.1 The Australian Chamber holds concerns that such a provision will negatively impact employment outcomes, particularly for low skilled workers, young people and people seeking to transition into the workforce.

31.2 A provision actively concerned with preventing employers from offering new employment opportunities would further limit employment opportunities.

31.3 Clearly some employers will likely do this today. If they do it is because it has proven feasible for them to do so and is practical and this might be because they are small or at the other end of the spectrum have a sophisticated shift bidding system that operates electronically.

31.4 Imposing this as a "minimum" rule is verging on the absurd as an employer would need to offer all available hours to existing employees irrespective of the feasibility, the commercial desirability or the practicality.

31.5 The Commission could readily see a situation emerge where an employer is iteratively calling through their employees in successive rounds until all employees have in effect put in their bids. This begs the question - who is offered work first and how long are they given to accept?

31.6 It also assumes that the hours can necessarily be packaged into shifts that fit the current employees and the relevant modern award.

31.7 In the interests of social inclusion and participation, modern awards would better meet the modern awards objective by facilitating the broadest possible range of options for workforce participation to meet our diverse workforce needs.[77]

31.8 Giving an unemployed person a number of casual hours a week (with the work experience they gain) may be socially more desirable than letting an existing employee earn more money that week.

[76] Transcript dated 23 March 2016, PNs 9059-9060.
[77] 2015 Intergenerational Report Australia in 2055, Commonwealth of Australia, March 2015, p. iii.

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?

32.1 As recently noted by the Productivity Commission:

> *The WR framework affects unemployed workers as well as the employed. It can determine who gets employed, the total hours they work, when and where they can work, and how their employment is terminated. It can also influence the prospects of people who are unemployed or outside the labour force, as it may create barriers to their employment. Its effects can vary across regions, by size and industry of firms, and by the age, skills and preferences of people. It can affect the way in which wages and prices move in an economy, and thereby influence overall macroeconomic performance and policy.*[78]

32.2 Participation in paid work is critical to maintaining adequate living standards and to prevent poverty while promoting social inclusion and this is recognised by the modern awards objective and in particular, section 134(1)(c) which requires the Commission to take into account "*the need to promote social inclusion through increased workforce participation*".

32.3 Unemployment has negative social consequences and the exercise of reviewing modern awards must not exacerbate the risk of unemployment, particularly for those most vulnerable in the labour market such as low skilled workers and young people.

32.4 In this regard it is worth highlighting the overarching object of the FW Act that guides the functions of the Commission, which is to "*provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for* ***all Australians****…*"(emphasis added).[79]

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?

33.1 The Australian Chamber opposes the establishment of a standard minimum engagement period and a wide variety of submissions have been provided by employer parties highlighting the particular

[78] Productivity Commission, Workplace Relations Inquiry, Issues Paper 1: Context, 2015, p. 2.
[79] *Fair Work Act 2009* (Cth), s 3.

nature of the industries they represent and specific circumstances they face. Examples of these are provided below.

33.2 The South Australian Wine Industry Association Incorporated filed draft determinations uploaded to the Commission's website on 17 July 2015 seeking to introduce a two hour minimum engagement for casual employees in the Wine Industry Award 2010, replacing the current minimum engagement period of four hours as set out in clause 13.3 of that award. In its submission dated 12 October 2015, it identifies the reasons why it is seeking this change, including but not limited to:

(a) the unpredictable nature of cellar door visits and short duration of each visit which makes it difficult to guarantee four hours of work;[80]

(b) weather events;[81]

(c) the seasonal nature of the industry and its vertical integration.[82]

33.3 Master Builders Australia filed draft determinations dated 17 July 2015 which, among other variations, seek to vary the Joinery and Building Trades Award 2010 to vary the minimum daily engagement from 7.6 hours to 4 hours. Draft determinations filed by the Housing Industry Association and dated 17 July 2015 also seek this outcome. In its submission dated 11 November 2014 Master Builders Australia argued at paragraph 4.4 that the current 7.6 hour minimum engagement "*does not fit with the modern award objectives, particularly 134(1)(d) relating to "the need to promote flexible modern work practices and the efficient and productive performance of work" and has denied the right of many prior respondents to pre moderns awards or NAPSAs to properly engage casuals.*"

33.4 In submissions dated 16 July 2015 the Australian Public Transport Industrial Association (APTIA) highlighted the "*specific use of casual employees/drivers in the public transport industry whether as school bus drivers or charter drivers*" and that "*there are circumstances where a driver is using the casual bus driving job purely to supplement other income and benefits which may be impacted or eroded if additional pay is made for hours that are not worked or deliberately intended to be worked*". A standard minimum engagement period of the nature sought by the ACTU would be highly inappropriate for this industry.

[80] p. 12.
[81] p. 13.
[82] p. 13.

33.5 The National Farmers Federation filed draft determinations dated 17 July 2015 seeking a two hour minimum engagement for dairy operators in lieu of the general three hour minimum engagement prescribed by the Pastoral Award 2010. Its submission dated 12 October 2015 made in support of its variations sought it noted that milking usually takes less than three hours and that "[f]*or many dairy farmers the three hour minimum has meant a decision to forgo the employment of casual and part time workers and do the work themselves, increasing their own heavy workloads and impacting on the health and wellbeing of fanning families, making them tired and less productive*."[83] It also noted that "*students who are keen to work in the afternoons after they finish school will often arrive after the milking has commenced. By this time, there is insufficient work to fill the three hour minimum period and this means the students are only employed on weekends*"[84] thereby reducing youth employment opportunities.

33.6 The Pharmacy Guild of Australia filed draft determinations which were uploaded to the Commission's website on 26 October 2015 seeking to vary the Pharmacy Industry Award 2010 to include a one and a half hour minimum engagement period for secondary school students working between 3.00pm and 6.30pm on a day in which they are required to attend school. The current minimum engagement period is three hours and submissions filed by the Pharmacy Guild of Australia on 30 October 2015 highlight the inability for school students to work three hours after school for reasons that include school finish times, pharmacy trading hours and homework and sporting commitments.

33.7 Witness evidence also supports the need for minimum engagements to be appropriate to the nature of the industry and enterprise. For example:

(a) when asked about circumstances that would require someone to be called into work for three hours, ACTU witness Ms Kemp also identified that "*some clients have physical requirements that would include things like hoisting and personal care and some of those clients may require two-person hoists due to a number of reasons, probably workplace health and safety reasons and those occasions then they would – there would be double-up shifts, so two staff members on at one time to provide that level of service*";[85]

(b) Australian Chamber witness Ms Brannelly explained that the current minimum engagement periods are well suited to the before and after childcare sector, stating in her oral evidence of 14 March 2016 that:

[83] p. 12.
[84] p. 10.
[85] Transcript dated 14 March 2016, PNs 594-595.

> [I]n *the case of a university student working two hours of a before school shift before going off to university and then coming back for an after school care shift, it is a perfect working arrangement. If they are studying an education degree not only does the work help them in their studies, but enables them to manage both in that schedule. So, yes, in my experience, I believe that those shifts do suit most students. I would think too that the possibility of having to work four hours before going off to a full day of university might have a negative impact on the employees in that arrangement as well*;[86]

(c) the evidence of Australian Chamber witness Ms Logue of BridgeClimb who stated that four-hour minimum engagements would present difficulties both on account of employee preference for shorter engagements and a lack of availability of work due to tours finishing and no tours being scheduled immediately thereafter.[87] Ms Logue also identified that a third of the casuals employed operate in a form of translating capacity[88] with the effect that demand for services is dependent upon the language spoken by those undertaking the tour; and

(d) the evidence of ACTU witness Ms Gale who accepted that employment offered by universities to students needed to fit in with their studies and that students would work in between their lectures on occasions.[89] This proposition is reinforced by the evidence of Mr Gladigau who confirmed that those who work at the university and who are engaged for periods of employment that are less than four hours are predominantly students.[90]

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?

34.1 As long as the agreement is "genuine", yes. Whether or not the request is initiated by the employee is practically moot as often such discussions are iterative and the issue emerges through discussion, not simply a unilateral request. It might for example involve an employer offering additional hours

[86] Transcript dated 14 March 2016, PN 1043. See also Exhibit #5 Witness Statement of Kylie-Anne Brannelly Dated 22 February 2016.
[87] Transcript dated 15 March 2016, PN 1132. See also Exhibit #6 Statement of Lauren Logue dated 22 February 2016.
[88] Transcript dated 15 March 2016, PN 1164.
[89] Transcript dated 15 March 2016, PNs 1942-1949.
[90] Transcript dated 17 March 2016, PN 4703.

with a reduced minimum. There seems little warrant to administratively curb what might be mutually beneficial outcomes.

34.2 Accordingly, the protection should simply be that the agreement is "genuine".

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?

35.1 The Australian Chamber's primary position is that a period of engagement should be as flexible as possible for all employees, not just school students, as shorter minimum engagements may be required to meet a variety of needs.

35.2 Notwithstanding this, the case for ensuring that any minimum engagement period for school students is short has been sufficiently made out.

35.3 Students working while attending school allows most students to have parental involvement in the hours they work. This would represent a major safe guard.

35.4 Limiting such hours to school days could prove problematic as public and private schools have differing school schedules as well as differing school holidays.

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) 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?

36.1 No. These modern awards already meet the modern awards objective and no case has been made out to do this.

Australian Chamber of Commerce and Industry

Australian Chamber Members

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