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# Four Yearly Review of Modern Awards: Casual and Part Time Employment Common Issue Proceedings Final Submissions

8 August 2016



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Chamber of Commerce  
and Industry

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**A: BACKGROUND**

**1. ABOUT THE AUSTRALIAN CHAMBER**

- 1.1 The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.
- 1.2 Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.
- 1.3 We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.
- 1.4 The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.
- 1.5 We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.
- 1.6 We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.
- 1.7 We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.
- 1.8 We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

## 2. INTRODUCTION

- 2.1 These submissions concern what is administratively known in proceedings AM2014/196 and AM2014/197 of the 4 Yearly Review as the ACTU “Common Claim” (**ACTU Claim**).
- 2.2 The ACTU Claim traverses over 100 modern awards and broadly seeks “one-size-fits all” model clauses as follows:
- (a) A casual conversion clause which would require an employer to accept a casual employee’s election to become permanent after a period of ongoing casual employment. In respect of some modern awards, the clause sought by the ACTU Claim would “deem” a casual employee to be permanent. The casual conversion clauses sought by the ACTU are stated not to apply to “*irregular casual employees*”.
  - (b) A four hour minimum payment/engagement for casual employees and part-time employees.
  - (c) A proscription against increasing the number of casual employees without first offering existing casual or part time employees “*engaged on similar work*” and whose hours are less than 38 hours per week an opportunity to increase their “*normal working hours*” by agreement.
- 2.3 A number of other clauses are also sought by the ACTU to facilitate the above claims.
- 2.4 Despite the breadth of the ACTU Claim, the case advanced by the ACTU appears to be focussed on the concept of casual conversion.
- 2.5 Indeed the ACTU Claim is characterised by its final written submissions as addressing the phenomenon of the “*permanent casual*”<sup>1</sup> or “*false casual*”.<sup>2</sup>
- 2.6 The Full Bench has now heard 3 weeks of evidence, sitting extended hours. Over 200 exhibits are now in evidence with the vast majority of this material being in the form of witness statements.
- 2.7 As noted in our oral opening statement of 14 March 2016,<sup>3</sup> we ask the Full Bench to assess this evidence and the submissions of the parties through the context of three prisms.
- 2.8 The ACTU Claim must firstly be assessed in light of s 134 of the *Fair Work Act 2009* (Cth) (**FW Act**) and the creation of a fair and relevant minimum safety net for both employees and employers.

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<sup>1</sup> See Final Written Submissions of the ACTU dated 20 June 2016 at [1]

<sup>2</sup> See Final Written Submissions of the ACTU at [15]

<sup>3</sup> See PN185

- 2.9 Secondly, the case of the ACTU must be assessed against the requirements outlined by the **Preliminary Issues Decision**.<sup>4</sup> While this will be expanded on below, the Preliminary Issues Decision requires the ACTU to support its claim with submissions which address the legislative provisions and with probative evidence properly directed to demonstrating the facts supporting the proposed variation.
- 2.10 If there was any doubt that the ACTU's "one size fits all" claim traverses a great variety of industries, each with their own unique conditions relevant to non-fulltime employment, the weight of evidence heard by the Full Bench has surely dispelled such doubt. Given this variety, we ask the Full Bench to view these proceedings through a third prism: the operation of s156(5) of the FW Act.
- 2.11 Section 156(5) requires the Full Bench to review each award "*in its own right*". Section 156(5) therefore requires the Full Bench to assess the effect of the ACTU Claim (and by extension the evidentiary position used to support it) in respect of each and every modern award which is subject to the ACTU Claim.
- 2.12 The hearing of these proceedings has emphatically demonstrated that issues relating to predictability of labour requirements, composition of labour-mix, employee preference and variability of client demand vary greatly between industries.
- 2.13 As the Full Bench has heard, what might be optimum in a "24-7" heavy manufacturing environment may not be optimum (or possible) in a childcare centre, or in a seasonal pastoral or horticultural employer, in an office or in a community service based organisation.
- 2.14 Thus, even putting to one side the operation of s 156(5) of the FW Act, the ACTU Claim and the evidence supporting it cannot be meaningfully assessed on a cumulative basis. "One size" cannot "fit all" with respect to casual and part-time employment, given the very specific demands of each industry subject to the ACTU Claim.
- 2.15 We submit that the ACTU Claim must be assessed on an award by award basis and, so far as possible, these submissions will attempt to assist the Full Bench in this admittedly difficult task.
- 2.16 For the reasons identified in these submissions, it is apparent that the material supporting the ACTU Claim is not sufficient to justify the granting of the claim for any of the nominated modern awards.

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<sup>4</sup> See 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788

2.17 Accompanying these submissions is the Australian Chamber's response to the Issues Paper published by the Full Bench on 11 April 2016.

**B: THE LEGISLATIVE FRAMEWORK AND THE TASK OF THE FULL BENCH**

**3. THE FAIR WORK ACT AND THE 4 YEARLY REVIEW**

3.1 The legislative framework relevant to these proceedings and the 4 Yearly Review was extensively outlined in the Australian Chamber's primary submissions filed 22 February 2016.

3.2 We summarise the key elements of this framework below.

- (a) Section 156(2) of the FW Act requires the Commission to review all modern awards during the 4 Yearly Review.
- (b) In doing so, the Commission may make determinations varying modern awards.
- (c) The ACTU Claim in these proceedings is described as a '*common claim*'. This designation is an administrative mechanism developed in the 4 Yearly Review to describe matters in which '*common issues*' across a number of awards are heard concurrently by the same Full Bench.
- (d) While the hearing of common issues is clearly allowable under s 156(5) of the FW Act, such section requires the Commission to review "*each modern award... in its own right.*"
- (e) Section 134(1) of the FW Act sets out the modern awards objective. The modern awards objective requires that modern awards along with the National Employment Standards provide a "*fair and relevant minimum safety net*" of terms and conditions.
- (f) What is "fair and relevant" is conditioned by the requirement to take into account the matters set out in s 134(1)(a) to (h) of the FW Act.
- (g) Section 138 of the FW Act outlines that

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

- (h) Given the above, regardless of the process relating to the hearing of these matters, the Full Bench must be satisfied that the ACTU's proposals are necessary to ensure a fair and

relevant minimum safety net in accordance with s 134 of the FW Act for each modern award subject to the ACTU Claim.

- (i) The above legislative framework was considered in detail in the Preliminary Issues Decision.<sup>5</sup>
- (j) The Preliminary Issues Decision at [23] confirms that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.
- (k) This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.
- (l) The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.<sup>6</sup>
- (m) When considering the merit basis to make variations to modern awards, the Preliminary Issues Decision held that:
  - (i) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;<sup>7</sup> and
  - (ii) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>8</sup>
- (n) The above principles were outlined in the decision of *Security Services Industry Award* [2015] FWCFB 620 at [8]:

*While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award*

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<sup>5</sup> [2014] FWCFB 1788

<sup>6</sup> Preliminary Issues Decision at [60]

<sup>7</sup> Preliminary Issues Decision at [23] and [60]

<sup>8</sup> Ibid



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

#### **4. QUESTIONS FOR THE FULL BENCH**

4.1 The Full Bench is now required to answer three questions:

- (a) Given that the ACTU Claim seeks significant award changes, has the ACTU advanced a case as contemplated by the Preliminary Issues Decision, including the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation so as to warrant the Commission exercising its discretion pursuant to sections 139 and 156, including the requirement that each award subject to the variation is reviewed “*in its own right*”?
- (b) Is any such exercise of discretion consistent with s 134?
- (c) Are the proposed changes consistent with s 138?

4.2 In our view, having regard to all the evidence, the answer to the first question is no.

4.3 The answers to the remaining questions are more difficult, only in so far that the ACTU has made almost no attempt to demonstrate that the granting of its claims will go “*only to the extent necessary*” to satisfy the modern awards objective for each of the relevant modern awards.

4.4 Despite this difficulty, these questions can also safely be answered in the negative and accordingly the ACTU Claim can be dismissed.

**C: THE CASE OF THE ACTU**

**5. FINDINGS REQUIRED TO SUPPORT THE ACTU CLAIM**

5.1 The Final Written Submissions of the ACTU outline a number of findings or conclusions which the ACTU submits can be made by the Full Bench in these proceedings.

5.2 Despite the weight of material filed in these proceedings, the ACTU's submissions make sparing mention of the actual evidence of lay employee witnesses.

5.3 Curiously, the ACTU Submissions appear to stress the findings which it submits cannot be made, apparently on the basis of "deficiencies" in the evidence of the employer parties.

5.4 In this vein, the ACTU submits that:

- (a) There is no basis for any finding that the cost of the grant of the ACTU Claim will be substantial.<sup>9</sup>
- (b) There is no basis for any finding that any costs caused by the introduction of the conversion clause are unable to be avoided by adjustments in workforce planning or organisation.<sup>10</sup>
- (c) There is no basis for any finding that the viability of any employer is jeopardised by the grant of the ACTU Claim.<sup>11</sup>
- (d) It has not been demonstrated that the ACTU Claim would have prejudicial effects on the efficient and productive performance of work.<sup>12</sup>
- (e) It has not been demonstrated that the grant of the ACTU Claim would result in any serious increase in employment costs or the regulatory burden.<sup>13</sup>
- (f) There is no evidence that increased casual employment improves participation rates.<sup>14</sup>

5.5 With respect, in addition to being incorrect, the above submissions misunderstand and/or mischaracterise the nature of these proceedings and the task before the Full Bench.

5.6 As the Preliminary Issues Decision makes clear, the proponent of a claim in the context of the 4 Yearly Review must provide submissions which address the legislative provisions accompanied by

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<sup>9</sup> See ACTU Final Submissions at [118]

<sup>10</sup> See ACTU Final Submissions at [118]

<sup>11</sup> See ACTU Final Submissions at [118]

<sup>12</sup> See ACTU Final Submissions at [147]

<sup>13</sup> See ACTU Final Submissions at [149]

<sup>14</sup> See ACTU Final Submissions at [150]

probative evidence properly directed to demonstrating the facts supporting the proposed variation.

- 5.7 This means that, as the proponent of its claim, it is incumbent on the ACTU to present an evidentiary case which is satisfactory to support it.
- 5.8 Any “onus” which exists in relation to the ACTU Claim falls on the ACTU, not the employer parties.
- 5.9 It is not enough to simply state that the employer parties have not presented an alternative or contradictory case and therefore the ACTU Claim should be granted. The FW Act and the Preliminary Issues Decision demand that the ACTU make its own case, which, as will be identified below, it has failed to do.
- 5.10 The following positive findings appear to be promoted by the ACTU:
- (a) An incident of the labelling of employment as “*casual*” is the withholding of basic safety net entitlements.<sup>15</sup>
  - (b) The use of casual employment has the effect of undermining the fairness and relevance of the safety net.<sup>16</sup>
  - (c) Casual employment has significant disadvantages for many, although not all, employees, including:
    - (i) reduced income;
    - (ii) unavailability of basic safety net entitlements including in respect of leave;
    - (iii) insecurity of employment and income;
    - (iv) reduced levels of workplace training and workplace development;
    - (v) consequential increases in stress and anxiety and reductions in employee welfare; and
    - (vi) exacerbation of gender-based differences.<sup>17</sup>
  - (d) There is some basis for a finding that a reduction in casual employment will increase the efficient and productive performance of work, principally by improvements in functional flexibility and labour mobility.<sup>18</sup>

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<sup>15</sup> See ACTU Final Submissions at [145]

<sup>16</sup> Ibid

<sup>17</sup> See ACTU Final Submissions at [146]

<sup>18</sup> See ACTU Final Submissions at [148]

- (e) Casual employment is associated with reduced levels of workplace training and workplace development, especially in occupations and industries where training is likely to be important.<sup>19</sup>
  - (f) There is no identifiable relationship between increased casual employment and unemployment.<sup>20</sup>
  - (g) Increased casual employment does not improve participation. To the contrary empirical data suggests increases in casual employment stymie improvements in participation.<sup>21</sup>
  - (h) The grant of the claim may increase costs in some cases, assuming the grant of the claim does not precipitate any change in workforce planning or organisation. <sup>22</sup>
  - (i) The disadvantages of long term casual employment for employees far outweigh the advantages to be gained by employers who wish to persist in using casual employment as a vehicle for virtual permanent employment, whatever their reason for doing so may be. <sup>23</sup>
  - (j) The grant of the ACTU Claim is necessary to achieve the modern awards objective.<sup>24</sup>
- 5.11 In the submission of the Australian Chamber, the ACTU Claim must be assessed against each relevant modern award. Notwithstanding this position, a number of general themes common to the operation of the ACTU Claim have been canvassed in our primary submission.
- 5.12 As will be further explored in the Australian Chamber's response to the Issues Paper filed alongside these submissions, the following difficulties are apparent on the face of the ACTU Claim.
- 5.13 Firstly, the scope of the ACTU Claim applies inconsistently across a range of employee "types". For example, the casual conversion claim focuses squarely on employees who are not irregular casual employees. If this subset of employees is understood to be those casuals performing work on a regular and systematic basis,<sup>25</sup> such employees are explicitly recognised within the scope of the FW Act and as such cannot be said to be an illegitimate or unrecognised form of employment.

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<sup>19</sup> See ACTU Final Submissions at [74]

<sup>20</sup> See ACTU Final Submissions at [74]

<sup>21</sup> See ACTU Final Submissions at [74]

<sup>22</sup> See ACTU Final Submissions at [117]

<sup>23</sup> See ACTU Final Submissions at [247]

<sup>24</sup> See ACTU Final Submissions at [151]

<sup>25</sup> Within the scope of S 384(2)(a)(i) of the FW Act

- 5.14 This subset of casual employee is likely to be defined by systematic and regular employment, regular and predictable income, an entitlement to payment for leave in advance and protection from unfair dismissal equivalent to a full time employee.
- 5.15 As such, if the casual conversion component of the ACTU Claim is limited to casuals performing work on a regular and systematic basis, the ACTU's submissions and evidence in relation to the inherent uncertainty and precariousness of casual employment do not seem to apply (or at least apply indirectly).
- 5.16 The ACTU Claim for a 4 hour minimum engagement applies more generally. Accordingly, the subset of employees which apparently "require" the creation of a 4 hour minimum engagement differs fundamentally from that of the "permanent casual" class. The ACTU posit that the minimum engagement claim is necessary to create a fair and equitable safety net by ensuring that employees are paid so as to be better off working than receiving the Newstart weekly allowance.
- 5.17 The requirement of s 156(5) of the FW Act that each award be reviewed in its own right is particularly relevant to the task of the Full Bench in respect of this limb of the ACTU Claim.
- 5.18 Notwithstanding that this claim interacts directly with the setting of minimum award rates, the ACTU and its evidence has not come to terms with the differing industrial conditions applying across the scope of its claim. Indeed, the ACTU acknowledges that the minimum engagement claim will result in employees being paid despite not being required to work. In respect of this consequence it submits that the *"possibility that an employee might be unable to be productively engaged for every minute of a shift is not so abhorrent as to overcome the requirement to ensure that employees are compensated for work"*.<sup>26</sup>
- 5.19 In the submission of the Australian Chamber, the fundamental industrial principle that employees be paid for work performed must apply both ways. To require otherwise cannot be consistent with the maintenance of a fair and relevant safety net for both employers and employees.
- 5.20 The final substantive limb of the ACTU Claim , the requirement to offer work to existing employees, received very little evidentiary support in the hearing of these proceedings.
- 5.21 Accordingly we rely on our Primary Submissions in respect of this claim.

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<sup>26</sup> See ACTU Final Submissions at [138]

## **D: ASSESSMENT OF THE ACTU CLAIM ON AN AWARD BY AWARD BASIS**

### **6. INTRODUCTION TO AWARD BY AWARD ASSESSMENT**

- 6.1 As noted above, s 156(5) of the FW Act requires the Full Bench to review each modern award subject to the ACTU Claim *“in its own right”*.
- 6.2 As such, it is critical for the Full Bench to assess the evidentiary case advanced in relation to each Modern Award.
- 6.3 The ACTU’s final comprehensive submissions identify that *“[e]mployer interests lead a large amount of evidence from a variety of industries and industry areas”*<sup>27</sup>
- 6.4 With respect, the same was required of the ACTU to support the ACTU Claim.
- 6.5 As will be identified below, this has not been the case.
- 6.6 While the Australian Chamber has been able to identify some evidence led in relation to some industries, the ACTU Claim in its entirety was not supported by evidence addressing all industries. An analysis of the evidence relevant to each of the modern awards subject to the ACTU Claim is provided below.
- 6.7 It should be noted that the below analysis does not deal with the generic or statistical references to a limited number of industries in Professor Markey’s reports.

### **7. AWARDS WHICH WERE THE SUBJECT OF EVIDENCE IN SUPPORT OF THE ACTU CLAIM**

#### **Black Coal Mining Industry Award 2010**

##### **Evidence provided in Support of ACTU Claim** Statement – Matthew James Francis – 27 October 2015 (ACTU)

- 7.1 The ACTU Claim in respect of the Black Coal Mining Industry Award was the subject of a statement from Mr Matthew Francis.
- 7.2 In Mr Francis’ statement, Mr Francis gave evidence that:
- (a) he would prefer to be directly employed with an employer rather than working for that employer under a labour hire or contract arrangement;<sup>28</sup>
  - (b) he would *“much prefer permanent work”*, that he *“hated being employed as a casual*

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<sup>27</sup> See Final Written Submission for the ACTU at [75]

<sup>28</sup> See Statement of Matthew Francis at [43]

*because I had no holidays or sick leave “and he preferred “to have access to paid entitlements in the bank.”<sup>29</sup>*

- 7.3 In the period between making his statement and appearing at hearing, Mr Francis had obtained full time employment and confirmed he had maintained for the best part of a decade his annual income of approximately \$120,000 per annum.
- 7.4 Despite the fact Mr Francis had converted to permanent employment and was now in receipt of paid leave entitlements, Mr Francis gave evidence that he was still “*not happy*”.<sup>30</sup> This was on the basis that Mr Francis had not obtained employment with his preferred employer, having unsuccessfully applied for a permanent position at that employer.<sup>31</sup>

#### **Submission as to available findings on the evidence**

- 7.5 The evidence presented by Mr Francis does not present a sound basis to make findings in respect of the ACTU’s Claim under the Black Coal Mining Industry Award.
- 7.6 The relevance of Mr Francis’ evidence must be limited to his own personal circumstances and preferences. Notwithstanding the content of his statement, Mr Francis’ discontent does not appear to be based in his status as casual or permanent employee but rather in respect of the identity of his employer. This issue is well beyond the scope of these proceedings.
- 7.7 If Mr Francis’ evidence could be said to apply generally, given his remuneration, his entitlement to paid leave and his conversion to permanent employment, his evidence cannot support the ACTU Claim.

#### **Children's Services Award 2010**

##### **Evidence provided in Support of ACTU Claim**

Statement – Narelle Jenks – 15 October 2015 (ACTU)

##### **Evidence provided opposing ACTU Claim**

Statement – Kylie-Anne Brannelly – 22 February 2016 (ACCI/NSWBC/ABI)

Statement – Paul Alexander Mondo – 24 February 2016 (ACCI/NSWBC/ABI)

- 7.8 The statement of Narelle Jenks was provided in support of the ACTU Claim in the Children’s Services Award 2010.

<sup>29</sup> See Statement of Matthew Francis at [46]

<sup>30</sup> PN6780

<sup>31</sup> PN6775-6

- 7.9 In her evidence Ms Jenks attested to the fact that:
- (a) She had entered the childcare industry because “[t]he hours suited [her] more, because finding childcare on the weekend was too difficult.”<sup>32</sup>
  - (b) She had not sought out full time work as her caring obligations prevented her from working full time.<sup>33</sup>
  - (c) She had changed from part-time work to casual work after moving towns as her casual job was the best job she could find.<sup>34</sup>
  - (d) Notwithstanding the content of her statement, Ms Jenks confirmed that she left a part-time job to go and work in a casual job on the basis that the casual job was better to balance her study and childcare commitments.<sup>35</sup>
- 7.10 While the testimony of a single witness should not be overstated, Ms Jenks’ candid responses under cross-examination identify a particular characteristic of the childcare industry: consistency with carer’s responsibilities. What Ms Jenks’ testimony did not touch on was the particular characteristics of rostering within the childcare industry which make the ACTU Claim entirely unworkable.
- 7.11 Ms Jenks’ evidence was complemented by the evidence provided by Mr Paul Mondo and Ms Kylie-Anne Brannelly which demonstrated that the children’s services industry is particularly unsuited to the “one size fits all” nature of the ACTU Claim.
- 7.12 Mr Mondo in his capacity as National Secretary of Australian Childcare Alliance and the proprietor of two childcare centres gave evidence as to the specific and unique requirements of the industry with particular focus on:
- (a) the requirements of legislative ratios in the industry,
  - (b) the effects arising from Federal Government Childcare Benefit and Childcare Rebate;
  - (c) the requirement of inclusion support in the industry.
- 7.13 Mr Mondo’s evidence identified the considerable inconsistency between the ACTU Claim and the nature of the children’s’ services industry. Mr Mondo’s evidence went beyond the mere

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<sup>32</sup> PN7473

<sup>33</sup> PN7482

<sup>34</sup> PN7522

<sup>35</sup> PN7544



identification of increased costs to the employer. Specifically, Mr Mondo identified:

- (a) The problematic interaction between the legislative requirement for staff ratios and the ACTU's proposed minimum engagement particularly in relation to lunch breaks.<sup>36</sup>
- (b) The inherent variability of the industry (as a result of the variability of children) which would be unworkable in the context of the ACTU Claim to provide an estimate to casual employees of their required hours of work.<sup>37</sup>
- (c) The specific requirements and skill-set of workers within the industry which mean that it is difficult to ascertain within six months the suitability of an employee for permanent employment, particularly if the worker is only working limited part time hours.<sup>38</sup>
- (d) The problematic interaction between the requirement of the ACTU Claim to offer current staff additional hours before recruiting additional employees<sup>39</sup> and the legislative requirement for staff ratios, particularly in relation to the qualifications of employees.

7.14 Ms Brannelly in her capacity as a representative of the National Outside School Hours Services Association (**NOSHSA**) and the proprietor of an outside of school hours care (**OSHC**) for 13 years gave evidence regarding the operating considerations for an OSHC service including:

- (a) the unique hours of operation, being before and after school;
- (b) the requirements of legislative ratios and qualifications in the industry;
- (c) the large casual workforce of the industry.

7.15 Ms Brannelly's evidence identified that the ACTU claim was, in many respects, inappropriate for the OSHC industry because:

- (a) A minimum engagement period of 4 hours:
  - (i) is entirely incompatible with the hours of operation of the service which generally operates for 2-3 hours at a time either before or after school;<sup>40</sup>
  - (ii) is inconsistent with the Federal Government Childcare Benefit or the Childcare Rebate which only funds 2 - 3.5 hours of care depending on whether the care is

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<sup>36</sup> See statement of Paul Mondo at [73]-[78]

<sup>37</sup> See statement of Paul Mondo at [79]-[80]

<sup>38</sup> See statement of Paul Mondo at [87]

<sup>39</sup> See statement of Paul Mondo at [88]-[90]

<sup>40</sup> See Statement of Kylie-Anne Brannelly at [41]-[51], [1]-[7]

before or after school;<sup>41</sup>

(iii) would make OSHC service providers operating under the federal *Children's Services Award 2010* more expensive to operate than OSHC providers operating under enterprise agreements and state awards.<sup>42</sup>

(b) Converting casuals to permanent employment is inconsistent with the way OSHC centres operate and roster. Employees provide their availability to the OSHC centres who then subsequently prepares a roster, not the other way around. This reverse rostering is a reflection of the fact that employee's availability is frequently changing due to university timetables, travel plans and other commitments.

(c) Offering current staff additional hours before recruiting additional employees would be problematic for staffing and recruitment in a high turnover, casual workforce.<sup>43</sup>

#### **Submission as to available findings on the evidence**

7.16 The evidence of Mr Mondo and Ms Brannelly establishes a number of unique characteristics of the children's services industry.

7.17 It is open for the Full Bench to make a finding that the unique legislative requirements placed on the childcare industry make it particularly unsuitable for the imposition of:

(a) a four hour minimum engagement;

(b) a requirement that "additional hours" are offered to existing staff before any new employees are engaged.

7.18 It is also open to the Full Bench to make a finding that the nature of the industry would make it unsuitable for the imposition of a casual conversion provision in the form proposed by the ACTU.

7.19 If any finding can be made in respect of the evidence of Ms Jenks, it is that casual employment under the Children's Services Award may be particularly conducive to those with parental responsibilities and that some employees will elect to work within the industry as a result of this.

7.20 The evidence of Ms Jenks is in no way sufficient to support the ACTU Claim for the purposes of the Children's Services Award in accordance with the requirements of the Act.

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<sup>41</sup> See Statement of Kylie-Anne Brannelly at [12]-[16]

<sup>42</sup> See Statement of Kylie-Anne Brannelly at [8]-[9], page 7

<sup>43</sup> See Statement of Kylie-Anne Brannelly at [24]-[28], page 10

## Electrical Power Industry Award 2010

**Evidence provided in Support of ACTU Claim** Statement of Michael Rizzo dated 22 September 2015

### Submission as to available findings on the evidence

- 7.21 The evidence of Mr Rizzo appears to be localised to his attempts in various forums to secure casual conversion of a particular group of “meter readers” under an enterprise agreement.
- 7.22 While presenting a detailed account of particular course of industrial history, this evidence is of limited probative value in relation to these proceedings and is insufficient to support the granting of the ACTU Claim in this award.

## Fast Food Industry Award 2010

**Evidence provided in Support of ACTU Claim** Statement – Linda Rackstraw – 8 October 2015 (ACTU)

**Evidence provided opposing ACTU Claim** Statement – Krista Limbrey – 12 October 2015 (AIG)  
Statement – Krista Limbrey – 24 February 2016 (AIG)

- 7.23 The evidence provided by the ACTU in the Fast Food industry was in the form of a statement from Ms Linda Rackstraw who previously had worked at McDonald’s.
- 7.24 Ms Rackstraw’s statement at [14] identified her belief that she had limited control over her shifts and that her employment as a casual made her feel that she was “*there but never really there*”<sup>44</sup> by which she meant that she did not feel an important part of the system as a casual.<sup>45</sup>
- 7.25 Under cross-examination Ms Rackstraw acknowledged that the actual hours she worked at McDonald’s varied from the content of her statement.<sup>46</sup>
- 7.26 The final submissions of the ACTU rely on the fact that Ms Rackstraw gave evidence about the consequences for her of refusing shifts as a casual employee at a McDonald’s store.<sup>47</sup> It should be noted that no reasonable opportunity was afforded to the employers to respond to or test this evidence given that the source of this evidence is not identified. At hearing, Ms Rackstraw was

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<sup>44</sup> See Statement of Linda Rackstraw at [28]

<sup>45</sup> See PN1383

<sup>46</sup> See PN1462

<sup>47</sup> See the Final Submissions of the ACTU at [29]

unable to identify the source of this evidence.<sup>48</sup>

- 7.27 Ms Limbrey, People Insights and Recruitment Manager, provided evidence on behalf of McDonald's.
- 7.28 Ms Limbrey outlined the fluctuation of staffing requirements in McDonald's stores based on time of day and time of year.<sup>49</sup> Her evidence also pointed to a requirement of McDonald's to structure their labour needs around "meal-time" peak periods of two hour duration which are currently facilitated by a three hour minimum engagement period.<sup>50</sup>
- 7.29 Ms Limbrey acknowledged the benefits for McDonald's of engaging non-casual employees<sup>51</sup> however noted that McDonald's often encountered a lack of interest on the part of casual employees to convert to part-time employment on the basis that casual loading would no longer be paid.<sup>52</sup> Interestingly, with respect to the casual conversion component of the ACTU Claim, Ms Limbrey gave evidence that the profile of a person who would be likely to accept part-time employment would be an employee who had been with the business for "*a couple of years*".<sup>53</sup>

#### **Submission as to available findings on the evidence**

- 7.30 The evidence relevant to the Fast Food Industry Award 2010 was limited solely to matters concerning McDonald's. It cannot be argued that McDonald's is an example of a typical employer. In this sense, it is trite to say that the Full Bench has not been provided with a comprehensive evidentiary position in respect of this award.
- 7.31 Nonetheless the evidence before the Full Bench is instructive that the fast food industry is subject to particular circumstances which make it inappropriate for the granting of the ACTU Claim. These include:
- (a) the relatively high level of student employment;
  - (b) the specific labour demands associated with meal times;
  - (c) the comparatively low level of "career" employees.
- 7.32 In our submission, the evidence of Ms Rackstraw is insufficient to support the granting of the ACTU Claim in the Fast Food Industry Award. Accordingly, its claim should fail in respect of this award.

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<sup>48</sup> See PN1373

<sup>49</sup> See Statement of Krista Limbrey dated 24 February 2016 at [6]-[7]

<sup>50</sup> See Statement of Krista Limbrey dated 24 February 2016 at [38]

<sup>51</sup> See PN7253

<sup>52</sup> See PN7256

<sup>53</sup> See PN7257

## General Retail Industry Award 2010

### Evidence provided in Support of ACTU Claim

Statement – Madeline Minervini – 11 November 2015 (ACTU)

Affidavit – Kyra Campbell – 30 October 2015 (ACTU)

### Evidence provided opposing ACTU Claim

Statement – Andy Hill – 22 February 2016 (ACCI/NSWBC/ABI)

Statement – Robert Blanche – 23 February 2016 (AIG)

7.33 Two witnesses were called in support of the ACTU Claim in the General Retail Industry Award 2010.

7.34 In addition to the content of her statement, Ms Madeline Minervini identified that:

- (a) between 2012 and 2014, she had been working full-time at a nursing home, working casually at Romeo IGA, completed a trade qualification in carer's certificate III and undergone a nursing qualification;<sup>54</sup>
- (b) the reason she retained her casual position was that she wanted extra money;<sup>55</sup>
- (c) she was seeking to be approved as a full-time carer for her mother as well as undertaking further nursing studies.

7.35 A second retail witness, Kyra Campbell, in addition to her statement outlined as follows:

- (a) she was no longer employed in the role which was identified in her statement as she had moved towns;<sup>56</sup>
- (b) upon moving towns, Ms Campbell had only applied for part-time or casual jobs;<sup>57</sup>
- (c) her current casual role “fitted in nicely” with the care and management of her two young children;<sup>58</sup>
- (d) while she did not understand that her casual loading was paid in lieu of holiday pay and sick pay, she accepted that if that were the case she had been paid her leave in advance.<sup>59</sup>

<sup>54</sup> See PN2225

<sup>55</sup> See PN2230

<sup>56</sup> See PN3824

<sup>57</sup> See PN3846

<sup>58</sup> See PN3850

<sup>59</sup> See PN3878

- 7.36 Despite the content of their prepared statements, neither Ms Minervini or Ms Campbell presented as witnesses who were seeking variations to their current working arrangements.
- 7.37 Both witnesses identified that their casual positions were consistent with their various study or care obligations and neither witness appeared to advocate for:
- (a) permanency in their role;
  - (b) longer engagements; or
  - (c) more hours.
- 7.38 Given the above (with absolutely no criticism intended, given they both were model witnesses), Ms Minervini and Ms Campbell utterly failed to embody the casual employee “type” which the ACTU has sought to develop in these proceedings. Neither witness appeared to be frustrated with the course of their employment but understood that their career, study and family choices left them either preferring or requiring the flexibility of casual work.
- 7.39 The statements of Mr Hill and Mr Blanche were adduced to resist the ACTU Claim in respect of the Retail Award. These statements speak for themselves and provide some indication of the effect of the ACTU Claim in relation to specific businesses.

### **Submission as to available findings**

- 7.40 On the evidence presented, the Full Bench is entitled to make a finding that casual employment in the retail industry is conducive to some people, specifically those with commitments outside their working life.
- 7.41 Plainly, the evidence presented for the purposes of the General Retail Industry Award cannot give rise to the findings that the ACTU require. Specifically, the Full Bench cannot be satisfied on the evidence presented that there is a phenomena of unwilling and unhappy “permanent casuals” engaged in the retail industry.

### **Higher Education Industry-General Staff-Award 2010**

#### **Evidence provided in Support of ACTU Claim**

Statement – Linda Gale – 14 October 2015 (ACTU)

#### **Evidence provided opposing ACTU Claim**

Statement – Stewart Andrews – undated (AHEIA)

Statement – Mark Gladigau – 25 February 2016 (AHEIA)

Statement – Ken Greedy – undated (AHEIA)

Statement – Steven Smith – 25 February 2016 (Group of 8)  
 Statement – David Ward – 25 February 2016 (Group of 8)  
 Statement – Bronwyn Shields – 25 February 2016 (Group of 8)  
 Statement – Diana Dalton – 25 February 2016 (Group of 8)

**The Australian Chamber’s Submission in respect of the Evidence provided**

- 7.42 The employer interests in the Higher Education Industry - General Staff-Award 2010 were represented in these proceedings by the Group of 8 Universities and Australian Higher Education Industrial Association.
- 7.43 The Australian Chamber adopts and supports the evidence and submissions of these parties in respect of this evidence.

**Horticulture Award 2010**

**Evidence provided in Support of ACTU Claim**

Statement - Adam Algate - 18 February 2016 (AWU)  
 Statement - Ron Cowdrey - 18 February 2016 ( AWU)  
 Statement - Keith Ballin - 9 October 2015 (AWU)

**Evidence provided opposing ACTU Claim**

Statement - Peter John McPherson - 22 February 2016 (Costa)  
 Statement - Richard Neil Roberts - 22 February 2016 (Costa)  
 Statement - Alice De Jonge - 22 February 2016 (NFF)  
 Statement - Andrew Bulmer - 22 February 2016 (NFF)  
 Statement - Andrew Young - 22 February 2016 (NFF)  
 Statement - Ann Young - 22 February 2016 (NFF)  
 Statement - Brendan Miller - 22 February 2016 (NFF)  
 Statement - Brock Sutton - 22 February 2015 (NFF)  
 Statement - John Dollisson - 22 February 2016 (NFF)  
 Statement - Steve Chapman - 22 February 2016 (NFF)  
 Statement - Donna Louise Mogg - 21 February 2016 (NFF)  
 Statement - Kylie Collins - 19 February 2016 (NFF)  
 Statement - Mick Dudgeon - 19 February 2016 (NFF)  
 Statement - Clint Edwards - 18 February 2016 (NFF)  
 Statement - Stephen Pace - 18 February 2016 (NFF)  
 Statement - Susan Finger - 16 February 2016 (NFF)

Statement - Vicky Forsyth - 16 February 2016 (NFF)  
 Statement - Tracey McGrogan - 15 February 2016 (NFF)  
 Statement - Nick Leitch - 12 February 2016 (NFF)  
 Statement - Andreas Reahberger - undated (NFF)  
 Statement - Chris Fullerton - undated (NFF)  
 Statement - Pennie Patane - undated (NFF)  
 Statement - Rhonda Jurgens - undated (NFF)  
 Statement - Ross Turnbull - undated (NFF)  
 Statement - Tim Wollens - undated (NFF)

#### **Submission as to available findings on the evidence**

7.44 The Australian Chamber relies on the evidence adduced above and adopts and supports the submissions of the Costa Group in respect of this evidence.

#### **Hospitality Industry (General) Award 2010**

**Evidence provided in Support of ACTU Claim** None

**Evidence provided opposing ACTU Claim**

Statement – Joanne Leslie Blair – 11 October 2015 (AHA)  
 Statement – Joanne Leslie Blair – 14 March 2016 (AHA)  
 Statement – Darren Lea Brown – 9 October 2015 (AHA)  
 Statement – Darren Lea Brown – 23 February 2016 (AHA)  
 Statement – Paul Stocks – 10 October 2015(AHA)  
 Statement – Paul Stocks – 23 February 2016 (AHA)  
 Statement – Sharni King (AHA)  
 Statement – Wendy Catherine Mead – 29 February 2016 (Recruitment and Consulting Services Ass)  
 Statement - Robert Woods - 11 October 2015 (AHA)  
 Statement - Rosario Leonardo - 12 October 2015 (AHA)  
 Statement - Elizabeth Cleaves- 12 October 2015 (AHA)  
 Statement - Elizabeth Cleaves- 8 July 2016 (AHA)  
 Statement - Christopher Peter William - 12 October 2015 (AHA)

#### **Submission as to available findings on the evidence**

7.45 The Australian Chamber relies on the evidence adduced above and adopts and supports the



submissions of the Australian Hotels Association in respect of this evidence.

### **Nurses Award 2010**

#### **Evidence provided in Support of ACTU Claim**

Statement – Jan Maria Paulsen – 13 October 2015 (ACTU)

Statement – Vicky Stewart – 16 October 2015 (ACTU)

7.46 Two statements were provided in support of the ACTU Claim in the Nurses Award 2010.

7.47 In Jan Maria Paulsen's evidence, Ms Paulsen confirmed that:

- (a) since providing the statement, she had elected to change her employment status from part-time to casual with her employer,<sup>60</sup> as well as commencing a second casual role;<sup>61</sup>
- (b) she did not work full-time as she assisted with the care of her partner's daughter;<sup>62</sup>
- (c) her current casual role provided her increased money, flexibility and hours<sup>63</sup> which were sufficient for her current needs;<sup>64</sup>
- (d) the variation in hours that she experienced in her previous role was at least in part driven by patient/client demand.<sup>65</sup>

7.48 Contrastingly, the statement of Vicky Stewart is almost entirely devoid of probative value.

7.49 Paragraph 3 of Ms Stewart's statement purports to explain why some employees have not given evidence in these proceedings by relying upon hearsay evidence. This evidence is highly prejudicial as it encourages the Full Bench to draw inferences regarding employee opinions and experiences without any direct evidence.

7.50 During the hearing, his Honour Hatcher VP noted that paragraph 3 could not be read as suggesting or supporting a conclusion that there is any rational basis to be concerned about providing evidence in these proceedings.<sup>66</sup>

7.51 The remainder of the statement, specifically paragraphs 3-10, 12, 14-19 and 21-24 refer to issues apparently concerning unnamed employees and employers.

7.52 While it is alleged certain unnamed employees do not wish their names to be disclosed, there is no

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<sup>60</sup> See PN3747

<sup>61</sup> See PN3750

<sup>62</sup> See PN3774

<sup>63</sup> See PN3782

<sup>64</sup> See PN3783

<sup>65</sup> See PN3796

<sup>66</sup> See PN6487

admissible evidence before the Full Bench to suggest that there is a rational proper basis for this preference. It was open to the ACTU to advance the statement with identified employees and employers with appropriate confidentiality orders. That course has not been taken and accordingly our clients, and more importantly the Full Bench, are left unable to test the evidence of Ms Stewart.<sup>67</sup>

7.53 Given that this evidence cannot be tested, it is of no probative value whatsoever to the Full Bench and should be entirely disregarded.

7.54 Regardless of the weight afforded to the statement of Ms Stewart, her evidence under cross-examination provided as follows:

- (a) a common feature of enterprise agreements in private hospitals negotiated by Ms Stewart's union included three-hour minimum shifts;<sup>68</sup>
- (b) Ms Stewart had no factual documentary material to understand how many employees in private health are casual employees;<sup>69</sup>
- (c) employers under the Nurses Award were required to change the amount of labour they require for that day on a "daily basis"<sup>70</sup> and that it was "[v]ery, very common"<sup>71</sup> for surgery lists to change.

### **Submission as to available findings on the evidence**

7.55 The Full Bench cannot be satisfied on the evidence presented by Ms Stewart and Ms Paulsen that there is a phenomena of unwilling and unhappy "permanent casuals" engaged under the Nurses Award.

7.56 It would be open however for the Full Bench to take notice of the evidence provided that employers under the Nurses Award are subject to a high degree of client variability. As noted by both Ms Stewart<sup>72</sup> and Ms Paulsen<sup>73</sup>, employers under the Nurses Award are subject to variable labour requirements which routinely require more or less labour than could have been foreseen. Given the nature of the health industry, this is unsurprising.

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<sup>67</sup> These matters were identified at PN6514 by Hatcher VP

<sup>68</sup> See PN6529

<sup>69</sup> See PN6583

<sup>70</sup> See PN6608

<sup>71</sup> See PN6609

<sup>72</sup> See PN6608

<sup>73</sup> PN3796

7.57 With this context, the four hour minimum component of the ACTU Claim is particularly problematic in respect of the Nurses Award. Given the lack of an adequate evidentiary case put forward by the ACTU and the obvious issues with implementation of the ACTU Claim into the Nurses Award, the claim should be dismissed.

### **Pastoral Award 2010**

<b>Evidence provided in Support of ACTU Claim</b>	None
<b>Evidence provided opposing ACTU Claim</b>	Statement - Simon Fiddelaers - 12 October 2015 (NFF) Statement - Cheryl McCartie - 9 October 2015 (NFF) Statement - Ann Wearden - undated (NFF) Statement - Leigh Shearman - 12 October 2015 (NFF) Statement - Susan Wearden - 15 April 2015 (NFF) Statement - Noel Campbell - 12 October 2015 (NFF)

### **Submission as to available findings on the evidence**

7.58 The Australian Chamber adopts and supports the evidence outlined above and endorses the submissions of the National Farmers Federation in respect of this award.

### **Social, Community, Home Care and Disability Services Industry Award 2010**

<b>Evidence provided in Support of ACTU Claim</b>	Statement – Tracy Kemp – 9 October 2015 (ACTU) Statement – Limasene Potoi – 21 December 2015 (ACTU) Statement – Scott Graeme Quinn – 16 December 2015 (ACTU) Statement – John Perry – 19 October 2015 (ACTU) Statement – Judith Wright – 18 March 2016 (ACTU) Statement – Stanley Morgan – 26 October 2015 (ACTU)
<b>Evidence provided opposing ACTU Claim</b>	Statement – Robert Blanche – 23 February 2016 (AIG) Statement – Amy Wolverson – 29 February 2016 (Recruitment and Consulting Services) Affidavit - Anthony John Rohr - 1 December 2015 (ABI/NSWBC) Statement - Dr Ken Baker - 29 April 2016 (JA) Statement - David Carey - 29 April 2016 (JA) Statement - Hugh Kenneth Packard - 26 November 2015

(ABI/NSWBC)

Statement - Lois Adrijich - 12 October 2015 (St Ives Group)

- 7.59 The Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHCDSI Award**) was seemingly a focus of the ACTU Claim given the comparatively large (when compared to other components of the claim) evidentiary case in respect of this Award.
- 7.60 Through such evidence, the ACTU sought to establish:
- (a) that casual employees would prefer the “stability and security” of permanent employment;<sup>74</sup>
  - (b) that casual employees feel pressure to accept shifts on the basis that to fail to do so may have negative ramifications;<sup>75</sup>
  - (c) that the irregularity of casual employment means that casual employees are required to carefully plan their absences so as not to cause financial concern;
  - (d) that there exists a phenomenon of “permanent casuals” which should be responded to by the Full Bench.<sup>76</sup>
- 7.61 Consistent with other evidence presented in the case, witnesses in respect of the SCHCDSI Award under cross-examination entirely failed to present casual and part-time employment in the light seemingly favoured by the ACTU. This cross-examination uncovered a rich history of employment within the experience of the witnesses, in marked contrast to their prepared statements which had strictly confined their evidence.
- 7.62 It was apparent in evidence provided by the witnesses to the SCHCDSI Award that casual employees in the industry regularly moved in and out of full-time, part-time or casual employment during the course of their careers.
- 7.63 Under cross-examination, the witnesses confirmed that casual employment provided flexible opportunities for employment which were amenable to the individual witnesses’ lifestyles and which “*fitted the circumstances of their lives at the time*”.<sup>77</sup> For example, Tracey Kemp confirmed that she: “*sought out work that would fit to my– so that I didn’t have to leave my child in childcare.*”<sup>78</sup> Ms

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<sup>74</sup> See for example Statement of Tracey Kemp at [8]

<sup>75</sup> See Statement of Tracey Kemp at [12]-[13]

<sup>76</sup> See ACTU Final Submissions at [1]

<sup>77</sup> See PN430

<sup>78</sup> See PN399

Kemp further confirmed that she moved to casual employment because: “...I wanted to be able to decide if I wanted to go to full time work or give up work and my partner support me, or if I wanted to travel with him.”<sup>79</sup>

7.64 The witnesses also largely confirmed that they had not actively sought out alternative or full time roles during the course of their part-time or casual employment.<sup>80</sup>

7.65 For those witnesses who had sought out permanent roles, the Commission heard that the witnesses did not seek permanent employment per se, but rather sought employment in their local area and in the industry that they wished to work in. For example, Ms Tracey Kemp from PN489 was involved in the following exchange:

*Do I take it that when you look, you can't find any jobs at all or you can't find any jobs you are interested in?---I can't find any that are in the industry that I choose to work in that are in my local area.*

...

*Would you agree with me that you haven't really made many efforts to move out of casual employment at FSG and find permanent work if you have only actually applied for one job in four years?---I would agree that on the face of it, it looks like that.*

7.66 The witnesses in the SCHCDSI Award, who should be commended for their candour, presented casual work in a manner far removed from the case proposed by the ACTU.

7.67 In fact, the oral evidence of witnesses in respect of their positions under the SCHCDSI Award was largely positive and the negatives highlighted by the ACTU Claim were largely underplayed. Ms Kemp outlined that:

*“Everything else about that job, I really, really enjoy it. I believe that I make a great deal of difference to the people that I work with and it suits the job, the location, the clients that I work with, the nature of the job. Everything about it is really good and I really, really like it. It is just the uncertainty. I really would prefer it to be permanent part time. But apart from that, unless something really happened to make me - you know, the clients changed or the*

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<sup>79</sup> See PN429

<sup>80</sup> See for example the evidence of Ms Kemp at PN486-PN489

*location changed or something that suits me very well changed, I am not predisposed to leaving that job just for one reason which is the casual nature of it.”<sup>81</sup>*

7.68 Mr Scott Quinn noted that he had not left his employment in the sector as:

*“[I]t’s not that it’s so bad. The employment - the bosses are very good. I have no complaints with the bosses. It’s just that the hours vary and can vary greatly from 7.00 in the morning until midnight.*

*And that frustrates you?---It does sometimes, yes. Because sometimes you can’t plan appointments or if you suddenly need to do something, sometimes you can’t do that.*

*But it hasn’t frustrated you enough to leave and go and get a full-time job somewhere else?---No, because I enjoy what I do and it’s the clients that would miss out.”<sup>82</sup>*

7.69 Mr John Perry provided evidence that, notwithstanding that he claimed he had had been told that he was to be transferred into permanent employment at his interview, he “*would have taken the job anyway*”, even in circumstances where he had been told the job was casual<sup>83</sup> as he was:

*“keen in getting in and doing that sort of work. I know what it’s like to live with a disability and they needed help and I had an insight on how to help them and I did. ... I still would have stayed there if it was still casual work, yes.”*

7.70 The evidence of employees also supported a view that casual employment allowed considerable flexibility for employees to fit work in and around other commitments. By way of example, evidence was given of employees utilising casual work:

- (a) to facilitate international travel<sup>84</sup>;
- (b) to “fit in” with arrangements relating to their partner’s employment<sup>85</sup>;
- (c) to allow flexible working arrangements to avoid childcare costs;<sup>86</sup>
- (d) to earn money so as to raise money for a house deposit;<sup>87</sup>
- (e) to allow them to engage in full time study or to pay for full time study;<sup>88</sup>

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<sup>81</sup> See PN494

<sup>82</sup> See PN1731

<sup>83</sup> See PN3292

<sup>84</sup> See PN391

<sup>85</sup> See PN397

<sup>86</sup> See PN397

<sup>87</sup> See PN407

(f) to engage in other full-time work.<sup>89</sup>

7.71 The support for the ACTU's Claim also included evidence from a union official, Ms Judith Wright.

7.72 The evidence of Ms Wright, Acting Branch Secretary of the Australian Services Union, pointed to one example of an employee potentially having difficulty if his employer did not provide confirmation of ongoing work<sup>90</sup> (a potentiality which did not eventuate) and a single example of an employee, Ms Jacquie Dredge, who had some difficulty in obtaining rental accommodation. Notably Ms Dredge did not attend the Commission to give evidence having apparently become "*disgruntled with the union, the ACTU and with the labour movement as a whole.*"<sup>91</sup>

7.73 None of the employees supported the view that their status as a casual made them less productive or committed to their role. In fact, all employees confirmed that they were good at their job and tried their best in their role.<sup>92</sup>

#### **The 'NDIS' and related evidence**

7.74 It is not entirely clear whether the unions are seeking to rely on the evidence filed in the 'NDIS' aspect of these proceedings in support of the broader ACTU Claim. However, and in any event, an analysis of that evidence reveals that it adds little to the ACTU's case. Put simply, the evidence filed by the unions in the 'NDIS' part of the proceedings did not deal with minimum engagements or casual conversion at all.

7.75 Rather, and not surprisingly, the unions' evidence in the NDIS proceedings focused on responding to claims by employer parties to vary provisions in the SCHCDSI Award and others concerning the requirement to agree in writing at commencement of employment on the number of hours to be worked and the days and starting and finishing times for part-time employees. A number of observations can quickly be made about the unions' employee evidence:

(a) firstly, none of the employee evidence in the 'NDIS' proceedings came from casual employees. Rather, the employee evidence was from part-time employees;

(b) secondly, there was no evidence at all from those part-time employees about minimum engagements or casual conversion;

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<sup>88</sup> See Ms Potoi who completed two degrees at PN1297, see Stanley Morgan at PN11466

<sup>89</sup> See PN1307-PN1309 for Ms Potoi, PN1719 for Mr Quinn

<sup>90</sup> See PN6927

<sup>91</sup> See PN6333

<sup>92</sup> See PN587 for Ms Kemp, PN1348 for Ms Potoi, PN1721 for Mr Quinn, PN3297 for Mr Perry, PN11472 for Mr Morgan

- (c) thirdly, the employee evidence focussed on their respective working arrangements and the predictability or otherwise of their working patterns, which does not assist the ACTU's case in relation to minimum engagements or casual conversion; and
- (d) fourthly, the employee evidence seemed to undermine the ACTU's assertion that there is a phenomenon of the "permanent casual", as the employee evidence actually showed that employees in the SCHCDSI sector are commonly employed on a permanent part-time basis (despite some of them working what might typically be considered irregular or unpredictable hours).

7.76 It should also be noted that the bulk of the employee evidence advanced in the NDIS proceedings came from one type of worker, being part-time residential support workers, and that no employee evidence was advanced from non-residential support workers.

7.77 On the whole, the evidence provided by the SCHCDSI Award employee witnesses and employer witnesses outlined the unique circumstances applying in the SCHCDSI industry, particularly in relation to the operation of the National Disability Insurance Scheme (**NDIS**).

7.78 As the Full Bench heard during the July hearings, the NDIS represents a significant reform in the way in which disability services are funded and delivered across Australia. At the heart of the NDIS is the provision of a far greater level of choice and control to 'participants' with respect to what services are provided to them, how those services are arranged and managed, when those services are provided, and by whom the services are provided. In essence, this change represents a considerable extension of the existing position in respect of labour demand within an industry which is already heavily client dependent. This was noted by Ms Kemp during cross-examination as follows:

*"Even though my current roster is pretty regular, there is no guarantee of permanent shifts and my roster can change in order to suit the needs of the client (for example, the client may go on holiday with family). Or due to unforeseen circumstances such as when a client is hospitalised."*<sup>93</sup>

7.79 Mr Quinn also noted in cross-examination the effect of client demand on labour requirements as follows:

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<sup>93</sup> See Ex 1 at [7]



*“Am I right in saying that it's the client who is determining the length of the appointment?---  
The length of the engagement is determined by the level of support the client may need.”<sup>94</sup>*

- 7.80 While the NDIS is overwhelmingly a positive reform for participants, the natural consequence is that service providers (employers) now have a reduced level of control over when, how and by whom their services are to be provided. The effect of the NDIS on labour resourcing is that employers no longer have the same level of certainty over rostering, and need to be more agile in order to respond to clients who have the ability to cancel services and/or change their minds (or at least have the ability to change their minds) about the days and/or times when their services are provided.
- 7.81 Anthony Rohr provided evidence that Mai-Wel seeks wherever possible to engage employees on a permanent basis, but that due to the NDIS the organisation has had to employ more casuals to meet the more individualised support requirements. The NDIS has led to deterioration in the consistency of working hours, with regular and predictable shifts having been replaced by optional additional ‘call-in’ shifts.
- 7.82 Hugh Packard gave evidence that much of the support provided to clients in parts of the SCHCDSI industry is provided in shifts of a short duration. Dr Ken Baker also provided evidence that under the NDIS there is an increased proportion of short duration service requests.

### **Submission as to available findings on the evidence**

- 7.83 In contrast to the findings which the ACTU sought to establish from the evidence in this sector, a proper consideration of the evidence leads to the following findings:
- (a) One simply cannot generalise about the preferences of casual employees in this sector. It is not correct that casual employees would prefer the “stability and security” of permanent employment. While some certainly would prefer permanency, others make a conscious and informed decision to work on a casual basis because it suits their lifestyle or particular life stage, or because it provides them with the flexibility to balance work against other commitments.
  - (b) Those employees who do prefer permanency over casual employment are in many cases able to take up permanent employment in this sector where it is available. Indeed, the

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<sup>94</sup> See PN1680

evidence of Rohr and Packard make it clear that employers in this sector prefer to engage people on a permanent basis wherever practicable.

- (c) The changing nature of work in the sector has caused a reduction in the predictability of working hours and less certainty of working arrangements that have traditionally been predictable and certain.
- (d) Prescriptive and impractical requirements in the SCHCDSI Award regarding part-time employment are discouraging or preventing employers from engaging employees on a permanent basis, despite employers' desires to build a permanent workforce.
- (e) Rather than there being a phenomenon of the "permanent casual" in this sector, there is instead of growing phenomenon of "flexible part-timers", who are employed on a part-time basis to perform work that was traditionally stable but is now increasingly subject to change at the whim of the client.
- (f) Unless the prescriptive and impractical requirements in the SCHCDSI Award regarding part-time employment are resolved, there will be a rise in the incidence of casual employment.

7.84 The Commission cannot be satisfied on the evidence presented by the ACTU that there is a phenomena of unwilling and unhappy "permanent casuals" engaged under the SCHCDSI Award.

7.85 It would be open however for the Commission to take notice of the evidence provided that employers under the SCHCDSI Award are subject to a high degree of client variability as a result of the NDIS.

7.86 In this sense, the 4 hour minimum component of the ACTU Claim is particularly problematic in respect of the SCHCDSI Award. Given the lack of an adequate evidentiary case put forward by the ACTU and further the obvious issues with implementation of the ACTU into the SCHCDSI Award, the ACTU Claim should be dismissed.

### **Timber Industry Award 2010**

#### **Evidence provided in Support of ACTU Claim**

Statement – Colin Aiton – 31 August 2015 (ACTU)

Statement – Michael Fisher – 1 September 2015 (ACTU)

#### **Evidence provided opposing ACTU Claim**

Statement – Adele Last – 6 October 2015 (Recruitment and Consulting Services Ass)

Statement – Stephen Noble – 7 October 2015 (Recruitment

and Consulting Services Ass)

- 7.87 We understand that the evidence provided in the Timber Industry Award was confined to evidence relating to a single enterprise.
- 7.88 While their relevant modern award is not specifically identified, we understand that two employees, Mr Collin Aiton and Mr Michael Fisher, are put forward by the ACTU as examples of “permanent casuals”.
- 7.89 It is noteworthy that under cross-examination Mr Aiton stated that he sought permanent employment:
- (a) to obtain protection from being arbitrarily dismissed;<sup>95</sup>
  - (b) so as to enable him to “plan” despite acknowledging that the fact he worked very regular and stable hours meant he was “*able to plan his life around those hours*”<sup>96</sup> and that casual conversion “*wouldn’t affect*” this ability: “[i]t’d be the same”;<sup>97</sup>
  - (c) because he had been refused a loan.
- 7.90 Mr Fisher confirmed that he remained working at the same employer as Mr Aiton, but recently had changed his employer entity to a labour hire provider.<sup>98</sup> He also sought permanent employment so as to obtain protection from being arbitrarily dismissed.<sup>99</sup>
- 7.91 Employer parties filed some evidence seeking to resist the ACTU Claim in the Timber Industry Award, primarily in the form evidence of labour hire providers.

### **Submission as to available findings on the evidence**

- 7.92 In short, the evidence of Mr Aiton and Mr Fisher does not assist the ACTU in supporting its claim.
- 7.93 Firstly, permanency in their employment will not result in a greater protection against unfair dismissal given that as casuals with sufficient periods of service involving regular and systematic work, both Mr Aiton and Mr Fisher would presumably have unfair dismissal access regardless of their casual status.
- 7.94 In respect of being able to “plan”, as acknowledged by Mr Aiton, the regularity of his hours meant that the operation of the ACTU Claim would have no practical effect.

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<sup>95</sup> PN2364

<sup>96</sup> PN2366- PN2367

<sup>97</sup> PN2368

<sup>98</sup> PN2469

<sup>99</sup> PN2364

- 7.95 Finally, assuming their hourly rates would be reduced by 25% in the event that the employees became permanent, it is unlikely on Mr Aiton's evidence that they would be in any better position to obtain a loan given their earning would remain low.
- 7.96 Given the above, there does not appear to be any sound basis for the Full Bench to grant the ACTU Claim in respect of this award and accordingly the claim should be refused.

### **Wine Industry Award 2010**

#### **Evidence provided in Support of ACTU Claim**

Statement - Adam Algate - 18 February 2016 (AWU)

Statement - Ron Cowdrey - 18 February 2016 ( AWU)

#### **Evidence provided opposing ACTU Claim**

Affidavit - Anthony Grundel - 8 October 2015 (SA Wine)

Statement - Steven Todd - 8 October 2015 (SA Wine)

Affidavit - Fred Peacock - 19 October 2015 (SA Wine)

Statement – Robert Blanche – 23 February 2016 (AIG)

Statement – Paula Colquhoun – 22 February 2016 (AIG)

### **Submission as to Available findings on the evidence**

- 7.97 It is unclear as to whether the ACTU seek to rely on the evidence of Mr Algate and Mr Cowdrey in support of the ACTU Claim. Notwithstanding any such reliance, this evidence is not framed to support the ACTU case but rather was prepared to resist a separate employer claim in these proceedings.
- 7.98 Unsurprisingly therefore, these statements do not provide any probative support for the ACTU Claim.
- 7.99 In respect of this evidence and the evidence filed by employer interests in relation to the wine industry, the Australian Chamber adopts and supports the evidence and submissions of the National Farmers Federation and the South Australian Wine Association.

## **8. ASSESSMENT OF THE EVIDENCE APPLICABLE TO THE AWARDS SUBJECT TO THE 'MANUFACTURING' AWARDS**

### **Manufacturing and Associated Industries and Occupations Award 2010**

#### **Evidence provided in Support of ACTU Claim**

Statement – Simon Peter Hynes – 12 October 2015 (AMWU)

Statement – Steven Murphy – 23 September 2015 (AMWU)

Statement – David Bernard Kubli – 7 October 2015 (AMWU)

Statement – Colin Aiton – 31 August 2015 (ACTU)  
 Statement – Michael Fisher – 1 September 2015 (ACTU)  
 Statements – Professor Raymond Markey – 19 October 2015  
 Jill Veronica Biddington (AMWU)  
 Heidi Kaushal (AMWU)  
 Deborah Vallance (AMWU)  
 Dr Elsa Underhill (AMWU)  
 John Herbertson (AMWU)  
 Brian Howe (AMWU)  
 Dr Tom Skladzien (AMWU)  
 Dr Martin O'Brien  
 Dr Joseph McIvor

**Evidence provided opposing  
ACTU Claim**

Statement – Mark Goodsell – 26 February 2016 (AIG)  
 Statement – Benjamin Norman – 22 February 2016 (AIG)  
 Statement – Benjamin Waugh – 22 February 2016 (AIG)  
 Statement – Paula Colquhoun – 22 February 2016 (AIG)  
 Statement – Adele Last – 6 October 2015 – 6 October 2015  
 (Recruitment and Consulting Services)  
 Statement – Stephen Noble – 7 October 2015 (Recruitment  
 and Consulting Services)

**Vehicle Manufacturing, Repair, Services and Retail Award 2010**

**Evidence provided in Support  
of ACTU Claim**

Statement – Simon Peter Hynes – 12 October 2015 (AMWU)  
 Letter AMWU to Glenn DeClase – 7 May 2014 (AMWU)  
 Statement – Clinton Lewin – 22 October 2015 (AMWU)  
 Reply Statement – Clinton Lewin – 9 March 2016 (AMWU)  
 Statement - Clinton Heit – 26 October 2015 (AMWU)  
 Statement - Clinton Heit – 15 March 2016 (AMWU)  
 Statement – Steven Elks – 26 October 2015 (AMWU)  
 Statement – Sean Procter – 26 October 2015 (ACTU)  
 Statements – Professor Raymond Markey – 19 October  
 2015

**Food, Beverage and Tobacco Manufacturing Award 2010**

**Evidence provided in Support  
of ACTU Claim**

Statement – Simon Peter Hynes – 12 October 2015  
 (AMWU)  
 Statement – Peter Richard Bauer – 8 October 2015  
 (AMWU)  
 Statement – Aaron Malone – 8 October 2015 (AMWU)  
 Statements – Professor Raymond Markey – 19 October

2015/9 March 2016 (ACTU)

**Evidence provided opposing  
ACTU Claim**

Statement – Benjamin Waugh – 22 February 2016 (AIG)  
Statement – Adele Last – 6 October 2015 (Recruitment and  
Consulting Services Ass)  
Statement – Stephen Noble – 7 October 2015 (Recruitment  
and Consulting Services)

**Graphic Arts, Printing and Publishing Award 2010**

**Evidence provided in Support  
of ACTU Claim**

Statement – Simon Peter Hynes – 12 October 2015  
(AMWU)

**Evidence provided opposing  
ACTU Claim**

Statement – Benjamin Waugh – 22 February 2016 (AIG)  
Statement – Adele Last – 6 October 2015 (Recruitment and  
Consulting Services)

8.1 Due the commonality of the above evidence across a number of awards and the claims of both the ACTU and the Australian Manufacturing Workers Union (**AMWU**), the Australian Chamber deals with this evidence on a statement by statement basis.

**Mr Simon Peter Hynes**

8.2 Mr Hynes' witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010, Food, Beverage and Tobacco Manufacturing Award 2010 and Graphic Arts, Printing and Publishing Award 2010.

8.3 The evidence of Mr Hynes is that he worked as a casual employee for an organisation between July 2007 and July 2014 and was paid a casual loading (see paragraphs 2, 3 and 4). Mr Hynes indicates that he worked 37.5 hours per week, Monday to Friday (paragraph 3).

8.4 Mr Hynes' evidence is that he, along with two others, made application for casual conversion and had that application rejected (see paragraph 7). Mr Hynes has not provided a copy of the response referred to in paragraph 7 so the validity of the statement cannot be tested. The identities of the other two people who are purported to have made statements and were rejected have not been provided and as such this evidence cannot be tested and should not be afforded any weight.

8.5 Statements of a hearsay nature are also contained within paragraph 13 and should not be afforded weight.

8.6 Mr Hynes states that in May 2013 he was paid \$19.17 per hour plus 23% casual loading (paragraph 4). Based on Mr Hynes' evidence that he "*only stopped work for Public Holidays or the Christmas Shut Down for two weeks*" (see paragraph 3), that he worked 37.5 hours per week Monday – Friday and assuming he worked in the state of South Australia, it is likely that he would have been absent from work for a total of 16 unpaid week days (factoring in public holidays and two weeks annual shutdown and assuming Christmas Day, Boxing Day and New Years' Day coincided with the shut-down period). This means that it is likely that Mr Hynes would have been paid around \$8,069.66 in casual loading during the 2012/2013 Financial Year (less \$33.07 per day for any sick days). Mr Hynes' evidence is that he would "save money coming up to Christmas time when the company shut down" (paragraph 14). It is unclear as to why he would be unable to adopt this practice for other periods of leave.

#### **Submission as to available findings**

8.7 Despite Mr Hynes statement that "*Being a casual is stressful*", the evidence does not establish that Mr Hynes work arrangements actually had a detrimental impact upon him.

8.8 Mr Hynes does not indicate whether he was willing to forgo his casual loading to convert to permanent employment or the conditions on which conversion to permanent employment were sought. It cannot be established that the ACTU Claim would remedy Mr Hynes's concerns regarding his employment arrangements.

#### **Mr Stephen Murphy**

8.9 Mr Murphy's witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010. Much of the statement of Mr Murphy contains hearsay evidence and evidence that cannot be tested due to the anonymity of persons referred to as can be seen in paragraphs should not be given any weight as contained within paragraphs 11, 18, 20, 21, 22, 23, 24, 27, 29, 38, 48 and 50.

8.10 The statement of Mr Murphy draws on his experience with casual employees as an organiser within the AMWU between 2003 and 2010 and as Assistant Secretary since March 2010. The evidence of Mr Murphy suggested that casual employees at a particular enterprise were fearful of joining the union because they could be terminated on short notice (see paragraphs 11 to 16). This evidence is not relevant to claim and such practices, if they were established, would not be remedied by the claim. Notwithstanding this, Part 3-1 of the FW Act already enables an employee to pursue remedies available to persons who are termination on the basis of union membership.

Specifically, section 346 of the FW Act provides that “A person not take adverse action against another person because the other person: (a) is or is not, or was not, an officer or member of an industrial association....”.

- 8.11 The statement does not establish whether employees at a particular enterprise who made requests to convert to permanent employment elected to forego their casual loading as a result and reference is made to conflicting accounts in this context (see paragraphs 37-38). In this context, the account of the HR Manager referred should be given greater weight than to the account in paragraph 38 which amounts to hearsay.
- 8.12 The statement refers to an enterprise agreement that contained a casual conversion clause that mirrored the relevant modern (see paragraph 8). Relevant extracts from that clause can be found within the MRI (Aust) Pty Ltd Collective Agreement 2011-2012 to be found at Appendix A of that statement.

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

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

*9.16. Every employer of such an employee must give the employee notice in writing of the provisions of clause 9.3.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 9.3.4 if the employer fails to comply with clause 9.3.4(b).*

- 8.13 Paragraphs 32-44 of the statement refer to a conversation with an unnamed manager in which Mr Murphy participated. Mr Murphy’s evidence is that the discussion involved an exchange regarding the manner in which the Manager was responding to casual conversion requests. At paragraph 39 and in the context of that discussion the following appears:

39. I then asked the Manager, “**Do you think that it is compliant with the words in the agreement around providing notice, to speak to a workers?(sic)** And secondly do you think that really did give workers the correct information about what they would be entitled to if they elected to go permanent?”



40. The Manager said, “Well I’ll have to have a read of it.”

8.14 The evidence fails to establish that the employer is in breach of the clause. The email correspondence between Mr Murphy and Mr Jackson attached at Appendix B of the statement merely establishes that a query has been raised by Mr Murphy that Mr Jackson says he will investigate. The MRI (Aust) Pty Ltd Collective Agreement 2011-2012 also contains a ‘Disputes Settlement Procedure’ at clause 7 and there is no evidence that this procedure has been utilised by anyone purported to be aggrieved by their status as a casual employee.

### **Submissions as to available findings**

8.15 The evidence merely establishes that agreement has been reached between MRI (Aust) Pty Ltd and its employees to an enterprise agreement which includes, among its clauses, a clause relating to casual employment of the nature described above and that the AMWU has made inquiries of management regarding compliance.

### **Mr David Kubli**

8.16 Mr Kubli’s witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010.

8.17 The evidence of Mr Kubli is that he commenced working for a labour hire company and then became directly employed by the host company. Mr Kubli’s statement does not expressly identify whether he is employed on a casual or permanent basis although it is inferred that he is a casual employee as evidenced by his intention to make a written request to become a permanent employee (see paragraph 28 of the statement).

8.18 Mr Kubli’s reasons for wanting to become a permanent employees are identified at paragraph 30 and are said to include “*because the permanent staff get their overalls for free, boots for free, a jacket for free, sick pay, annual leave, public holidays, long service leave and redundancy*”.

8.19 The evidence establishes that Mr Kubli intends to make a request to convert his current employment arrangement to permanent employment and that he has been advised by his supervisor and union on the mechanisms for doing this (see paragraphs 23 and 27 of the statement). In particular, the evidence suggests:

- Mr Kubli has not yet made a request from the person responsible for considering his request (see paragraph 23 and 25); and
- Mr Kubli is merely speculating the outcome of his request (see paragraph 25).

- 8.20 Mr Kubli does not identify the terms on which he would be willing to become a permanent employee, including whether he is currently in receipt of a casual loading and willing to forgo this loading in the event that his employment status is changed.
- 8.21 Paragraph 26 of Mr Kubli's statement is hearsay and should not be given any weight. Paragraph 32 is opinion and should not be given any weight.

### **Submissions as to available findings**

- 8.22 Mr Kubli identifies his preference to be a permanent employee at paragraph 30 but Mr Kubli's evidence does not suggest that he is dissatisfied with or detrimentally impacted by his current arrangements as provided for under the *GB Galvanizing Service Pty Ltd Collective Agreement 2012*. To the contrary, paragraph 31 suggests that he is currently happy and that conversion to permanent employment would not alter this. In this regard he states at paragraph 31 "*If I became a permanent worker, I would **still be happy**, because of the sick leave, public holidays and annual leave*" (emphasis added).

### **Ms Jill Biddington**

- 8.23 Ms Biddington's witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010
- 8.24 The statement of Ms Biddington refers to her union background, appointment to the ACTU's inquiry into insecure work (**ACTU Inquiry**) and involvement in the preparation of the report "Lives on Hold" together with other members of the inquiry and officers of the ACTU ( see paragraphs 2, 4, 5 and 8). The Attachment, "Lives on Hold" is not evidence of the matters referred to in that Report, or of any fact in issue in this Review. Rather, the Report is evidence of the conclusions reached by the Lives on Hold Inquiry. It is a submission containing the Panel's recommended reform proposals.
- 8.25 A significant portion of Ms Biddington's statement amounts to hearsay evidence as she recounts stories she purports to have heard during the course of the ACTU commissioned inquiry. This can be seen at paragraphs 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 33, 34, 34, 36, 37, 38, 41.
- 8.26 It remains the Australian Chamber's position that the evidence of Ms Biddington should be afforded no weight and that to do so would be manifestly unfair for reasons that include the inability to test the evidence. In many cases, the individuals Ms Biddington refer to in purporting to retell their conversations are not identifiable. Such retelling of conversations should not be taken as fact.

## Submissions as to available findings

8.27 The evidence establishes:

- (a) the inquiry referred to in Ms Biddington's evidence was an ACTU commissioned inquiry;<sup>100</sup>
- (b) the ACTU drafted the terms of reference for the inquiry;<sup>101</sup>
- (c) the ACTU and its affiliates made submissions to the inquiry;<sup>102</sup>
- (d) there were no submissions from employer associations;<sup>103</sup>
- (e) the information provided to the inquiry did not take the form of sworn evidence;<sup>104</sup>
- (f) there is no public transcript for the inquiry;<sup>105</sup>
- (g) it is unclear what proportion of people that participated in the inquiry were employees and covered by a modern award;<sup>106</sup>
- (h) as noted by Hatcher VP, "*the nature of the process was that it would attract people who were aggrieved by casual employment rather than those who are quite content with it*";<sup>107</sup>
- (i) those who participated in the inquiry were not predominantly people who were working as casuals but who worked regular hours;<sup>108</sup>
- (j) assertions made within the 'Lives on Hold' report are made on the basis of statements made within the ACTU submission made to its inquiry;<sup>109</sup>
- (k) data referred to in the 'Lives on Hold' report is overstated;<sup>110</sup>
- (l) Ms Biddington is not proficient in numerical data analysis.<sup>111</sup>

## Ms Heidi Kaushal

8.28 Ms Kaushal's witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010.

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<sup>100</sup> See PN655.

<sup>101</sup> See PN659.

<sup>102</sup> See PN660-665.

<sup>103</sup> See PN713.

<sup>104</sup> See PN672.

<sup>105</sup> See PN708.

<sup>106</sup> See PN683-685, 716.

<sup>107</sup> See PN690.

<sup>108</sup> See PN701-702, 822,.

<sup>109</sup> See PN741-.797.

<sup>110</sup> See PN729-731.

<sup>111</sup> See PN798.

- 8.29 Ms Kaushal is the Regional Secretary of the Food and Confectionary Division of the AMWU with prior experience as an industrial office and delegate (paragraphs 2 -3).Ms Kaushal's evidence is that her statement describes some of her experiences working with AMWU members since she commenced working with the AMWU in August 2014.
- 8.30 In the first sentence at paragraph 9 of the Statement Ms Kaushal states that the production manager of the site had offered permanent positions to some casuals however they declined the offer and chose to stay as casual employees. In the next sentence Ms Kaushal describes the belief of the delegate Peter (purportedly based on his discussions with the casuals) "that the casuals actually do want a permanent position and it wasn't clear that they were being offered a permanent job". This statement amounts to hearsay and should not be afforded any weight. In the last sentence of paragraph 9 Ms Kaushal suggests that the industrial relations manager Sonia "was of the view that the company should be converting casuals" however it is not clear on what basis she holds that view and how Ms Kaushal became aware that such a belief was held. It is not clear who the casuals referred to in this statement are, what industrial instrument covers them, the nature of their working arrangements and whether they have any right to convert their employment status from casual employment to permanent employment. The evidence that cannot be tested due to the anonymity of persons referred to within the statement.
- 8.31 Statements of hearsay that should not be afforded any weight are also contained within paragraph 11 and Ms Kaushal does not have first-hand knowledge of the meeting referred to. Ms Kaushal states at paragraph "To date, despite requests for the outcomes of the matter still remains unresolved". The particulars of the matter are not described and are unclear and such broad general statements should not be afforded weight.
- 8.32 Paragraph 15 is of no relevance to the ACTU/AMWU claim. It is unclear as to why the Health and Safety Representative Pat ceased work at the company and how, if at all, this person would be impacted by a variation of the nature sought by the AMWU
- 8.33 Ms Kaushal's suggestion in paragraph 16 that multiple casual employees referred to would like to request casual conversion is based on hearsay and cannot be tested due to the anonymity of persons referred to within the statement so should not be afforded any weight. The identity of one employee, Amanda McKenzie is made known. However it is clear from Ms Kaushal's oral evidence that she does not have a clear factual understanding of the pattern of engagement of employees

referenced in her statement or as reflected in the time cards for Amanda McKensie.<sup>112</sup> It is also clear that Ms Kaushal does not have a clear factual understanding of the prevalence of casual employment at the workplaces she refers to in her statement.<sup>113</sup>

- 8.34 Notwithstanding her concerns of non-compliance, Ms Kaushal’s oral evidence establishes that the dispute resolution procedures of the AMWU, CEPU and Simplot National Enterprise Agreement 2014 – 2017 were not accessed to address concerns related to casual engagement.

### **Submissions as to available findings**

- 8.35 The evidence has not established that Amanda McKenzie or any of the other anonymous employees referred to by Ms Kaushal in the statement have a right to convert their employment from casual to permanent employment or that they would stand to benefit from the ACTU claim. The evidence does however suggest that casual employment is conducive to some people for reasons that include the “money” and “lifestyle”.

### **Dr Deborah Vallance**

- 8.36 Ms Vallance’s witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010.
- 8.37 Ms Vallance is an employee of the AMWU and her evidence should not be considered independent expert evidence and should be treated as a submission.
- 8.38 At paragraph 9 Ms Vallance states that “*Precarious or insecure work is a broad descriptive term applied to temporary, casual, part-time or labour hire arrangements*” before proceeding to refer to literature which describes the effects of ‘precarious work’. However such definition does not have recognition universally or in statute and it is unclear as to whether the sources of literature define or interpret the term in the same manner as Ms Vallance. Notwithstanding this, even if the sources referred to did adopt such a definition, their findings are irrelevant to the claim. The claim is not directed at addressing work health and safety concerns of persons working pursuant to temporary, casual, part-time or labour hire arrangements. It is, rather, concerned with whether a casual employee, other than an irregular casual employee, should have an entitlement to convert their employment from casual to permanent status. Indeed in some cases this may see people converted to part-time employment which, according to Ms Vallance’s submission, would not have their concerns remedied by the claim. Accordingly, paragraphs 10-12, 16, 20, 21, 22, 24 should not

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<sup>112</sup> See PN3564-3603.

<sup>113</sup> See PN3616-3621.

be afforded any weight.

- 8.39 At paragraph 13 of her Statement Ms Vallance refers to recent Australian research showing a significant association between casual full time employment and poor physical health. It is unclear how this compares with other forms of employment such as full-time permanent employment.
- 8.40 Paragraph 15 is concerned with “agency workers” and the structure of the industry and has no relevance to the claim.
- 8.41 Paragraphs 18-19 relate to worker representation and participation in workplace health and safety and have not relevance to the ACTU/AMWU claim.
- 8.42 Parts of the statement of Ms Vallance merely amount to endorsement of previous submissions written by her employment as can be seen in paragraph 17. Multiple parts of the statement contain statements of opinion offered without any clear factual basis and which should not be given weight as can be seen in paragraphs 21, 23, 34, 46, 47 and 48. Paragraph 23 also contains hearsay which should not be given weight.
- 8.43 Ms Vallance refers to an AMWU Survey from paragraph 35 onwards. This survey should not be given any weight. The ACTU/AMWU application is directed at a particular type of casual employee (i.e. those who are not working irregular hours) and the survey does not draw this distinction.

#### **Submissions as to available findings**

- 8.44 The statement of Ms Vallance takes the form of submission and suggests her preference for full-time permanent employment over casual, contract and part-time employment or labour hire arrangements. It cannot be concluded based on Ms Vallance’s submission and opinion that a change of the nature sought by the ACTU/AMWU is necessary to achieve the modern awards objective or that the awarding of the claim would address her concerns with regard to these forms of labour.

#### **Dr Elsa Underhill**

- 8.45 Ms Underhill’s witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010.
- 8.46 Ms Underhill is a Senior Lecturer and Director of Research in the Department of Management at Deakin University and states at paragraph 1 that her *“research has focused upon precarious employment and workplace health and safety since the early 2000s, including my doctoral thesis on the implications of labour hire employment for health and safety and return to work post-injury.”*

Ms Underhill does not define what she means by “precarious work” however it can be inferred that this includes casual employment.

- 8.47 Ms Underhill relies extensively on international research in her statement and identifies that casual employment is known as “temporary employment” in the international research.
- 8.48 At paragraph 3 of her statement Ms Underhill suggest that “*the degree of job insecurity associated with casual employment will be influenced by institutional settings such as the level of protection and employment entitlements attached to casual employment, and macro-economic settings*”.
- 8.49 The evidence of Dr Underhill under cross examination suggests that the level and nature of any link between casual employment arrangements and occupational health and safety outcomes can be impacted by:
- (a) institutional factors such as the nature of unemployment or health care benefits available;<sup>114</sup>
  - (b) the level of regulatory protection for casual workers for matters such as discrimination, harassment or unfair dismissal;<sup>115</sup>
  - (c) demographic considerations;<sup>116</sup>
  - (d) the level of instability in a particular casual arrangement;<sup>117</sup>
- 8.50 It is also acknowledged by Dr Underhill that the types of employment identified in the international literature are not necessarily identical to casual employment in the Australian context and that there is some overlap between the terms “temporary employment” and “casual employment” in the literature.<sup>118</sup> As such the findings of international research referred to in the evidence of Dr Underhill may be of limited relevance and this should be reflected in the weight given to the evidence. Dr Underhill also suggests that “*there isn’t a lot of evidence around stable casual employment and OHS outcomes*”<sup>119</sup> and the inference can be drawn from this that her research is not directed at ‘regular casuals’ that are the focus of the ACTU’s claim when she states “*The link between casual employment and poorer health and safety outcomes is now well established in*

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<sup>114</sup> See PN7880.

<sup>115</sup> See PN7881.

<sup>116</sup> See PN7882-7886.

<sup>117</sup> See PN7888.

<sup>118</sup> See PN7956, 7959.

<sup>119</sup> See PN7892.

*scientific literature*".<sup>120</sup> Notwithstanding this, where persons are working on a regular and systematic basis this will give rise to greater stability and potentially greater regulatory protection from unfair dismissal given the FW Act provides unfair dismissal protection to award covered casuals who have completed a period of employment of at least the minimum employment period where:

- (a) the employment as a casual employee was on a regular and systematic basis; and
- (b) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.<sup>121</sup>

8.51 The evidence of Dr Underhill is that periods of unemployment have adverse health effects.<sup>122</sup>

#### **Submissions as to available findings**

8.52 If Dr Underhill's suggestions that institutional settings such as the level of protection and employment entitlements attached to casual employment, and macro-economic settings is accepted, this suggests that the international studies and research referred to should be considered cautiously as it may have limited relevance to the Australian context. This is compounded as the evidence establishes the term "temporary employment" is a broader construct in comparison to the notion of casual employment in Australia and is not directly comparable.

#### **Mr John Herbertson**

8.53 Mr Herbertson's witness statement has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010. Mr Herbertson's evidence is that he is a Growth Transition Officer for the 'Vehicle Division' and was previously employed as Victorian Regional Organiser of the AMWU Vehicle Division in January 2010 and before this as a return to work organiser for 18 months.<sup>123</sup>

8.54 Although Mr Herbertson states that he receives enquiries from casual employees regarding whether they can convert to permanent employment, the evidence does not establish that the anonymous employees actually have such a right and what industrial instrument covers them. The evidence does not provide details regarding the employment arrangements of those making the

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<sup>120</sup> See Statement of Elsa Underhill para 4.

<sup>121</sup> *Fair Work Act 2009* (Cth), s 384.

<sup>122</sup> See PN7970.

<sup>123</sup> Paras 2-4.



requests. Mr Herbertson states at paragraph 11 that he “*formed the view based on discussions with casual employees that employers were not informing casual employees of their rights to elect to convert under the Award clause*”. However Mr Herbertson does not identify the relevant award or the factual basis upon which he formed that view.

- 8.55 Paragraphs 24 and 25 of the statement contain expressions of opinion and should not be accepted as statements of fact.

### **Submissions as to available findings**

- 8.56 The evidence does not demonstrate any widespread non-compliance concern regarding any requirements for employers to notify their casual employees to convert to permanent employment. It should also be noted that this case is not one concerned with non-compliance or issues of enforcement and in any case there is no evidence to suggest that compliance outcomes will be enhanced if the ACTU/AMWU claim is awarded. Even if there was evidence of non-compliance within the statement (which the Australian Chamber does not concede), Mr Herbertson’s evidence is that “*Most of the time, issues relating to conversion were resolved through direct communication with management*”. The evidence does not establish a need to vary the award in the manner sought by the AMWU. Mr Herbertson also raises concern regarding employer awareness of obligations. Even if a lack of awareness was established, this is not a matter that would be remedied by the ACTU/AMWU claim.

### **Mr Brian Howe**

- 8.57 Mr Howe’s evidence has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010. Mr Howe has been asked by the AMWU to “*write a report about the impact of long term casualisation on both the individual and society and the implication of not having a deeming casual conversion clause in Modern Awards*”. In this regard, Mr Howe’s evidence is not relevant to the claim relating to the Manufacturing and Associated Industries and Occupations Award 2010 as it already contains a clause relating to casual conversion.
- 8.58 Mr Howe states at paragraph 2 of his statement that “*In writing the report, I draw on my experience as a federal minister, my research into Australian labour market and social policy, and my experience as chair of the ‘Lives on Hold’ inquiry*”.
- 8.59 The statement of Mr Howe provides details of his involvement in the ACTU’s inquiry into insecure

work (**ACTU Inquiry**) resulting in the report “Lives on Hold”. The “Lives on Hold” Report is not evidence of any fact in issue in this matter. Rather, the Report is evidence of the conclusions reached by the ACTU Inquiry. It is a submission containing the Panel’s recommended reform proposals and should be treated as such. Accordingly, the aspects Mr Howe’s statement relating to the ACTU Inquiry and associated report cannot be accepted as evidence relevant to the case that the ACTU/AMWU is required to make out. The affected paragraphs of the statement include paragraphs 10, 11, 13, 15, 16, 18, 19, 20, 21.

8.60 In the Australian Chamber’s respectful opinion, much of Mr Howe’s statement should be treated as a submission as distinct from evidence of fact. For example, at paragraph 5 of his statement, Mr Howe makes a number of assertions regarding labour market changes however no factual basis is provided in support of these assertions. At paragraphs 7, 12, 14, 17 (last sentence) of his statement Mr Howe makes broad expressions of opinion which should not be taken as factual. Additionally, the following parts of Mr Howe’s statement should not be given any weight:

- (a) the first and second sentences of paragraph 18, paragraph 19 and paragraph 21 on the basis that they contain hearsay evidence and amount to statements of opinion;
- (b) paragraph 20 and the second sentence of paragraph 43 in which broad, generalised statements of opinion are made;
- (c) paragraphs 26 and 27, the first and second sentences of paragraph 31, paragraph 32, the first sentence of paragraph 33 and paragraph 47 after the words “labour market, but” on the basis that they are submissions rather than statements communicating facts;
- (d) the first and second sentences of paragraph 29 on the basis that they represent opinion absent a clear factual basis;
- (e) the ninth sentence of paragraph 31 on the basis it is hearsay.

### **Submissions as to available findings**

8.61 This Report is a submission containing the Panel’s recommended reform proposals and should be treated as such. Accordingly, the aspects Mr Howe’s statement relating to the ACTU Inquiry and associated report is not evidence of any fact in issue in this Review. Much of Mr Howe’s statement takes on the form of expressions of opinion which should not be taken as factual and should be treated as submission. The evidence does not establish facts that are relevant to or support a need to vary the award in the manner sought by the ACTU/AMWU.

## Dr Tom Skladzien

- 8.62 Dr Skladzien's evidence has been provided in support of the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010. Dr Skladzien is the National and Economic Industry Adviser to the AMWU.
- 8.63 Dr Skladzien's statement dated 10 October 2015 contains statements that take the form of submission rather than evidence as can be seen within paragraphs 18, 21, 22, 24 and 26. Other parts of the statement take the form of opinion and speculation as can be seen within paragraphs 17, 18, 24, 25 and 26.
- 8.64 Dr Skaldzien acknowledges that his views are shaped by a set of values shared with the AMWU.<sup>124</sup> Dr Skladzien suggests at paragraph that his 10 October 2015 "*statement discusses the broader economic impacts of this proposed conversion clause as it relates to casual workers, the broader manufacturing industry and the broader economy. It does not discuss the merits of the case for such a conversion clause, which are addressed in the AMWU substantive submission.*"
- 8.65 However this incorrect as it is apparent that aspects of Dr Skladzien's statement take on the form of an endorsement of the submission of his employer the AMWU, rather than factual evidence of an expert nature. For example:
- (a) at paragraph 9 he states "*The AMWU substantive submission provides significant evidence of the costs of casualisation on the individual worker who would prefer to be a permanent employee.*" This is merely Dr Skladzien's opinion of his employer's submission and the Australian Chamber does not share this opinion. At paragraph 10, he suggests that the "*ACTU survey cited in the AMWU submission which suggests that 22% of 'permanent casuals' in the manufacturing industry didn't seek permanent status when entitled to due to fear for their job security*" indicates "*that these costs are not insignificant.*" The Australian Chamber disputes that such a finding can be made from the ACTU data;
  - (b) at paragraph 11 of his statement, Dr Skladizen says:  
*Uncertainty that impacts individual's ability to plan, whether that be plan recreation, caring responsibilities, household purchases or with respect to other aspects of life, has an impact for other family members, their employers, other businesses and by extension, the*

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<sup>124</sup> See PN11272-11272.

*economy as a whole. By mitigating these costs to some degree, the AMWU claim can be said to improve broader economic outcomes.*

8.66 The ACTU/AMWU claim is directed at casual employees who are working on the basis of regularity of hours. It is not an established fact in this case that casual employment of this nature this gives rise to an inability to plan and witness evidence suggests otherwise.<sup>125</sup> It is also not established that the ACTU/AMWU claim will be said to “*improve broader economic outcomes*”:

- (a) At paragraph 15 of his statement Dr Skladizen says “*The evidence presented in the AMWU submission makes it clear that casual employees are rarely in a position that can foster the type of relationship between employer and employee that leads to a ‘high performance workplace’.*” The Australian Chamber disputes that such a finding can be made from the AMWU submission. This statement is Dr Skladizen’s opinion and should not be taken as fact;
- (b) At paragraph 17 of his statement Dr Skladizen says “*As a direct consequence of the AMWU claim, the number of former casual workers that are deemed permanent will (relative to the past) increase, making high performance workplaces more attainable*”. The Australian Chamber disputes that such a finding can be made from the AMWU submission. This statement is Dr Skladizen’s opinion and should not be taken as fact;
- (c) At paragraph 26 of his statement Dr Skladizen says “*Indeed, the conversion clause proposed by the AMWU has the potential to improve competitiveness through supporting the establishment of better relations between employees and employers (and in particular through the greater likelihood of achieving the cooperation and trust necessary for high performance workplaces) and through the greater incentives of employers to invest in the skills of permanent workers*”. This statement is Dr Skladizen’s opinion and should not be taken as fact.

8.67 Dr Skladizen also provides statements of opinion that are not supported by evidence to validate that opinion. At paragraph 27 he states “*The AMWU claim is unlikely to generate either positive or negative economic impacts that will be observable at the macroeconomic level. This is because the changes contemplated are relatively small when compared to both measurement error in macroeconomic variables and the impacts of large policy reforms or economic shocks.*” There is no data or economic modelling provided in support of this proposition. Unsupported assertions of this

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<sup>125</sup> See PN2362-2365.

nature are also made in paragraphs 29 and 32.

- 8.68 Dr Skladzien acknowledges in cross examination that for some workers the flexibility offered by casual employment is actually conducive to them undertaking study and that some employees see a benefit in casual employment in that it more readily enables them to accommodate changing class time or the need to take time off for exams and assignments.<sup>126</sup>
- 8.69 Dr Skladzien also indicates that the ACTU case relates, at least in part, to perception rather than fact when he states in his oral evidence that *“uncertainty doesn’t have to be damaging to be realised. ....The bad event, the phone call doesn’t have to occur to be damaging...”*<sup>127</sup>
- 8.70 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.<sup>128</sup> 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).<sup>129</sup>
- 8.71 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 *“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”*.<sup>130</sup>
- 8.72 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<sup>131</sup> and his evidence should be interpreted on the basis of that understanding.

### **Submissions as to available findings**

- 8.73 A *“guaranteed safety net of fair, relevant and enforceable minimum wages and conditions”*<sup>132</sup> is not a safety net that should be constructed around perception or a belief that employees should have a unilateral right to change employment arrangements so they are in line with personal preference. A real need must be established based on a consideration of the modern awards objective.

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<sup>126</sup> See PN11309-11310.

<sup>127</sup> See PN11338 -11339.

<sup>128</sup> See PN11708 -11711.

<sup>129</sup> See PN11722 -11723.

<sup>130</sup> See PN11722 -11723.

<sup>131</sup> See PN11758 -11766.

<sup>132</sup> *Fair Work Act 2009* (Cth)

8.74 The evidence of Dr Skladizen does not establish that it is “*more likely than not that the AMWU claim will improve economic outcomes consistent with section 3 and 134 of the Fair Work Act 2009*”. The evidence of Dr Skladzien should be, for the most part, considered as a submission which endorses his employer’s position.

#### **Mr Mark Goodsell**

8.75 Mr Goodsell’s evidence has been provided in opposition to the ACTU/AMWU claim to vary the Manufacturing and Associated Industries and Occupations Award 2010. Mr Goodsell is employed by the Ai Group as a national director of manufacturing and has in excess of 30 years’ experience working closely with manufacturers. This positions him well to provide evidence regarding the practices and operations of manufacturers and the challenges they face.

#### **Submissions as to available findings**

8.76 Mr Goodsell’s evidence highlights a number of factors that are conducive to engagement of casual labour by manufacturing companies. Importantly, Mr Goodsell’s evidence reinforces the Australian Chamber concerns regarding the negative employment impacts of the claim. The Australian Chamber submits that the balance of employer evidence establishes the following, as reflected in paragraphs 26 and 28 of Mr Goodsell’s statement:

*It would be highly disruptive for manufacturing workplaces (and not at all conducive to smart workplaces) to force manufacturing employers to convert casual employees to permanent in circumstances where they would then likely find themselves in the position of having to reduce the hours of permanent staff or make permanent staff redundant when the workload reduces (even if only on a temporary basis).*

...

*Reduced flexibility for manufacturers, such as the AMWU claim for deeming provisions, will result in reduced employment in the industry.*

#### **Mr Clinton Lewin**

8.77 Mr Lewin’s evidence is provided in support of the ACTU/AMWU application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010.

8.78 The Statement of Mr Lewin indicates that he is an AMWU Vehicle Division organiser and has held

this role since January 2006.<sup>133</sup>

- 8.79 The statement of Mr Lewin contains several statements which, as noted by Commissioner Roe, are in very general terms such that it is unclear what the basis for Mr Lewin's statement is.<sup>134</sup> When attempts are made to clarify the general nature of the statements, Mr Lewin's evidence indicates that he does not recall specific persons raising the concerns referred to in his statement.<sup>135</sup> A reply submission contains only limited additional detail.
- 8.80 An example can be seen in paragraph 10 where he states "*I recall being told by casual employees that some of their colleagues had asked about conversion, but then after asking they won't called back to work. Others I was told were subsequently given inconsistent shifts where they had previously been getting shifts regular shifts of 5 days a week. These employees told me that if they raised the issue with the company that the same could happen to them and so were afraid to act on the conversion provision.*" No detail is provided regarding who provide this information or when and where it was provided. Other examples can be seen in paragraphs 14, 22, 23.
- 8.81 Mr Lewin also makes estimation regarding the percentage of labour hire casual employees at sites and how many "*long term casual employees are made permanent employees*" but does not provide a clear factual basis for these estimations (see paragraphs 11 and 12).
- 8.82 Such statements are of no probative value and should not be afforded any weight.
- 8.83 It is also clear from the evidence of Mr Lewin that only a small number of employees at the sites actually raised concerns regarding their status as a casual.<sup>136</sup> Mr Lewin's evidence is also that some companies convert an employee's status from casual to permanent without his intervention.<sup>137</sup>

### **Submissions as to available findings**

- 8.84 The evidence does not establish those matters asserted by the ACTU/AMWU including:
- (a) that the use of labour hire casuals is increasing (and this is not relevant to the claim in any case);

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<sup>133</sup> Para 3.

<sup>134</sup> See PN3020.

<sup>135</sup> See PN3023-3032.

<sup>136</sup> See PN3130-3135.

<sup>137</sup> See PN3184.



- (b) that casual employees who are not members of the union are less aware of their rights under the award;
- (c) that employees who made requests to convert were refused in circumstances which could be considered unreasonable;
- (d) any widespread problem of being too afraid to ask to convert because of fear of repercussions and detriment to their ongoing employment.

### Mr Clinton Heit

8.85 Mr Heit's evidence is provided in support of the ACTU/AMWU application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010.

8.86 Mr Heit's evidence is that:

- (a) he is employed as casual Diesel Fitter by Haynes Mechanical Pty Ltd, working at Goonyella-Riverside Coal Mine in the Bowen Basin in Central Queensland (Site);<sup>138</sup>
- (b) he commenced employment with Haynes Mechanical Pty Ltd on 7 June 2010;<sup>139</sup>
- (c) he has been working at the Site for the duration of his employment with Haynes Mechanical Pty Ltd;<sup>140</sup>
- (d) Haynes Mechanical Pty Ltd supplies labour at the site to the BHP Billiton Mitsubishi Alliance (BMA);<sup>141</sup>
- (e) he is employed under the *Vehicle Manufacturing Repair, Service and Retail Award 2010*;<sup>142</sup>
- (f) he works on average between 40 and 60 hours per week depending on his roster;<sup>143</sup>
- (g) he earned \$104,000 for the 2013/2014 tax year;<sup>144</sup>
- (h) he does not receive casual loading, personal leave, annual leave, shift loadings, overtime or penalties.<sup>145</sup>

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<sup>138</sup> Paras 5, 7, 8.

<sup>139</sup> Para 9.

<sup>140</sup> Para 9.

<sup>141</sup> Para 7.

<sup>142</sup> Para 10.

<sup>143</sup> Para 11.

<sup>144</sup> Para 14.

<sup>145</sup> Para 15.



- 8.87 Various details are provided by Mr Heit regarding changes to his hourly rate.
- 8.88 Mr Heit's understanding that he is engaged as a casual employee is based on a discussion with a representative of his employer at the time of his engagement.<sup>146</sup> There is no evidence that Mr Heit was unhappy with the arrangement at the time of engagement.
- 8.89 Mr Heit provides details regarding his requests to convert his employment from casual employment to permanent employment which have been refused.
- 8.90 Clause 13.3 of the Award provides that "*a casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a **sequence of periods of employment** under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full time or part-time employment if the employment is to continue beyond the conversion process*".
- 8.91 It is apparent from Mr Heit's roster (marked 'CH-1') that there is considerable variance in the times and days worked so it is unclear as whether he is considered an "irregular employee" despite his hours exceeding 38 hours per week. Questions may also arise around to what ordinary hours Mr Heit would convert to if employed on a permanent basis, however of note, clause 11 of the award defines a full-time employee as one who is engaged to work for no less than an average of 38 ordinary weekly hour and clause 37 of the Award contains averaging provisions that permit flexibility in scheduling of hours.
- 8.92 Mr Heit suggests that he likes the job and his lifestyle.<sup>147</sup> However he states he would like to have "job security" and a "paid holiday and sick days", suggesting that is more important to him than on casual loading".<sup>148</sup> It is unclear as to what Mr Heit perceives to be "job security". On the basis that Mr Heit suggests he does not receive a casual loading it is unclear whether he is suggesting that he would be willing to accept a reduction in pay to convert his employment to permanent status.

### Submissions as to available findings

- 8.93 Mr Heit's evidence suggests that the effects of casual employment are not as detrimental as the AMWU would claim and does not demonstrate a need to vary the award safety net in the manner sought by the ACTU/AMWU. Mr Heit's income is in excess of \$100,000 per year and he suggests he likes his job and lifestyle. While Mr Heit expresses a preference for "job security" and a "paid

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<sup>146</sup> Paras 19-20.

<sup>147</sup> Para 34.

<sup>148</sup> Para 34.

holiday and sick days”, suggesting that is “more important to him than on casual loading” there is no evidence that Mr Heit will suffer any detriment in the event that his preference to convert from casual to permanent employment is not satisfied.

### **Mr Stephen Elks**

8.94 Mr Elks’ evidence is provided in support of the ACTU/AMWU application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010.

8.95 Mr Elks’ evidence is that he as a bus mechanic.

8.96 Mr Elks’ evidence is that his hours have been subject to change during the course of his career. At paragraph 17 he states:

*Since commencing employment I have worked my hours are based on the work that is needed. I initially started work working 5 hours per day, and after a few months this went up to 7-8 hours per day. At the time I was averaging 25 hours per week. Although there is not a roster I have always been required to work 5 days per week.*

8.97 At paragraphs 19 and 20 he states:

*My hours gradually increased and since March 2015 I have been working full time hours - from 38 hours - 45 hours/week.*

*Although I am required to work 5 days per week, I am able to choose the start and finish times consistent with when buses start their scheduled routes. I usually commence work at 5am and finish between 1-3pm. Sometimes I work beyond this finish time.*

8.98 At paragraph 22 he states:

*My pay varies depending on the number of hours that I work, but when I work 38 hours per week it works out to be gross \$998.26.*

8.99 This statement contemplates a fluctuation in pay based on hours worked.

8.100 The second sentence of paragraph 30 should not carry weight on the basis that it is purely speculative and without a clear factual basis.

### **Submissions as to available findings**

8.101 Mr Elks’ hours of work have varied across the course of his working life as a bus driver and the context around these changes (including timing) is not apparent. It appears that Mr Elks has

entered into multiple employment agreements with the most recent agreement provided and dated 19 November 2014 clearly identifying Mr Elks as a casual employee. There is insufficient information to ascertain whether Mr Elks' working pattern is such that he has a right to request to convert his casual employment to part-time employment under the Vehicle Manufacturing, Repair, Services and Retail Award 2010. As such, this statement is of questionable relevance to the case that the ACTU/AMWU is seeking to advance.

### **Mr Sean Procter**

8.102 Mr Procter's evidence is provided in support of the ACTU/AMWU application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010.

8.103 Mr Procter was employed from June 2012 as a casual customer service employee.

8.104 It is apparent that Mr Procter's hours have varied during the course of his employment as evidenced within paragraphs 12-15 of his statement.

### **Submissions as to available findings**

8.105 Mr Procter's hours of work have varied across the course of his employment and the evidence does not establish a working pattern that would give rise to a right to request to convert his casual employment to part-time employment under the Vehicle Manufacturing, Repair, Services and Retail Award 2010. As such, this statement is of questionable relevance to the case that the ACTU/AMWU is seeking to advance.

### **Mr Peter Bauer**

8.106 Mr Bauer's evidence is provided in support of the ACTU/AMWU application to vary the Food, Beverage and Tobacco Manufacturing Award 2010.

8.107 Mr Bauer is the Assistant State Secretary of the AMWU's South Australian Branch and previously held roles as regional secretary and organiser and

8.108 Mr Bauer's evidence is that sometime in July 2010 he was approached by Simon Hynes, an employee of Christie Tea who identified issues that employees had in relation to a number of issues including their casual employment status. Details of these employees are not provided with the exception of Mr Hynes himself and it cannot be established whether the employees' hours of work meant that these employees had a right to request to convert their casual employment to permanent employment.

- 8.109 Notwithstanding this the evidence shows that Mr Hynes did make a request which was refused on a number of grounds.
- 8.110 The evidence establishes that Mr Hyne's working hours were subject to some variation and that 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 awards contains 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*".
  - (c) Accommodating the request would have impact on other team members. It is possible that this would be on account of flexibility lost as a consequence of the conversion to permanent employment which would lock in fixed working hours and days.
- 8.111 The letter of Christie Tea also suggests that it has made concerted efforts to try and source additional work for Mr Hynes during shutdowns/slow periods and has provided him with training opportunities despite his casual employment.

### **Submissions as to available findings**

- 8.112 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. In particular, clause 12 of the Food, Beverage and Tobacco Manufacturing Award 2010 states:
- 12.1 *An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 ordinary hours per week.*
  - 12.2 *A part-time employee must be engaged for a minimum of three consecutive hours a shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for less than the minimum of three hours.*

- 12.3 *Before commencing part-time employment, the employee and employer must agree in writing:*
- (a) *on the hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times for the work; and*
  - (b) *on the classification applying to the work to be performed in accordance with Schedule B—Classification Structure and Definitions.*
- 12.4 *The terms of the agreement in clause 12.3 may be varied by consent in writing.*
- 12.5 *The agreement under clause 12.3 or any variation to it under clause 12.4 must be retained by the employer and a copy of the agreement and any variation to it must be provided to the employee by the employer.*
- 12.6 *Except as otherwise provided in this award, a part-time employee must be paid for the hours agreed on in accordance with clauses 12.3 and 12.4.*
- 12.7 *The terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38.*
- 12.8 *A part-time employee who is required by the employer to work in excess of the hours agreed under clauses 12.3 and 12.4 must be paid overtime in accordance with clause 33—Overtime.*
- 12.9 *Where the part-time employee’s normal paid hours fall on a public holiday prescribed in the NES and work is not performed by the employee, such employee must not lose pay for the day. Where the part-time employee works on the public holiday, the part-time employee must be paid in accordance with clauses 30.2(f), 31.5 and 33.*
- 8.113 These provisions operate in such a way that it is possible that conversion may constrain employers 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 for a converted employee.

### **Mr Aaron Malone**

- 8.114 Mr Malone’s evidence is provided in support of the ACTU/AMWU application to vary Food, Beverage and Tobacco Manufacturing Award 2010. Mr Malone is an Organiser with the ACTU/AMWU working in the food division.

- 8.115 Mr Malone's evidence is that there were about 15-20 employees employed by an employer that should have been converted to permanent employment because they had been with the company for more than six months (see paragraph 14). Mr Malone does not provide any further detail that would establish that employees had met the other eligibility requirements within clause 13.4 of the award. Notwithstanding this, Mr Malone suggests that all of the casuals he had requested to be converted were converted. Mr Malone makes several allegations of underpayment of wages. Such allegations are immaterial to the case.
- 8.116 The statement of Mr Malone contains several statements that take on the form of hearsay and opinion evidence which should not carry any weight including, the third sentence of paragraph 13 and the first and last sentences of paragraph 15. Other parts of the statement amount to hearsay and cannot be tested due to the anonymity of the persons referred to in the evidence so should not be given weight including the words appearing after "their food" in paragraph 16, paragraph 17 and the first and second sentences of paragraph 34. Hearsay statements also appear in the second sentence of paragraph 33 and final sentence of paragraph 34 and should not be given weight.

### **Submissions as to available findings**

- 8.117 Mr Malone does not provide sufficient detail that would establish that the employees had met the other eligibility requirements within clause 13.4 of the Food, Beverage and Tobacco Manufacturing Award 2010. Tenure is not in itself sufficient to trigger an employee right to elect to have their casual employment status converted to full-time or part-time employment. Clause 13.4 of the Food, Beverage and Tobacco Manufacturing Award 2010 provides:

*13.4 Casual conversion to full-time or part-time employment*

- (a) *A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.*
- (b) *Every employer of such an employee must give the employee notice in writing of the provisions of clause 13.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 13.4 if the employer fails to comply with clause 13.4(b).*

- (c) *Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.*
- (d) *Any casual employee who has a right to elect under clause 13.4(a), on receiving notice under clause 13.4(b) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.*
- (e) *Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.*
- (f) *If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 13.4(d), the employer and employee must, subject to clause 13.4(d), discuss and agree on:*
  - (i) *which form of employment the employee will convert to, being full-time or part-time; and*
  - (ii) *if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 12—Part-time employment.*
- (g) *An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.*
- (h) *Following such agreement being reached, the employee converts to full-time or part-time employment.*

- (i) *Where, in accordance with clause 13.4(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.*
- (j) *By agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 13.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 13.4(a).*
- (k) *For the purposes of clause 13.4, **an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis** (emphasis added).*



**10. AWARDS WHICH WERE **NOT** THE SUBJECT OF AWARD SPECIFIC EVIDENCE IN SUPPORT OF ACTU CLAIM BUT WERE THE SUBJECT OF EMPLOYER EVIDENCE**

10.1 The Preliminary Issues Decision requires the ACTU to support its claim with submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation (at [23] and [60]).

10.2 For the following modern awards, the ACTU Claim was not supported by any award-specific evidence. Given that the Full Bench is required to review each award in its own right, the ACTU Claim in relation to the following awards must fail.

**Aged Care Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**

Statement – Robert Blanche – 23 February 2016 (AIG)

Statement – Amy Wolverson – 29 February 2016

(Recruitment and Consulting Services)

Statement – Wendy Catherine Mead – 29 February 2016

(Recruitment and Consulting Services)

10.3 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Aged Care Award 2010.

10.4 Material was advanced in opposition to the ACTU Claim in the Aged Care Award in the form of the statements of Mr Hugh Packard, Robert Blanche, Amy Wolverson, and Wendy Mead, all of whom provided evidence in relation to the Aged Care Award for the position of employers in the industry.

**Submission as to available findings on the evidence**

10.5 Given that no evidence has been advanced in support of the ACTU Claim in respect to the Aged Care Award 2010, we submit that no findings can be made to support the ACTU Claim, particularly given the evidence filed in opposition to the claim.

**Amusement, Events and Recreation Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**

Statement – Wendy Catherine Mead – 29 February 2016  
(Recruitment and Consulting Services)

Statement – Lauren Logue - 22 February 2016 (ACCI/NSWBC/ABI)

- 10.6 No evidence was advanced in support of the ACTU Claim in respect of the Amusement, Events and Recreation Award.
- 10.7 Two statements however were filed in relation to the Amusement, Events and Recreation Award opposing the ACTU Claim.
- 10.8 The statement of Ms Logue identifies the position of BridgeClimb Sydney in respect of the changes proposed by the ACTU.
- 10.9 Ms Logue's statement at [15] identifies a particular characteristic of the Amusement, Events and Recreation industry which should strongly bear upon the Full Bench's determination of the ACTU Claim under this award including that the seasonality of customer demand in the industry (by reason of weather, festival, season or holidays) means that businesses require greater than usual flexibility in labour supply at different times of year.
- 10.10 While the ACTU seeks to identify BridgeClimb as an "atypical" business, it has not identified any other evidence in the Amusement, Events and Recreation industry which would more readily adapt to the provisions of the ACTU Claim. In light of this failure, the ACTU Claim cannot be granted in respect of this award.

#### **Submission as to available findings on the evidence**

- 10.11 Given that no evidence was filed in respect of the Amusement, Events and Recreation Award, the material before the Full Bench cannot give rise to the findings that the ACTU require to be made in granting the ACTU Claim.

#### **Banking, Finance and Insurance Award 2010**

**Evidence provided in Support of ACTU Claim** None

**Evidence provided opposing ACTU Claim** Statement – Amy Wolverson – 29 February 2016 (Recruitment and Consulting Services)

#### **Submission as to available findings on the evidence**

- 10.12 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Banking, Finance and Insurance Award 2010. In accordance with the requirements of the FW Act and the Preliminary Issues Decision, there is accordingly no basis on which the Full Bench should proceed to make a finding in respect of this award.

### **Clerks - Private Sector Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Kerry Allday – 19 February 2016 (AIG)  
Statement – Amy Wolverson – 29 February 2016 (Recruitment and Consulting Services)

- 10.13 No award specific evidence was filed in respect of the Clerks - Private Sector Award in support of the ACTU Claim.
- 10.14 Ms Kerry Allday and Ms Amy Wolverson provided evidence, at least in the context of labour hire arrangements, in respect of the Clerks - Private Sector Award in opposition to the ACTU Claim.
- 10.15 Perhaps unsurprisingly, we do not say that the Clerks - Private Sector Award is subject to any unique or extraordinary characteristics. If anything, the defining feature of the award is its ubiquity within businesses of all types and sizes.
- 10.16 No evidentiary case has been made for the ACTU Claim in respect of the Clerks - Private Sector Award. The reason for this may be that the award does not present the phenomena which the ACTU alleges justify the granting of the ACTU Claim (e.g. a prevalence of “permanent casuals”).
- 10.17 Regardless of the reason for the lack of evidence, in accordance with the requirements of the FW Act and the Preliminary Issues Decision, there is no basis on which the Full Bench should proceed to make a finding in respect of this award.

### **Contract Call Centres Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Kerry Allday – 19 February 2016 (AIG)  
Statement – Amy Wolverson – 29 February 2016 (Recruitment and Consulting Services)

### **Submission as to available findings on the evidence**

- 10.18 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Contract Call Centres Award 2010. In accordance with the requirements of the Act and the Preliminary Issues Decision, there is accordingly no basis on which the Full Bench should proceed to make a finding in respect of this Award.

### **Hair and Beauty Industry Award 2010**

**Evidence provided in Support of ACTU Claim** None

**Evidence provided opposing ACTU Claim** Statement – Maureen Harding – undated (Hair and Beauty)  
Statement – Graham Thatcher – undated (Hair and Beauty)  
Statement – Helen Golisano – undated (Hair and Beauty)  
Statement – Wendy Michetti – undated (Hair and Beauty)

10.19 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Hair and Beauty Award.

10.20 Material was advanced in opposition to the ACTU Claim in the Hair and Beauty Award which indicates that employer interests within the industry oppose the ACTU Claim.

### **Submission as to available findings on the evidence**

10.21 Given that no evidence has been advanced in support of the ACTU, we submit that no findings can be made to support the ACTU Claim.

### **Health Professionals and Support Services Award 2010**

**Evidence provided in Support of ACTU Claim** None

**Evidence provided opposing ACTU Claim** Statement – Kay Neil – 24 February 2016 (AIG)

10.22 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Health Professionals and Support Services Award 2010.

10.23 Ms Kay Neil provided evidence in respect of the Health Professionals and Support Services Award with respect to her role as Chief Executive Officer for Corporate Health Group Pty Ltd.

10.24 Ms Neil provides evidence in relation to the Health Professionals and Support Services Award that:

- (a) the vast majority of employees engaged in Ms Neil's business were casual;<sup>150</sup>
- (b) this workforce composition was a result of seasonal and/or client driven factors<sup>151</sup> and that

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<sup>150</sup> See Ms Neil's statement at [20]

<sup>151</sup> See Ms Neil's statement at [22]

clinics operated at the demand (or lack thereof) of clients;<sup>152</sup>

- (c) unplanned workload increases currently being met by casual employees would result in overtime payments if those employees were converted to permanent part-time under the ACTU Claim;<sup>153</sup>
- (d) the effect of the ACTU Claim would be to encourage the use of “agency” casuals (in effect, labour-hire employees)<sup>154</sup> and the granting of the ACTU Claim would result in the employment of fewer employees.<sup>155</sup>

### Submission as to available findings on the evidence

10.25 Given that no evidence has been advanced in support of the ACTU Claim, we submit that no findings can be made to support the ACTU Claim.

### Educational Services (Schools) General Staff Award 2010 and Educational Services (Teachers) Award 2010

#### Evidence provided in Support of ACTU Claim

None

#### Evidence provided opposing ACTU Claim

Statement – Robert Blanche – 23 February 2016 (AIG)

Statement – Amy Wolverson – 29 February 2016 (Recruitment and Consulting Services Ass)

Statement - Paul Mondo - 24 February 2016 (ACA)

Statement – Kylie-Anne Brannelly – 22 February 2016 (ACCI/NSWBC/ABI)

### Submission as to available findings on the evidence

10.26 We have been unable to identify any award specific evidence filed in respect of the Educational Services (Schools) General Staff Award 2010 and the Educational Services (Teachers) Award 2010 (**Schools and Teachers Awards**) in support of the ACTU Claim.

10.27 Mr Paul Mondo, Ms Kylie-Anne Brannelly, Mr Robert Blanche and Ms Amy Wolverson provided evidence in respect of the Schools and Teachers Awards in opposition to the ACTU Claim.

10.28 Given that no evidentiary case has been made for the ACTU Claim in respect of the Schools and Teachers Awards, the ACTU Claim should fail in respect of these awards.

<sup>152</sup> See Ms Neil’s statement at [26]

<sup>153</sup> See Ms Neil’s statement at [36]

<sup>154</sup> See Ms Neil’s statement at [37]

<sup>155</sup> See Ms Neil’s statement at [41]

### **Legal Services Award 2010**

**Evidence provided in Support of ACTU Claim**

None

**Evidence provided opposing ACTU Claim**

Statement - Sheila Roberts - 14 June 2016 (law firm group)

### **Submission as to available findings on the evidence**

10.29 The Australian Chamber adopts and supports the evidence and submissions of the “law firm group” in respect of the Legal Services Award 2010.

### **Meat Industry Award 2010**

**Evidence provided in Support of ACTU Claim**

None

**Evidence provided opposing ACTU Claim**

Statement – Kevin Cottrill – 22 February 2016 (AMIC)

Statement – Ben Thomas – 23 February 2016 (AMIC)

Statement – Gary Johnston including supplementary table to Annexure B – 24 February 2016 (AMIC)

Statement – Ken McKell – 21 March 2016 (AMIC)

10.30 The Australian Chamber adopts and supports the evidence and submissions of the Australian Meat Industry Council in respect of the meat industry.

### **Miscellaneous Award 2010**

**Evidence provided in Support of ACTU Claim**

None

**Evidence provided opposing ACTU Claim**

Statement – Benjamin Norman – 22 February 2016 (AIG)

10.31 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Miscellaneous Award 2010. In accordance with the requirements of the Act and the Preliminary Issues Decision, there is accordingly no basis on which the Full Bench should proceed to make a finding in respect of this award.

### **Passenger Vehicle Transportation Award 2010**

**Evidence provided in Support of ACTU Claim**

None

**Evidence provided opposing  
ACTU Claim**

Statement – Geoffrey Ivan Ferris – 18 February 2016  
(Australian Public Transport Industrial Association)

Statement – Mark Driver – 18 October 2015 (Australian  
Public Transport Industrial Association)

10.32 The Australian Chamber adopts and supports the evidence and submissions of the Australian Public Transport Industrial Association in respect of this award

**Plumbing and Fire Sprinklers Award 2010**

**Evidence provided in Support  
of ACTU Claim**

None

**Evidence provided opposing  
ACTU Claim**

Statement – Stephen Noble – 7 October 2015 (Recruitment  
and Consulting Services Ass)

10.33 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Plumbing and Fire Sprinklers Award 2010.

10.34 Material was advanced in opposition to the ACTU Claim in the Plumbing and Fire Sprinklers Award 2010 in the form of the statement of Stephen Noble.

**Submission as to available findings on the evidence**

10.35 Given that no evidence has been advanced in support of the ACTU Claim, we submit that the ACTU Claim should be dismissed in respect of this award.

**Professional Employees Award 2010**

**Evidence provided in Support  
of ACTU Claim**

None

**Evidence provided opposing  
ACTU Claim**

Statement – Benjamin Norman – 22 February 2016 (AIG)

10.36 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Professional Employees Award 2010.

10.37 Material was advanced in opposition to the ACTU Claim in the Professional Employees Award 2010 in the form of the statement of Benjamin Norman.

**Submission as to available findings on the evidence**

10.38 Given that no evidence has been advanced in support of the ACTU Claim, we submit that the

ACTU Claim should be dismissed in respect of this award.

### Registered and Licenced Clubs Award 2010

#### Evidence provided in Support of ACTU Claim

None

#### Evidence provided opposing ACTU Claim

Affidavit - Lesley Thompson - 9 October 2015 (Clubs)  
 Affidavit - Maree Sophocleous - 8 October 2015 (Clubs)  
 Affidavit - Collette Williams - 8 October 2015 (Clubs)  
 Affidavit - Denis John Brendan Kildare - 12 October 2015 (Clubs)  
 Affidavit - Karen Kamini Giles - 29 September 2015 (Clubs)  
 Affidavit - Walter Lee - 2 October 2015 (Clubs)  
 Affidavit - Melissa Faddy - 7 October 2015 (Clubs)  
 Affidavit - Richard Ian David Tait - 12 October 2015 (Clubs)  
 Further Affidavit - Richard Ian David Tait - 6 July 2016 (Clubs)  
 Statement - Rachel Ferris - 27 June 2016 (Clubs)  
 Affidavit of Paula Rocca - 7 October 2015 (Clubs)  
 Affidavit - Neill Murray - 9 October 2015 (Clubs)  
 Amended Statement - Andrew Breeden-Walton - 15 October 2015 (Clubs)  
 Affidavit - Krystal Anne Rees - 7 October 2015 (Clubs)  
 Statement - Lisa Petrie - 17 September 2015 (Clubs)  
 Affidavit - Jill Teeling - 2 October 2015 (Clubs)  
 Statutory Declaration - Michelle Best - 25 September 2015 (Clubs)  
 Affidavit - Joanne Luke - 6 October 2015 (Clubs)  
 Affidavit - Karen Stansfield - 1 October 2015 (Clubs)  
 Statement - Michaela Hamilton - 13 October 2015 (Clubs)  
 Affidavit - Scott Spicer - 18 September 2015 (Clubs)

10.39 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Registered and Licensed Clubs Award 2010.

10.40 Material was advanced in opposition to the ACTU Claim in the Registered and Licensed Clubs Award 2010 in the form of the above listed evidence by Clubs Industrial Australia.



10.41 The Australian Chamber adopts and endorses the evidence and submissions of Clubs Australia Industrial.

### Road Transport (Long Distance Operations) Award 2010

### Road Transport and Distribution Award 2010

#### Evidence provided in Support of ACTU Claim

None

#### Evidence provided opposing ACTU Claim

Statement – Robert John Blanchard – 16 February 2016 (ACCI/NSWBC/ABI)

Statement – Robert Blanche – 23 February 2016 (AIG)

Statement – Paula Colquhoun – 22 February 2016 (AIG)

Statement – Adele Last – 6 October 2015 (Recruitment and Consulting Services Ass)

10.42 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Road Transport (Long Distance Operations) Award 2010 and Road Transport and Distribution Award 2010.

10.43 Material was advanced in opposition to the ACTU Claim by employer parties including the statement of Robert Blanchard who was not subject to cross-examination.

10.44 Mr Blanchard noted in his evidence that:

- (a) his business engages a variety of casual workers in the trucking industry including:
  - (i) school student washing vehicles;<sup>156</sup>
  - (ii) a pilot driver;<sup>157</sup>
  - (iii) a retiree who moves vehicles around the depot;<sup>158</sup>
- (b) his experience with employees is that they want “*more flexible working arrangements to fit their individual requirements*”<sup>159</sup>

### Submission as to available findings on the evidence

10.45 Given that no evidence in respect of the Road Transport (Long Distance Operations) Award 2010 and Road Transport and Distribution Award 2010 has been advanced in support of the ACTU

<sup>156</sup> See statement of R Blanchard at [8]

<sup>157</sup> See statement of R Blanchard at [9]

<sup>158</sup> See statement of R Blanchard at [10]

<sup>159</sup> See statement of R Blanchard at [21]

Claim, we submit that the ACTU Claim in respect of these awards must fail.

#### **Stevedoring Industry Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Greg Nugent – 22 February 2016 (Qube)  
Statement – Greg Muscat – 22 February 2016 (Qube)  
Statement – Benjamin Norman – 22 February 2016 (AIG)

10.46    The Australian Chamber adopts and supports the evidence and submissions of Qube Ports Pty Ltd, Qube Bulk Pty Ltd, and the employing entities in the DP World Australia group in respect of this award.

#### **Storage Services and Wholesale Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Benjamin Norman – 22 February 2016 (AIG)  
Statement – Robert Blanche – 23 February 2016 (AIG)

10.47    We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Storage Services and Wholesale Award 2010.

10.48    Material was advanced in opposition to the ACTU Claim in the Storage Services and Wholesale Award 2010 in the form of the statements of Benjamin Norman and Robert Blanche.

#### **Submission as to available findings on the evidence**

10.49    Given that no evidence has been advanced in support of the ACTU Claim in respect to the Storage Services and Wholesale Award 2010, we submit that no findings can be made to support the ACTU Claim.

#### **Sugar Industry Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Adele Last – 6 October 2015 (Recruitment and Consulting Services Ass)

10.50 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Sugar Industry Award 2010.

10.51 Material was advanced in opposition to the ACTU Claim in the Sugar Industry Award 2010 in the form of the statements of Adele Last.

**Submission as to available findings on the evidence**

10.52 Given that no evidence has been advanced in support of the ACTU Claim in respect to the Sugar Industry Award 2010, we submit that no findings can be made to support the ACTU Claim.

**Telecommunications Services Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Robert Blanche – 23 February 2016 (AIG)

10.53 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Telecommunications Services Award 2010.

10.54 Material was advanced in opposition to the ACTU Claim in the Telecommunications Services Award 2010 in the form of the statements of Robert Blanche.

**Submission as to available findings on the evidence**

10.55 Given that no evidence has been advanced in support of the ACTU Claim in respect to the Telecommunications Services Award 2010, we submit that no findings can be made to support the ACTU Claim.

**Transport (Cash in Transit) Award 2010**

**Evidence provided in Support of ACTU Claim**                      None

**Evidence provided opposing ACTU Claim**                      Statement – Adele Last – 6 October 2015 (Recruitment and Consulting Services Ass)

10.56 We have been unable to identify any specific evidentiary material advanced in support of the ACTU Claim in respect of the Transport (Cash in Transit) Award 2010.

10.57 Material was advanced in opposition to the ACTU Claim in the Transport (Cash in Transit) Award 2010 in the form of the statement of Adele Last.

### **Submission as to available findings on the evidence**

10.58 Given that no evidence has been advanced in support of the ACTU Claim in respect to the Transport (Cash in Transit) Award 2010, we submit that no findings can be made to support the ACTU Claim.

### **11. AWARDS IN WHICH NO EVIDENCE WAS HEARD**

11.1 The final category of modern awards subject to the ACTU Claim are awards in which no award-specific probative evidence was heard at all.

11.2 For the reasons identified above, the ACTU Claim must fail in relation to the following awards given that no substantive probative evidence has been heard which demonstrate the facts supporting the proposed variations.<sup>160</sup>

11.3 At a practical level, given no evidence has been heard about the current arrangements (or indeed award conditions) for casual and part-time employees within these industries, the Full Bench has been left in the unenviable position of being asked to speculate as to whether the ACTU's "one-size-fits-all" application will "fit" a diverse variety of industries.

11.4 In short, the ACTU have not presented a case in respect of the vast majority of awards subject to the ACTU Claim. Given that the Full Bench must review each award "*in its own right*", where no case has been presented, the ACTU Claim must fail.

11.5 Modern Awards which were not the subject of any award-specific evidence are as follows:

1. Aboriginal Community Controlled Health Services Award 2010
2. Air Pilots Award 2010
3. Aircraft Cabin Crew Award 2010
4. Airline Operations-Ground Staff Award 2010
5. Airport Employees Award 2010
6. Alpine Resorts Award 2010
7. Aluminium Industry Award 2010
8. Ambulance and Patient Transport Industry Award 2010
9. Animal Care and Veterinary Services Award 2010
10. Aquaculture Industry Award 2010
11. Architects Award 2010

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<sup>160</sup> See Preliminary Issues Decision at at [23] and [60]

12. Asphalt Industry Award 2010
13. Book Industry Award 2010
14. Broadcasting and Recorded Entertainment Award 2010
15. Business Equipment Award 2010
16. Car Parking Award 2010
17. Cement and Lime Award 2010
18. Cemetery Industry Award 2010
19. Cleaning Services Award 2010
20. Coal Export Terminals Award 2010
21. Commercial Sales Award 2010
22. Concrete Products Award 2010
23. Corrections and Detention (Private Sector) Award 2010
24. Cotton Ginning Award 2010
25. Dredging Industry Award 2010
26. Dry Cleaning and Laundry Industry Award 2010
27. Electrical, Electronic and Communications Contracting Award 2010
28. Fire Fighting Industry Award 2010
29. Fitness Industry Award 2010
30. Funeral Industry Award 2010
31. Gardening and Landscaping Services Award 2010
32. Gas Industry Award 2010
33. Horse and Greyhound Training Award 2010
34. Hydrocarbons Field Geologists Award 2010
35. Hydrocarbons Industry (Upstream) Award 2010
36. Joinery and Building Trades Award 2010
37. Journalists Published Media Award 2010
38. Labour Market Assistance Industry Award 2010
39. Live Performance Award 2010
40. Local Government Industry Award 2010
41. Mannequins and Models Award 2010
42. Marine Tourism and Charter Vessels Award 2010
43. Marine Towage Award 2010
44. Maritime Offshore Oil and Gas Award 2010
45. Market and Social Research Award 2010

46. Medical Practitioners Award 2010
47. Mining Industry Award 2010
48. Nursery Award 2010
49. Oil Refining and Manufacturing Award 2010
50. Pest Control Industry Award 2010
51. Pharmaceutical Industry Award 2010
52. Pharmacy Industry Award 2010
53. Port Authorities Award 2010
54. Ports, Harbours and Enclosed Water Vessels Award 2010
55. Poultry Processing Award 2010
56. Premixed Concrete Award 2010
57. Professional Diving Industry (Industrial) Award 2010
58. Professional Diving Industry (Recreational) Award 2010
59. Quarrying Award 2010
60. Racing Clubs Events Award 2010
61. Racing Industry Ground Maintenance Award 2010
62. Rail Industry Award 2010
63. Real Estate Industry Award 2010
64. Restaurant Industry Award 2010
65. Salt Industry Award 2010
66. Seafood Processing Award 2010
67. Security Services Industry Award 2010
68. Silviculture Award 2010
69. Sporting Organisations Award 2010
70. State Government Agencies Administration Award 2010
71. Supported Employment Services Award 2010
72. Surveying Award 2010
73. Travelling Shows Award 2010
74. Waste Management Award 2010
75. Water Industry Award 2010
100. Wool Storage, Sampling and Testing Award 2010

**E: EXPERT AND SURVEY EVIDENCE**

**12. PROFESSOR MARKEY**

- 12.1 In light of the position relating to the award-specific evidence outlined above, it is apparent that the material advanced by Professor Markey is the basis of the ACTU case.
- 12.2 Professor Markey's evidence presents him as an advocate for a series of propositions. These propositions are effectively asserted as intellectualised hypothesis based largely on uncontroversial publically available data. There is no empirical research or study of any note presented to support the assertions albeit we acknowledge that Professor Markey reflects his assertions against the ACTU survey.
- 12.3 In large measure Professor Markey advances his assertions in a relatively stark black and white way: that is to say the assertions are advanced as "a given".
- 12.4 Ultimately the Professor accepts all of the dynamic shifts in the Australian economy since the 1970's including shifts away from agriculture and manufacturing to the services sector<sup>161</sup>, an increase in female participation rates<sup>162</sup>, Year 12 retention rates<sup>163</sup> and tertiary education rates<sup>164</sup> and a shedding of low skilled workers and an increased demand for skilled workers<sup>165</sup>. The Professor acknowledged that this has brought to the fore a changing pattern of demand for labour.
- 12.5 The Professor accepts that within this context, employers act rationally balancing a large array of factors in how they source labour, set their optimum labour mix and deploy labour (as nearly all of the evidence in this case supports).
- 12.6 In doing so, the Professor accepted that there was a correlation between the increased participation of women in the workforce and an increased supply of employees working non-fulltime hours<sup>166</sup>. Likewise the Professor acknowledged a "*relationship*" between non-fulltime employment and Year 12 retention rates and tertiary education rates.<sup>167</sup>
- 12.7 The Professor acknowledged that the shift in the structure of the economy to the services sector has had an impact on part-time employment but sought to downplay the effect of such shift on the

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<sup>161</sup> See Withers Section 1.3 and PN9001 to PN9008

<sup>162</sup> See Withers Figure 9 Page 25 and PN8986 to PN8994

<sup>163</sup> See Withers Figure 10 Page 26 and PN8995 to PN8998

<sup>164</sup> See Withers Figure 11 Page 27 and PN8999 to PN9000

<sup>165</sup> See PN9009

<sup>166</sup> See PN9010 - PN9015

<sup>167</sup> See PN9021

growth of casual employment.<sup>168</sup>

- 12.8 Despite acceptance of the above context, the Professor appeared to be unwilling or reluctant to accept that these factors have been a cause of the use casual employment by employers. Instead, the Professor posited the unsatisfactory position that employers are somehow “culturally” or “institutionally” “influenced”<sup>169</sup> or conditioned to use casual labour because it is available and the “easy route”.<sup>170</sup> The Professor argued that if only employers were more aware of “options”<sup>171</sup> in how they do their job, they would be able to better organise their labour and increase functional flexibility by using part-time employment in preference to casual employment.
- 12.9 This line of argument from Professor Markey characterises the use of casual employment as illegitimate.
- 12.10 Perhaps it is relevant that the Professor’s only practical experience about making management decisions to employ and deploy labour is in the university sector (where somewhat ironically he himself uses casual employment) which can hardly be held up as representative of the private sector generally or the disparate industries subject to the common claims.
- 12.11 Any reasonable observer is left considering the Professor’s views with an air of anxious concern; no doubt his views are applicable somewhere (the evidence of the workers of Westend Pallets appears to be a likely example) but they should not be taken as the norm.
- 12.12 Professor Markey’s primary assertions are as follows:
- (a) Casual employment is not a path to career security later<sup>172</sup> or rather, casual employment is a trap;<sup>173</sup>
  - (b) Employers use casuals because they have not properly, effectively or fully considered how to better run their businesses;<sup>174</sup>
  - (c) Casual employment is a less legitimate form of employment than permanent forms of employment;<sup>175</sup>

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<sup>168</sup> See PN9027

<sup>169</sup> See PN9038

<sup>170</sup> See PN9041

<sup>171</sup> See PN9045

<sup>172</sup> Attachment RM-2 at Page 39

<sup>173</sup> PN9090 and Attachment RM-2 at Page 39

<sup>174</sup> PN9045

<sup>175</sup> See Attachment RM-2 at Page 40



- (d) It is difficult to conceive that an employee would willingly be casual except in very limited and particular circumstances;<sup>176</sup>
- (e) The growth of casual employment in the past 30 years has not been driven by a supply side need: that is the dramatic increase in female participation rates, student participation rates etc has not lead to the increase in casual employment but rather the increase in casual employment has been driven by largely misconceived biases of employers for an inherent preference to insecure labour;<sup>177</sup>
- (f) Many casuals do not receive casual loading;<sup>178</sup>
- (g) Casual loading has a limited ability to compensate for low base rates in the absence of paid leave rights;<sup>179</sup>
- (h) Casuals earn less than other classes of employees;<sup>180</sup>
- (i) Casuals are not trained;<sup>181</sup>
- (j) Casuals are less engaged than other classes of employees;<sup>182</sup>
- (k) Casual employment is linked to long term negative health effects.<sup>183</sup>

12.13 Before dealing with these assertions, we turn firstly to those matters which appear largely to be uncontroversial. It is evident from Professor Markey's evidence and that of Professor Withers that a large part of what has occurred in the labour market in Australia over the past 30 to 40 years is entirely uncontroversial:

- (a) Part time employment (which as the Full Bench will now understand includes what is industrially known as both part time and casual employees) increased substantially as a proportion of total employment from the 1970's into the early 2000's.<sup>184</sup>
- (b) Since the mid 1970's male full time employment in Australia has trended down, female full time employment has risen slightly, female part time employment has rising dramatically and male part time employment has risen.<sup>185</sup>

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<sup>176</sup> See PN9086

<sup>177</sup> See PN9024 - PN9041

<sup>178</sup> Attachment RM-2 at Page 6

<sup>179</sup> Attachment RM-2 at Page 6

<sup>180</sup> Attachment RM-2 at Page 6

<sup>181</sup> See PN9092

<sup>182</sup> See PN9207

<sup>183</sup> Attachment RM-2 at Page 39

<sup>184</sup> See Withers Figure 5 Page 20 and PN8941

- (c) Since 2000 casual employment has affectively plateaued in Australia.<sup>186</sup>
- (d) Casual employment is heavily represented in the accommodation and food sector, the retail sector, the health and social assistance services sector.<sup>187</sup>
- (e) A very large proportion of the accommodation and food sector workforce is casual, a large proportion of the retail sector is casual, a large proportion of the administration and support sector is casual and a large proportion of the agricultural sector is casual.<sup>188</sup>
- (f) Persons 15 to 19 years of age in the workforce and persons 20 to 24 years of age in the workforce are heavily represented by casual employees.<sup>189</sup>
- (g) Since the 1970's there has been a dramatic increase in the female participation rate in the Australian workforce and a marked decline in the male participation rate in the Australian workforce.<sup>190</sup>
- (h) Since the 1980's there has been a dramatic increase in Year 12 retention rates both male and female in Australia.<sup>191</sup>
- (i) Since the 1990's there has been a substantial increase in persons enrolled in tertiary education in Australia.<sup>192</sup>
- (j) Since the mid 1970's the Australian economy has experienced a substantial contraction in manufacturing as an employing industry, a contraction in the agriculture and mining sector as an employing industry and a very substantial increase in the services sector as an employing industry<sup>193</sup>.
- (k) Occasioned with this shift there has been a pronounced shedding of low skilled workers and an increased demand for skilled workers.<sup>194</sup>
- (l) There is a correlation between the dramatic increases in the participation rate of female employees in the Australian workforce (especially with dependent children), the shift to the

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<sup>185</sup> See Withers Figure 4 Page 20 and PN8942 to PN8954

<sup>186</sup> Withers Figure 6 Page 21 and PN8955 to PN8956)

<sup>187</sup> See Withers Figure 18 Page 42 and PN8964 to PN8966

<sup>188</sup> See Withers Figure 19 Page 43 and PN8967 to PN8970

<sup>189</sup> See Withers Figure 20 Page 44 and PN8971 to PN8976, Withers Figure 21 Page45 and PN8976 to PN8982

<sup>190</sup> See Withers Figure 9 Page 25 and PN8986 to PN8994

<sup>191</sup> See Withers Figure 10 Page 26 and PN8995 to PN8998

<sup>192</sup> See Withers Figure 11 Page 27 and PN8999 to PN9000

<sup>193</sup> See Withers Section 1.3 and PN9001 to PN9008

<sup>194</sup> See PN9009

services sector as an employing sector and the dramatic increase in part time work (inclusive of what is industrially known as casual employment).<sup>195</sup>

- 12.14 Professor Markey worked hard during the cross examination to maintain the positions he advanced but a series of material concessions were made by the Professor which, when considered alongside the other evidence advanced in the case, demonstrate a far more involved and complex picture than the simplistic picture Professor Markey urges upon the Full Bench.
- 12.15 We now turn to these matters.
- 12.16 Professor Markey concedes that the services sector which has grown dramatically over the past 40 years has intrinsically by its nature resulted in differing patterns of demand for labour than manufacturing in a factory.<sup>196</sup>
- 12.17 Professor Markey concedes that the retail sector which has grown substantially in the past 40 years also has differing patterns of demand for labour than manufacturing in a factory.<sup>197</sup>
- 12.18 Professor Markey concedes that restaurants intrinsically have a differing pattern of demand for labour than manufacturing in a factory.<sup>198</sup>
- 12.19 Professor Markey accepts that subject to their competence, managers running businesses will act rationally in determining how to organise labour but he qualifies this by forming the view that managers take an easy route through casualisation<sup>199</sup> but in his words “*they just haven’t thought of the options*”.<sup>200</sup>
- 12.20 Professor Markey advances no evidentiary basis for this qualification other than an example of how he personally employs people in universities using what he described as “*soft money*” and why he personally employs people as casual employees including his colleague Dr McIvor.<sup>201</sup>
- 12.21 While Professor Markey holds onto the view that there is some inherent bias in the way employers behave in Australia<sup>202</sup> he does ultimately concede that when managers sit down to write a roster

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<sup>195</sup> See PN9010 and PN9011

<sup>196</sup> See PN9029

<sup>197</sup> See PN9030 to PN9032

<sup>198</sup> See PN9032 to PN9034

<sup>199</sup> See PN9038 to PN9045

<sup>200</sup> See PN9045

<sup>201</sup> See PN9049 and following

<sup>202</sup> See refer PN9053

that they have first and foremost in their mind balancing the demands of the customer with the cost of structuring the roster in a rational way.<sup>203</sup>

- 12.22 These notions of rational behaviour and contemplation of options were explored with Professor Markey through a real modern award being the *Quarrying Award 2010*. This line of enquiry commenced at PN9061. Professor Markey concedes that in the context of this example when an employer is rationally trying to determine how best to roster people they will balance the qualifications and fetters placed on casual employment against the qualifications and fetters placed on part time employment and he accepts that in some cases employers might be moved to engage casuals because of the limitations placed on part time employment in modern awards rather than any inherent bias towards casual employment per se.<sup>204</sup>
- 12.23 Professor Markey concedes that even though he holds the view that casual employment is a trap from a career perspective there are a number of classes of persons for whom it would not be a trap, these include students seeking to earn income while they are studying,<sup>205</sup> persons deciding that in their circumstances casual employment is more suitable than any other form of employment (and there was substantial examples of evidence from lay witnesses of this).<sup>206</sup>
- 12.24 Professor Markey then engaged in a line of discussion with the Full Bench who sought to try and identify when casual employment is a trap and Professor Markey identified and reflected upon the prospects for long term employment and permanent employment when people were in casual employment for a long period of time. In this regard Professor Markey then conceded that when a person applies for a job there would be a series of acceptable and rational reasons why an employer might select one candidate over another that are not necessarily related to the fact that they are a casual. These included education standards<sup>207</sup>, experience<sup>208</sup>, the availability of the employee to fit in with the times the job is to be performed<sup>209</sup>, behavioural or cultural fit<sup>210</sup> and qualifications.<sup>211</sup>

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<sup>203</sup> See PN9055

<sup>204</sup> See PN9071 to PN9075

<sup>205</sup> See PN9079 to PN9084

<sup>206</sup> See PN9086 to PN9087

<sup>207</sup> See PN9093 to PN9094

<sup>208</sup> See PN9095 to PN9096

<sup>209</sup> See PN9097

<sup>210</sup> See PN9099

<sup>211</sup> See PN9100

- 12.25 Professor Markey also acknowledged that when an employer is reviewing a CV of a potential job candidate that notions of employment in stability, whether they be related to casual employment or otherwise, may be taken into account and might well be legitimate.<sup>212</sup>
- 12.26 Professor Markey further conceded that whether or not a casual employee may be able to find other work might be related more to market conditions and the nature of the labour market where the person is and these things might include the level of the employment market in the local area<sup>213</sup>, the strength of business performance in the area<sup>214</sup> and matters as simple as the psychological or economic preparedness of a person to travel to actually get work other than casual work.<sup>215</sup>
- 12.27 Professor Markey was challenged as to whether or not circumstances might ever arise where it would be better for a person to be unemployed than being a casual. He seemed to form the view that casual employment would be a preference to unemployment on the basis that as he put it “*any work experience is work experience*”.<sup>216</sup> He accepts that if the only work available is casual employment that it would be preferable to “*move up the ladder*” and that you will be better off getting that work experience than being unemployed.<sup>217</sup>
- 12.28 It’s difficult to understand why Professor Markey gave evidence about whether or not casuals do or do not receive casual loading. The fact of the matter is that the Australian Bureau of Statistics provides data on this. Professor Markey’s assumptions in relation to persons not being paid casual loading is predicated on a conclusion that persons who do not receive the casual loading or persons who do not know they receive the casual loading are deemed to not be paid the casual loading. Given that this case is not about casual loading as Professor Markey acknowledged<sup>218</sup> his commentary in this area would seem purely to be adding sub text to the underlying theme that in some sense casual employment is a less legitimate form of employment.
- 12.29 Again, Professor Markey sought to advance the proposition that casual loading has a limited ability to compensate for the low base rates and the absence of paid leave rights but when cross examined on this acknowledged that the case was not about casual loadings,<sup>219</sup> that the Fair Work

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<sup>212</sup> See PN9105 and following

<sup>213</sup> See PN9106

<sup>214</sup> See PN9107

<sup>215</sup> See PN9108

<sup>216</sup> See PN9127

<sup>217</sup> See PN9128

<sup>218</sup> See PN9148

<sup>219</sup> See PN9151

Commission have worked over a series of iterations to ensure that the current loading has been properly calculated to compensate for entitlements foregone, in practical effect the payment of the loading is in fact a payment of monies in advance to an employee which is a benefit while full time and part time employees wait until they actually exercise the leave. Professor Markey accepted that proposition which is at material odds with his general thesis.

- 12.30 Professor Markey proposed a thesis that casual employees earn less than permanent employees even controlling for hours and gender in the same industry.<sup>220</sup> Under questioning from the Bench, the Professor acknowledged however that the conclusion that casuals are paid less does not control for the classification the work they performed.<sup>221</sup>
- 12.31 While Professor Markey advanced the proposition that casuals are not trained, he generally accepted the proposition that employees (including casual employees) will be trained to be sufficiently competent to perform their job.<sup>222</sup>
- 12.32 Professor Markey was cross examined at some length about the distinction between rational and emotional engagement. While not his area of expertise it became clear through cross examination that he draws these conclusions on labour turnover rather than any empirical examination of job satisfaction or engagement. It is relevant to note in this regard that the lay witnesses who were cross examined almost universally identified a very high level of organisational commitment and engagement to their work contrary to Professor Markey's assertions.
- 12.33 Professor Markey conceded that there is nothing economically unsound or wrong with what has become coined the "one and half earner" theory: that is, a couple electing to balance their economic and family affairs on the basis of a full time employee and a non full time employee whether they be in an industrial sense part time or casual.<sup>223</sup>
- 12.34 Professor Markey was engaged in a level of cross examination over his theories associated with functional flexibility. It is not immediately clear in the context of modern awards how this theory should be crystallised but it is clear from the cross examination that elements of this theory are associated with labour mix as well as multi skilling. Ultimately in cross examination Professor Markey's notion of functional flexibility appears largely rendered down to his base propositions that

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<sup>220</sup> See PN9180

<sup>221</sup> See PN9186

<sup>222</sup> See PN9188 and PN9191

<sup>223</sup> See PN9454 to PN9458

casuals are not trained, less trained people mean less skill and less skilled employees means that the employer has less flexibility options available to them in the construction of their labour mix.<sup>224</sup>

12.35 The remainder of Professor Markey cross-examination identified followed a similar course. Under cross-examination, Professor Markey conceded:

- (a) the suggestion contained in his reports that casual employment was linked with a range of negative impacts on mental and physical health and well being in comparison to non casual employees<sup>225</sup> was unsupported by any clinical medical trials. Professor Markey conceded that none of the reports supporting this thesis appeared in the Australian Clinical Trials Register.<sup>226</sup> Professor Markey further acknowledged that he was not aware of any health based clinical trials in Australia that could support his proposition.<sup>227</sup>
- (b) to the extent that his reports considered specific industries, the reports only touched on<sup>228</sup>:
  - (i) the accommodation food services sector;
  - (ii) the administrative and support services sector;
  - (iii) the retail trade sector;
  - (iv) the University sector;
  - (v) the wholesale and retail sector;
  - (vi) the health care and social assistance sector;
  - (vii) the social community home care and disability sector;
  - (viii) the aged care sector;
  - (ix) the manufacturing building and construction industry;
  - (x) the education and training sector; and
  - (xi) Primary industry.

12.36 Finally, Professor Markey's answers under cross examination in respect of the statistical data arising from the ACTU survey disclosed the considerable uncertainty as to the legitimacy of such data.

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<sup>224</sup> See PN9482 to PN9484

<sup>225</sup> See PN9490

<sup>226</sup> See PN9491 to PN9492

<sup>227</sup> See PN9495

<sup>228</sup> See PN9513

- 12.37 Professor Markey was first taken to figure 4.1 of his initial report which identified that 44% of casual employee respondents worked as casual employees because *“I freely choose to work as a casual because it more flexible/convenient for me”* while 49% of respondents were engaged as a casual because *“It was the only work available, I had no choice”*.<sup>229</sup>
- 12.38 Professor Markey’s concessions in relation to this methodology were significant when compared to the lay evidence heard in this case.
- 12.39 Firstly, Professor Markey in cross-examination acknowledged that an employee who, in order to obtain permanent work, had to work a long way away from where they preferred to work, could be included in the category of having *“no choice”* but to work as a casual.<sup>230</sup>
- 12.40 The Full Bench heard evidence from Ms Kemp<sup>231</sup> who appears to be a perfect example of this type of employee. Despite the fact that Ms Kemp identified the casual nature of her job as a *“downside”*<sup>232</sup>, she was not willing to move to another area to obtain permanent work. Ms Kemp was emphatic in this preference, stating: *“...I have made a commitment that we are not moving anymore. So, no, I do not want to move for another job, thank you.”*
- 12.41 Secondly, Professor Markey in cross-examination acknowledged that an employee who was unwilling to work in an alternative field in order to obtain permanent work, could be included in the category of having *“no choice”* but to work as a casual if they sought only to work in their chosen field.<sup>233</sup>
- 12.42 Mr Scott Quinn would be an appropriate example of such an employee in the sense that he identified that while he had worked in other industries with more standardised hours, he wished to remain in disability care because: *“I enjoy what I do and it’s the clients that would miss out.”*<sup>234</sup>
- 12.43 Thirdly, Professor Markey in cross-examination acknowledged that an employee who was unqualified to obtain permanent work, could be included in the category of having *“no choice”* but to work as a casual if they sought only to work in their chosen field in a role they were qualified for.<sup>235</sup>

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<sup>229</sup> See ACTU Final Submissions at [24]

<sup>230</sup> See PN9527

<sup>231</sup> See PN490-PN492

<sup>232</sup> PN494

<sup>233</sup> See PN9528

<sup>234</sup> See PN1733

<sup>235</sup> See PN9529



12.44 Lastly Professor Markey in cross-examination acknowledged that an employee who was unsuccessful in applying for permanent work could also be included in the category of having “no choice” but to work as a casual.<sup>236</sup>

12.45 The Full Bench heard a number of potential examples of this type of employee in the form of Ms Kemp<sup>237</sup>, Ms Minervini<sup>238</sup> and Mr Francis.<sup>239</sup>

### Conclusions on Markey

12.46 The Commission is entitled to make the following findings based on Professor Markey’s evidence:

- (a) While an expert he struggled with the ABS definitions relevant to the case.
- (b) Female part-time employment (as a percentage of persons employed) has risen dramatically.<sup>240</sup>
- (c) Since about the year 2000 casual employment (as a percentage of persons employed) has plateaued.<sup>241</sup>
- (d) The majority of casual employees are in accommodation and food, retail, health and social assistance services.<sup>242</sup>
- (e) A very large proportion of the retail, admin and support and the agricultural workforce is casual.<sup>243</sup>
- (f) Of the employees between the age of 15 and 19, around 70 percent are casuals and of the employees aged between 20 and 24 a little under 40 percent are casuals.<sup>244</sup>
- (g) There has been substantial growth in female participation in the workforce.<sup>245</sup>
- (h) There has been substantial growth in year 12 retention rates<sup>246</sup> and a substantial increase in take up of university and TAFE positions from 1999 to 2012.<sup>247</sup>

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<sup>236</sup> See PN9530

<sup>237</sup> See PN482

<sup>238</sup> See PN2259

<sup>239</sup> See PN6776

<sup>240</sup> See PN8946

<sup>241</sup> See PN8956

<sup>242</sup> See PN8966

<sup>243</sup> See PN8968

<sup>244</sup> See PN8975-8976

<sup>245</sup> See PN8987

<sup>246</sup> See PN8998

<sup>247</sup> See PN9000

- (i) There has been a fairly profound structural change in the Australian economy moving away from agriculture and manufacturing to the services sector.<sup>248</sup>
- (j) There has been a fairly pronounced shedding of low skilled workers and an increased demand for skilled workers.<sup>249</sup>
- (k) Increased women's workforce participation correlates with an increase in part-time employment.<sup>250</sup>
- (l) Certain parts of the services sector have by their nature differing patterns of demand for labour than manufacturing.<sup>251</sup>
- (m) Casual employment may be a 'trap' for a limited number of persons who are seeking permanent employees but it cannot hold as a general proposition.
- (n) There are a substantial number of persons for whom casual employment is preferable or acceptable and some employees will even chose to move from permanent employment to casual employment but he could not understand why.
- (o) Employers will rationally seek to optimise their labour mix and rosters based on a variety of complex factors only one of which is what Professor Markey calls the applicable institutional and cultural framework.
- (p) Employers will balance a variety of complex issues when recruiting an employee for a permanent position and whether they are currently a casual employee is only one of these.
- (q) The complexity in modern award provisions relating to non-casual employment could promote the use of casual employees.<sup>252</sup>
- (r) If the only work experience a person can get is in casual employment and that helps people to move up the ladder then it would be better for a person to get that work experience than to be unemployed.<sup>253</sup>
- (s) Casual loading is actually calculated to pay in advance money for benefits full-time and part-time employees ordinarily accrue.<sup>254</sup>

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<sup>248</sup> See PN9001-9007

<sup>249</sup> See PN9009

<sup>250</sup> See PN9009-9011

<sup>251</sup> See PN9029-9034.

<sup>252</sup> See PN9059-9060, PN9066-9075.

<sup>253</sup> See PN9128.

- (t) If casual employees earn less than permanent employees this is not attributable to modern award rates but is rather attributable to whether people have enterprise agreements or are in receipt of over-award payments.<sup>255</sup>
- (u) Enterprise agreements may regulate the types of employee an employer employs.<sup>256</sup>
- (v) Casual employees are trained to be competent to perform their work but are less likely to receive training leading to formal qualifications supported by their employer.
- (w) In regard to Professor Markey's assertion that casual employees are linked with a range of negative impacts on mental and physical health and wellbeing when compared to non-casual employees,<sup>257</sup> that:
  - (i) none of the studies he references are clinical studies or medical trials in terms of their assessment of impacts on health;
  - (ii) the studies are principally based on self-reporting by employees; and
  - (iii) the authors of the studies are mostly economists, sociologists and industrial relations specialists as distinct from health professionals.<sup>258</sup>
- (x) Professor Markey's evidence in his first report made very limited references to specific industries:
  - (i) administrative and support services, including contract cleaning;<sup>259</sup>
  - (ii) retail trade;<sup>260</sup>
  - (iii) the university sector;<sup>261</sup>
  - (iv) the health care and social assistance sector and those covered by the SCHCDSI Award;<sup>262</sup>
  - (v) the Aged Care Award 2010;<sup>263</sup>

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<sup>254</sup> See PN9155.

<sup>255</sup> See PN9182.

<sup>256</sup> See PN9187.

<sup>257</sup> See PN9490.

<sup>258</sup> See PN9491-9494.

<sup>259</sup> See PN9501.

<sup>260</sup> See PN9502.

<sup>261</sup> See PN9504.

<sup>262</sup> See PN9507-9508.

<sup>263</sup> See PN9509.

- (vi) to a lesser extent, the education and training sector;<sup>264</sup>
- (vii) by way of passing reference, manufacturing, building and construction;<sup>265</sup>
- (viii) by way of passing reference, primary industry.<sup>266</sup>
- (y) Working someone for two hours and paying them for four is not an efficient way for an employer to run their business.<sup>267</sup>
- (z) The majority of casuals surveyed by the ACTU (around 58 per cent) did not agree that their minimum shift should be longer.<sup>268</sup>

### 13. PROFESSOR WITHERS

13.1 The evidence of Withers et al is principally set out in a report that is attached to Professor Withers' statement dated 22 February 2016 (**Withers Report**). Our primary submission at paragraph 2.27 indicates to the Full Bench that:

*"The Professor Withers Report will allow the Commission to make amongst the following findings:*

- *Part time work has increased and continues to increase.*
- *Part time work was over 30% of all employment in 2014.*
- *The proportion of casual workers reached 25% by 2000 following steady growth in the 1980s and 1990s.*
- *That figure has fallen slightly in 2014 but stabilised at around that percentage.*
- *Job tenure is not necessarily short in casual employment with a quarter of all casuals having worked in the same job for ten years or more.*
- *On the other hand, casual engagement is strong for the young.*
- *The 15-19 and 20-24 age groups account for almost 40% of casual employees.*
- *The reasons that part time work and casual work have grown is related to structural change within the economy.*

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<sup>264</sup> See PN9511.

<sup>265</sup> See PN9510.

<sup>266</sup> See PN9513.

<sup>267</sup> See PN9550

<sup>268</sup> See PN9553-9558.

- *Increased globalisation and technological change, together with a decline in the manufacturing sector, has led to a decline or shift in low skilled positions.*
- *These have been reduced through automation or have moved to economies with cheap labour, particularly China.*
- *Shifting consumer preferences has seen the expansion of the service economy, particularly retail and hospitality.*
- *Because service industries tend to work outside of the typical 9-5 working structure or experience demand upswings at peak hours during the day, they rely to a greater extent upon casual and part time workers*
- *In a similar fashion, technological change has resulted in a decreased necessity for the provision of full time work, substituting full time positions with a combination of technology and casual and part time work.*
- *There are now a greater number of flexible hours available to workers.*
- *Casual employees are found to:*
  - A. Be young;*
  - B. Have lower levels of education;*
  - C. Be concentrated in sales workers and labourers; and*
  - D. Be in retail trade or accommodation and food services.*
- *Casual employment is not “bad”. It can be a stepping stone to other work.*
- *Casual employment assists some workers. Others “remain in casual employment for extended periods.” But most people are happy in casual employment.*
- *Casual status when compared against permanent status has slightly lower job satisfaction for men but not for women.*
- *It has no significant effect on overall life satisfaction or on mental health.*
- *Businesses are often unable to influence the amount consumers are willing to pay for particular goods or services. Consequently, much of a firm’s profit maximisation is based on the ability to organise production through scheduling labour to increase output per worker.*

- *The decision to organise labour flexibly enhances a business’s ability to make production efficient. It also lowers the costs of employing labour. As such, the flexibility of casual employment for employers is highly significant in determining the productivity in the economy.*
- *In conjunction with the importance of casual workers for the industries which now have prevalence in the Australian economy, primarily in the services sector, going back to these basic economic tenets demonstrates the detrimental effects policy which restricts flexible employment would have.*
- *The impact of the ACTU Claim has been modelled at a macro level.*
- *The changes proposed by the ACTU are unfavourable because they introduce a loss of productivity gain for the employed casual workforce.*
- *The modelling shows an indicative multibillion dollar loss each year in GDP (\$3.7billion).*
- *The modelling also shows an indicative annual loss of full time equivalent jobs of around 19,000.*

13.2 In its submission dated 20 June 2016, the ACTU refers to the Withers Report in a number of contexts. In the submission the ACTU seeks to reinforce some of the elements of its claim by reference to the Withers Report and argues that the Withers Report should be characterised as providing “*possible alternative viewpoints without seriously prosecuting an alternative case*”<sup>269</sup> to that emanating from the case it advances based on the evidence of Professor Markey et al.

13.3 The ACTU has misrepresented the role of the Withers Report and the Withers’ testimony in indicating that it has the purpose of “prosecuting an alternative case.” This is a mischaracterisation of the role of an expert and the effect of the testimony. Indeed, counsel for the ACTU was at pains to reinforce to Withers that the Federal Court of Australia “Practice Note CM 7 – Expert witnesses in proceedings in the Federal Court of Australia”<sup>270</sup> was “read and understood” by Professor Withers.<sup>271</sup> Paragraph 1.2 of that Practice Note says:

*“An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.”*

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<sup>269</sup> Id at para 123

<sup>270</sup> <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm7>

<sup>271</sup> See PN10800

- 13.4 The position adopted by Professor Withers clearly shows that he has the terms of paragraph 1.2 in mind when providing testimony and in respect of the Withers Report. He says that *“I must say I don’t have a particular view as to what the outcome of this should be. It’s a careful balancing exercise.”*<sup>272</sup> Despite what the ACTU says in its submissions, and impliedly in being less critical of Professor Withers than concerning evidence provided by other experts<sup>273</sup>, there should be no lessening of the weight given to his testimony or the terms of the Withers Report. In fact because of the palpably even-handed manner in which the testimony was framed, it should be given added weight. The Withers Report is presented as a proper and measured reflection of the views of Withers without the advancement of a specific cause or one which favours an “employer-biased” stance. This is especially the case given the exchanges between counsel for the ACTU and Withers where he denies that Professor Lewis’ views are *“coming through”* in aspects of the Report; full responsibility for its content is taken by Withers.<sup>274</sup>
- 13.5 In these submissions we will seek to assess Withers’ conclusions listed at 13.1 above against his testimony at hearing. Where such conclusions are either reinforced or added to, they are shown in bold below.
- 13.6 First Withers is asked about the term flexibility and indicates that for economists the distinction between concepts heavily relied on in the Markey et al evidence that is between functional and numerical flexibility are unclear. Withers’ testimony is that the distinction is *“not all that clear.”*<sup>275</sup> He adds: *“It does seem to be made much use of in this discussion but it seems to be very blurred and the concept of functional is very unclear.”*<sup>276</sup> These remarks reinforce the economic arguments raised in the Submission at paragraphs 17.10-17.16. **The fundamental underpinning of the ACTU case, that “functional flexibility” and greater levels of regulation around casual employment will increase productivity is questioned.** Withers’ testimony reinforces the fact that, as described in our primary submission, the notion that greater regulation will increase productivity is counter-intuitive. The notion that “converted” casual employees would receive more training is a key component of the ACTU argument that the “functional flexibility” effect will add to productivity and detract from increased costs were the claim to be granted. That notion is dismissed by Withers when he draws a distinction between formal skills and the skills/training likely

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<sup>272</sup> See PN10810

<sup>273</sup> Above note 4 at para 123

<sup>274</sup> PN10820

<sup>275</sup> PN10827

<sup>276</sup> Ibid

to be required of those undertaking work where interpersonal skills are critical.<sup>277</sup>

- 13.7 The same discussion shows that casuals **experience less training**. But that is explicable by the nature of the work and is clearly distinguished from casual employment causing this effect; Withers says *"And remember that all jobs are not homogenous."*<sup>278</sup> This point is also made at paragraph 16.25 of our primary submission relying on the Productivity Commission's workplace relations framework report. The "correlation is not cause" argument is also furthered by the testimony referenced in the prior paragraph.
- 13.8 Our primary submission and the Withers Report emphasise that casual employment is an essential component of the organisation of work. In responding to a hypothetical situation posed by counsel for the ACTU, Withers indicates his view that employers want flexibility as it *"will enhance efficiency in a narrow market sense of an employer who wants to maximise the revenues relative to the cost of the position of employing somebody."*<sup>279</sup> This reinforces the point made at 13.1 above that much of a firm's profit maximisation is based on the ability to organise production through scheduling labour to increase output per worker.
- 13.9 At PN10893 Withers confirms that **casuals tend to be young and that a significant proportion are students**. This reinforces the point made at paragraph 16.31 of our primary submissions that casual jobs enhance young people's prospects and that many are combining employment with education.
- 13.10 In the same exchange with a Commission member, Withers reinforces the notion that **casual employment is not a "trap" and at the same time shows that the training issue is not an impediment to casual employment being a "stepping stone"**. At PN10896 he says: *"Australia apparently has very high by global rates transitions out of casual into various forms of permanent employment, so they are not inhibited from moving into occupations that require substantial training and investment in the new occupation or new employment."* The explanation of how this might be so is given at PN10904 where the acquisition of what are referred to as *"informal skills"* are of assistance in transitioning into *"more formalisation as needed."* The ACTU seek to use material in the Withers Report to combat this evidence: see paragraph 52 of the 20 June 2016 ACTU submission but that does not detract from the difference in the type of training gained by casuals.
- 13.11 At paragraphs 16.44 to 16.47 of our primary submission we state that **employees in casual**

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<sup>277</sup> PN10859 and PN10869.

<sup>278</sup> PN10859

<sup>279</sup> PN10883



**employment are more likely to go on to other employment and that casual employment is better than unemployment, especially amongst the young.**

- 13.12 At PN10915 Withers refers to the “counterfactual” that underlines the Markey evidence when compared with his underlying thesis: “*His (Markey’s) counterfactual is always casual compared to permanent.*” In contrast Withers indicates that his “counterfactual” is unemployment:

*“Again, if universities within an existing budget were obliged to offer more ongoing employment, much more permanent employment, that might mean fewer people being able to be employed, so that those who are there obtain a better career path but a number of others don’t get access to that career path because of extra costs associated with that permanency.”<sup>280</sup>*

- 13.13 The evidence just quoted is, however, qualified by the statement that one counterfactual does not necessarily exclude the other from consideration but that, at the least, Withers acknowledges that neither expert has done sufficient work to exclude either counterfactual: see PN10917. The evidence is also qualified by what is said at paragraph PN10935 that what he presents is not a multi-variable analysis, a similar criticism levelled at Markey.

- 13.14 In furtherance of the argument that a relevant counterfactual is unemployment, Withers at PN10923 talks about the rationale for the expansion of the casual workforce as follows:

*“So what you had is an ability to augment a permanent workforce with a casual workforce, particularly comprising a lot of people who otherwise wouldn’t in the past get into the permanent workforce; they would’ve been not in the labour force, which is hardly discussed very much in what we’re dealing with here in the evidentiary work, plus some of them are unemployed.”*

- 13.15 The ACTU sought to question the Withers analysis of the factors which are identified in the Withers Report as causative of an increase in demand for casual and part-time labour. Counsel for the ACTU identified the first factor as “technological and organisational changes which have increasingly enabled employers to schedule the hiring of labour in line for the demand for their services.”<sup>281</sup> Withers agreed.<sup>282</sup>

- 13.16 The second factor that is isolated in the Withers Report is the extension of opening hours. The

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<sup>280</sup> PN10915

<sup>281</sup> PN11020

<sup>282</sup> Ibid

cross-examination did not deter Withers from arguing this as a relevant factor.<sup>283</sup>

- 13.17 The third is increased competitive pressures and the need for firms to therefore have greater labour flexibility, raised by ACTU's counsel at PN11046. This is at the heart of the Australian Chamber's case: see for example paragraph 16.51 of our primary submission. At PN11053 Withers sets out what is subsequently labelled as a neoclassical view<sup>284</sup> of this important issue:

*"That firms will seek to, well fairly standard near classical propositions, firms will seek to maximise profit. They can do that best where they can be flexible in their choices as firms, and that, in maximising profit, it's not just a matter of wage costs, since we're ultimately saying that the wage differences between casual and permanent are not that great, but with respect to that relative to productivity so that it is effectively the wage cost meaning not just the wage but is wage relative to what's produced or given by the worker. That in turn feeds into what the revenue is brought in by a worker, and if you're talking about service type industries with flexible hourly requirements when there's more people arriving after work to buy at a supermarket or no one there at 3 am and so on, that – **an ability of an employer to adjust to the profit potential of each of those hours will be an argument for why they want the capacity to have the casuals who can vary time commitments.**"*

- 13.18 It is noted that the ACTU addresses the Withers' evidence in this context at paragraph 59 of its 20 June submission as follows:

*"Two observations may be made about the Withers analysis on this point. First, it is entirely theoretical. By contrast with the Markey analysis which extensively reviews the literature and the available empirical evidence, the Withers Report offered a theoretical or speculative analysis. Second, the discussion does not distinguish between part-time and casual employment and does not distinguish between forms of flexibility. Put differently, the Withers Report makes no serious assertion that the numerical flexibility associated with casual employment—as opposed to labour flexibility generally—is associated with improved productivity. "<sup>285</sup>*

- 13.19 The exchange between Commission members and Withers which then follows (PN11060-PN11068) raises the issue of whether employers are always acting rationally and that they have all

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<sup>283</sup> PN11044 and PN11045

<sup>284</sup> PN11055

<sup>285</sup> Above note 4 at paragraph 59

market information before them. Whilst those issues are acknowledged as important by Withers, it is clear from his response at PN11068 that he cautions the Commission from diverting from consideration of the market in fulfilling its functions. It must be admitted then that at PN11070 to PN11075 Withers indicates that the arguments about the use of casual employees and productivity are “tentative” and, impliedly, given his comment about “logical and evidentiary factors”<sup>286</sup> the exploration of the productivity argument is one that must be made at the level of the individual firm as explored in other evidence before the Commission.

- 13.20 The ACTU has, however, characterised the Withers’ approach as set out in its 20 June 2016 submission thus:

*“There were some claims in the employer material to the effect that increased casual employment had community or economy-wide benefits in the form of increased employment, increased participation or improved productivity. The claims were not very confidently advanced. That is unsurprising because there was no persuasive theoretical or empirical basis for any conclusion that increased casual employment resulted in increased employment, participation or productivity.”<sup>287</sup>*

- 13.21 The exchange between counsel for the ACTU and Withers which next follows relates to the proposition put by counsel: “**what’s the basis of the assertion that there’s *no cost saving in employing casual employees?***”<sup>288</sup> The testimony is in large part derived from the report of the OECD<sup>289</sup> (OECD Extract) that was relied on by Withers and subsequently tendered under cover of a letter dated 21 April 2016.<sup>290</sup> The most compelling quotation from the OECD extract is at PN11091- PN11094 as follows:

*“The share of non-standard workers comprising self-employed, part-timers, casual workers and those on fixed term contracts is high at around 44 per cent compared with the OECD average of one-third, but **non-standard workers do not face substantial wage penalties once other demographic and job characteristics are taken into account.**”*

- 13.22 The next area where there is the cross-examination in relation to the modelling that was undertaken by Withers. This cross-examination follows from the questioning of Withers about the assumptions that were used in the modelling about which he was questioned when giving evidence

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<sup>286</sup> PN11074

<sup>287</sup> Above note 4 at paragraph 47

<sup>288</sup> PN11076

<sup>289</sup> OECD document dated 21 May 2015 titled “In it Together Why Less Inequality Benefits All... in Australia”

<sup>290</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-OECD-report-210416.pdf>

in chief particularly at PN10749-PN10794. In particular, that questioning and the cross-examination from PN11122 relate to the criticisms of the modelling exercise made by Dr Martin O'Brien in a report filed by the ACTU on 9 March 2016.<sup>291</sup> In that report the type of modelling used is in itself criticised as a means by which assumptions are “recycled” as conclusions. The main substantive criticism detailed in the O'Brien report is that the modelling exercise does not directly estimate that the claims will lead to an increase in unemployment and a decrease in productivity that in turn leads to the main finding of a \$3.7 billion loss to the economy and 19k job loss. 'Rather, detrimental effects to unemployment and productivity are assumed by Withers et al in a hypothetical exercise and then imposed upon the CGE model as “inputs.”'<sup>292</sup>

- 13.23 The assumptions applied in the modelling exercise are explored in detail by counsel for the ACTU at PN11122 – PN11190. Despite the concessions and the language used, the modelling exercise shows that the ACTU claim will have a negative effect on the economy. The assumptions used have been codified and quantified. The Commission is therefore able to use the model to have before it an illustration of the negative consequences which would flow from ACTU claims being granted bearing in mind the assumptions analysed in detail in the proceedings.
- 13.24 More generally we have shown with subsequent examples of the use of CGE models<sup>293</sup>, that CGE models have been widely applied in efforts to quantifiably evaluate the effects of economic policy scenarios upon, in this case a simulated, economy. In particular, CGE has served within Australia over the last three decades as a powerful accompaniment to decision makers seeking guidance on the merits of various microeconomic reform proposals. In an evaluation of CGE modelling, economist Philippa Dee noted that certain features of CGE frameworks have proved invaluable in carrying out model based economic policy analysis: they each trace the interactions between producing and consuming activities in considerable detail; they each incorporate, at the individual activity and commodity level, a wide range of policy instruments; and they each allow analysis of the short-term adjustment pressures created by policy changes, as well as the long-term effects on resource allocation and aggregate economic efficiency.<sup>294</sup>
- 13.25 At page 88 of the Withers Report Withers indicates the adoption of the CGE model approach as informed by its characteristic of allowing “*analysis of both aggregate and compositional effects of*

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<sup>291</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/OBrien.pdf>

<sup>292</sup> Id p 4

<sup>293</sup> ABLA letter dated 21 April 2016 filed on the same date

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-OECD-report-210416.pdf>

<sup>294</sup> Philippa Dee, 1994, *General equilibrium models and policy advice in Australia*, Industry Commission, Staff Information Paper, p. 3-4.

*changes affecting the economy – in this case regulatory change – and the provision of projections.*<sup>295</sup> That has always been a transparent and accessible aspect of the modelling. The modelling approach employed by Withers is to ‘shock’<sup>296</sup> the simulated Australian economy with additional labour market regulation, reflective of the ACTU’s position in the case, and to assess what impact this shock has upon employment.

- 13.26 The assumptions that have been used to undertake this exercise, as was made plain in the our primary submission, is to correlate additional regulation of the employment market with negative effects. The Withers analysis is essentially that labour market regulatory burdens produce unemployment, because of the increased costs and reduced revenues of the more rigid employment requirements under enhanced regulation. As indicated in paragraph 13.6 above, a fundamental tenet of the Australian Chamber submissions is that greater levels of regulation are likely to adversely affect the economy. That fundamental aspect of the case is, therefore, able to be seen reflected in the modelling used.

#### **14. REPORT OF DR MUURLINK**

- 14.1 On 16 May 2016, United Voice filed the report of Dr Olav Muurlink, which was filed “*in reply to the employer claims listed for hearing on 14 and 15 July 2016*” (**Muurlink Report**).<sup>297</sup>
- 14.2 Importantly, the Muurlink Report was filed well after the commencement of these proceedings and following the hearing of the majority of the common claim evidence.
- 14.3 We note that the submissions of the ACTU dated 22 July 2016 includes a reference to the expert report of Dr Olav Muurlink, characterising that report as a “*reply to the employer’s claims in the health and care industry awards*”. Notwithstanding this background, the submissions of the ACTU seek to place reliance on the report of Dr Muurlink in relation to the common issues.
- 14.4 In our submission, this reliance is entirely inappropriate given that the employer parties were not on notice that the Muurlink Report was intended to be advanced in respect of the common claims. Accordingly, we submit that the Muurlink Report should not be accepted as evidence in support of the ACTU Claim.

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<sup>295</sup> The Report p. 88.

<sup>296</sup> The Report especially at paragraph 245

<sup>297</sup> The Muurlink Report was filed on 16 May 2016 in accordance with [7] of the Statement of the Commission dated 22 February 2016. This Statement required any party seeking to file evidence in reply to the claims of St Ives Group (in Aged Care Award 2010, Nurses Award 2010 and the SCHCDSI Award) and Australian Business Industrial and the NSW Business Chamber Ltd (in the SCHCDSI Award) to do so by 29 April 2016.

- 14.5 If the Commission is minded to accept the Muurlink Report as evidence to in respect of the ACTU Claim, we submit that:
- (a) The Muurlink Report has no relevance to the ACTU Claim in any event, and does not lend any weight to the ACTU case.
  - (b) The Muurlink Report consisted of a literature review of scholarly work on the effects of *unpredictable working hours* on employees. At its highest, the Muurlink Report stands for the proposition that having unpredictable working patterns, or having a perceived (rather than actual) lack of control over working schedules, may result in adverse health effects.
  - (c) The Muurlink Report does not examine the issue of short shifts or minimum engagements, nor does it deal directly with the issue of casual conversion. With respect, it is difficult to see how the Muurlink Report can have any relevance to the ACTU Claim at all.
  - (d) By way of example, even if the Commission was inclined to introduce 4 hour minimum engagements into modern awards, it would not in any way address the concerns that are raised in the Muurlink Report. Minimum engagements do not provide employees with predictability in working patterns. It merely guarantees a minimum amount of money for a short shift.
  - (e) Further, the casual conversion claim is incapable of addressing the concerns that are raised in the Muurlink Report, because the conversion clause is only proposed to operate where employees are working reasonably predictable hours.
  - (f) If anything, the Muurlink Report undermines the ACTU case as it acknowledges that the shift towards greater variety in working patterns in Australia is “*follow[ing] an international trend*” and is consistent with what is happening in other parts of the world, which suggests that there are broader economic realities at play rather than simply employers making a deliberate and unreasonable decision to utilise casual labour in favour of permanent employees.
  - (g) Even if the Muurlink Report was relevant to the ACTU Claim, the findings about unpredictable working patterns which Muurlink asserts can be drawn from the studies must be viewed with a high degree of caution. This is because:
    - (i) the bulk of the studies referred to in the Muurlink Report relate to overseas jurisdictions such as Hungary, Tunisia, the USA, UK and Europe;

- (ii) there are a range of economic, cultural, regulatory and political differences between Australia and those other jurisdictions which may render the findings of those overseas studies as either inapplicable to Australia or viewed with caution;
- (iii) there is a lack of quality Australian studies which could support the findings asserted in the Muurlink Report. For example, the few Australian studies referred to in the Muurlink Report were either of such a small sample size as to be not empirically reliable, or on closer analysis did not support the findings that Dr Muurlink sought to rely on them for.

## 15. THE EMPLOYER SURVEY

- 15.1 The final piece of evidence which is necessary to address in these submissions is the employer survey (**Survey**).
- 15.2 The Australian Chamber maintains that the Survey covers a broad mix of industries, and has a strong geographical spread across Australia which is reflective of concentration of populations and businesses. Each State and Territory is evenly represented having regard to their relative populations.
- 15.3 The Survey is a valuable snapshot of the employer response to the ACTU Claims and their self-perceptions of the impact of the ACTU Claims and their impact on their businesses.
- 15.4 The Australian Chamber also maintains that the Survey is of valuable probative value and establishes that:
- (a) 82.57% of respondents indicated they were covered by one or more modern awards, making the responses particularly relevant to the Commission's review of modern awards and these proceedings.
  - (b) The Survey has good representative industry spread, with the results again reflecting relative coverage of modern awards and the number of businesses and employees covered by them. Industries with high numbers of responses include:
    - (i) Clerks - Private Sector Award (694 responses);
    - (ii) Hospitality Industry (General) Award (407 responses);
    - (iii) Manufacturing and Associated Industries and Occupations Award (389 responses);



- (iv) General Retail Industry Award (284 responses);
  - (v) Social, Community, Home Care and Disability Services Industry Award (194 responses);
  - (vi) Nurses Award 2010 (136 responses);
  - (vii) Storage Services and Wholesale Award (133 responses);
  - (viii) Aged Care Award (122 responses);
  - (ix) Health Professionals and Support Services Award (116 responses);
  - (x) Professional Employees Award (105 responses); and
  - (xi) Road Transport and Distribution Award (102 responses).
- (c) Respondents to the Survey indicated that, globally:
- (i) Over 80% had utilised a casual employee in the previous month;
  - (ii) Over 35% of their employees are employed as casuals;
  - (iii) Over 50% indicated that they employ casuals on an irregular basis;
  - (iv) Over 80% of the casuals employed by respondents do not regularly work fulltime hours;
  - (v) Under 20% of respondents (covered by a modern award that presently contains a casual conversion clause and who have paid a casual employee in the last month) have had a casual employee make a request under a modern award, since 1 January 2010, to convert to full or part-time permanent employment;
  - (vi) Over 70% of respondents (covered by a modern award that presently contains a casual conversion clause and who have paid a casual employee in the last month) have not received a request by a casual employee under a modern award to convert to permanent employment since 1 January 2010;
  - (vii) Where a conversion request had been made, over 60% of those requests were granted by the employer;
  - (viii) Under 40% of respondents always offer extra hours to existing casual and part time staff before recruiting new casual or part time employees;



- (ix) Over 25% of respondents often offer extra hours to existing casual and part time staff before recruiting new casual or part time employees;
- (x) Over 25% sometimes offer extra hours to existing casual and part-time staff before recruiting new casual or part time employees;
- (xi) Under 10% of respondents never offer extra hours to existing casual and part-time staff before recruiting new casual or part time employees.

15.5 The Australian Chamber submits that the data contained within the survey is far more representative than the evidence tendered by the ACTU during these proceedings with the ACTU neglecting to produce evidence in relation to entire industries that will be impacted by the ACTU's proposed variation to the awards in those industries.

## **F: THE MODERN AWARDS OBJECTIVE**

### **16. THE SCOPE OF THESE SUBMISSIONS**

16.1 As noted above, after dealing with the evidence, the Full Bench is required to determine whether, if the ACTU Claim is granted, the resultant modern awards satisfy the modern awards objective.

16.2 The theoretical operation of the modern awards objective was comprehensively addressed in the Australian Chambers' primary submission filed 22 February 2016.

16.3 The scope of these submissions is to identify how the evidence presented in these proceedings relates to the modern awards objective and to answer the limited submissions of the ACTU in respect of s 134 of the FW Act.

### **17. RELATIVE LIVING STANDARDS AND THE NEEDS OF THE LOW PAID**

17.1 The submissions of the ACTU filed 20 June 2016 note that casual conversion provisions ensure that casual employees in regular work need not suffer the disadvantages attendant on casual employment.<sup>298</sup> No examples of material which is in evidence is cited to support this position.

17.2 If evidence is interrogated, the position that the ACTU Claim answers the needs of the low paid is not necessarily made out.

17.3 Firstly, casual employment is not necessarily determinative of low pay. The evidence of Matthew Francis is perhaps the most memorable example of a casual employee who under no

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<sup>298</sup> See [155] of the ACTU Final Submission

circumstances could be considered “*low paid*”.<sup>299</sup>

- 17.4 It is also relevant to examine the position of the type of casual employees who is the centrepiece of the ACTU Claim; the permanent casual. These employees will receive a 25% premium for their work. Given this premium will no longer be paid if casual employees are converted, it logically follows that the granting of the ACTU Claim will result in less pay for low paid individuals.
- 17.5 The effects to industry which have been identified by the employer case in these proceedings including a reduction in workforce participation, will have a negative effect on the low paid.
- 17.6 In the submission of the Australian Chamber, no case has been made out by the ACTU that the use of casual employment necessarily has the effect of undermining the fairness and relevance of the safety net for low paid employees.

## **18. THE NEED TO ENCOURAGE COLLECTIVE BARGAINING**

- 18.1 As noted in our primary submissions there is no evidence before the Commission suggesting that the terms claimed by the ACTU cannot be bargained for or that the terms claimed if part of the minimum safety net will promote bargaining.
- 18.2 The evidence of Scott Quinn<sup>300</sup> and Vicki Stewart<sup>301</sup> identified examples where the granting of the ACTU Claim will remove from the scope of bargaining an entitlement which would otherwise encourage bargaining by parties.

## **19. THE NEED TO PROMOTE SOCIAL INCLUSION THROUGH INCREASED WORKFORCE PARTICIPATION**

- 19.1 Contrary to the characterisation of casual employees promoted by the ACTU, the witnesses who appeared before the Full Bench in these proceedings on the whole demonstrated engagement with their employment and commitment to their role.
- 19.2 The vast majority of the employees disputed the view that their status as a casual made them less productive or committed to their role. Indeed employees confirmed that they were good at their job and tried their best.<sup>302</sup>

## **20. THE NEED TO PROMOTE FLEXIBLE MODERN WORK PRACTICES AND THE EFFICIENT AND PRODUCTIVE PERFORMANCE OF WORK**

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<sup>299</sup> See PN6784

<sup>300</sup> PN1694

<sup>301</sup> See PN6532

<sup>302</sup> See PN587 for Kemp, PN1348 for Potoi, PN1721 for Quinn, PN3297 for Perry, PN11472 for Morgan

- 20.1 An assessment of this limb of the modern awards objective requires an assessment of the various components of the ACTU Claim.
- 20.2 In respect of the 4 hour minimum engagement claim, a number of elements of the evidence are relevant.
- 20.3 Firstly, it should be uncontroversial that the payment of employees for periods of time in which they perform no work is antithetical to flexible modern work practices and the efficient and productive performance of work. The Full Bench heard a number of examples of scenarios where a minimum engagement scenario may result in payment when available work has “run out”. In terms of employee evidence, Ms Paulsen gave evidence in relation to the Nurses Award which presented a scenario where, through no fault of the employer, employees could not be usefully engaged and were accordingly sent home<sup>303</sup>. As noted by the ACTU submissions, the evidence of the employers over a variety of industries was that shifts shorter than four hours were a feature of work and that to require payment for four hours despite the unavailability of productive work would be to facilitate inefficiency.
- 20.4 In respect of the casual conversion claim, a recurring question in these proceedings was the relationship between the prevalence of casual work and the flexibility and efficiency of part-time employment under the various awards.
- 20.5 No serious attempt was made by the ACTU to develop the effect that a transition from casual employment to part-time employment would have under the various award regimes. Further the evidence of employers overwhelmingly endorsed casual employment as providing a necessary component of its workforce, particularly in relation to meeting variable demands.

## **21. THE NEED TO PROVIDE ADDITIONAL REMUNERATION**

- 21.1 No evidence has been heard by the Full Bench in relation to this limb of the modern awards objective.

## **22. THE PRINCIPLE OF EQUAL REMUNERATION FOR WORK OF EQUAL OR COMPARABLE VALUE**

- 22.1 No evidence has been heard by the Full Bench in relation to this limb of the modern awards objective.

## **23. THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON BUSINESS,**

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<sup>303</sup> See from PN3794

#### **INCLUDING ON PRODUCTIVITY EMPLOYMENT COSTS AND THE REGULATORY BURDEN**

- 23.1 Perhaps unsurprisingly, every witness statement filed by employer parties in these proceedings provided evidence that the ACTU Claim will have a negative effect on business, including on productivity, employment costs and the regulatory burden.
- 23.2 Even less surprisingly, the ACTU have sought to discount this evidence and, as noted at 5.4 above, submit that the Full Bench should discount the overwhelming evidence of employers in these proceedings which state that the ACTU will be detrimental to business.
- 23.3 In our view, this evidence cannot be easily discounted. It is plainly apparent that the ACTU Claim will have different effects in different industries under different awards. As is stressed above, these effects must be assessed on an industry by industry award by award, level.
- 23.4 Having regard to this evidence, the Australian Chamber considers that the ACTU case has not been made out.

#### **24. THE NEED TO ENSURE A SIMPLE, EASY TO UNDERSTAND, STABLE AND SUSTAINABLE MODERN AWARD SYSTEM FOR AUSTRALIA THAT AVOIDS UNNECESSARY OVERLAP OF MODERN AWARDS**

- 24.1 No evidence was heard by the Full Bench in respect of any ambiguity or confusion that would be remedied by the granting of the ACTU Claim.
- 24.2 As contemplated by the Issues paper published by the Full Bench, a number of aspects of the ACTU Claim, including the definition of irregular casual employee, require further clarification.
- 24.3 As noted in our previous submission, viewed award by award the terms claimed are anything but simple. Employers are to be confronted by a complex regime of administration with tight and specific time obligations combined with a need to delineate its workforce to fit the casual conversion and employment prohibition into their workplace.

#### **25. THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON EMPLOYMENT GROWTH, INFLATION AND THE SUSTAINABILITY, PERFORMANCE AND COMPETITIVENESS OF THE NATIONAL ECONOMY**

- 25.1 As noted above, it is apparent that the ACTU Claim will have different effects in different industries under different awards. These effects must be assessed on an industry by industry, award by award, basis.

**F: Conclusion**

**26. SCOPE OF SUBMISSIONS**

- 26.1 These submissions seek to complement the Australian Chamber's primary submissions filed 22 February 2016 by addressing the evidentiary position advanced in respect of the ACTU Claim.
- 26.2 Accompanying these submissions is the Australian Chamber's response to the Issues Paper published by the Full Bench on 11 April 2016.
- 26.3 Taken together, these materials demonstrate that:
- (a) the ACTU has not advanced a sufficient evidentiary case to support the ACTU Claim in accordance with the requirements of the FW Act or the preliminary issues decision;
  - (b) casual employment does not necessarily undermine the fairness and relevance of the safety net nor does it necessarily result in disadvantage to employees;
  - (c) the variations proposed by the ACTU Claim are inappropriate having regard to the modern awards objective.
- 26.4 For these reasons, the ACTU Claim should be dismissed.

**AUSTRALIAN CHAMBER MEMBERS:** BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF COMMERCE & INDUSTRY VICTORIAN' CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AGED AND COMMUNITY SERVICES AUSTRALIA** AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION **ASSOCIATION OF FINANCIAL ADVISERS** ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW **AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL LIMITED **AUSTRALIAN DENTAL ASSOCIATION** AUSTRALIAN DENTAL INDUSTRY ASSOCIATION **AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES** AUSTRALIAN FEDERATION OF TRAVEL AGENTS **AUSTRALIAN FOOD & GROCERY COUNCIL** **AUSTRALIAN GIFT AND HOMEWARES ASSOCIATION** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RECORDING INDUSTRY ASSOCIATION** AUSTRALIAN RETAILERS' ASSOCIATION **AUSTRALIAN SELF MEDICATION INDUSTRY** AUSTRALIAN STEEL INSTITUTE AUSTRALIAN TOURISM EXPORT COUNCIL AUSTRALIAN TOURISM INDUSTRY COUNCIL **AUSTRALIAN VETERINARY ASSOCIATION** BOATING INDUSTRY ASSOCIATION **BUS INDUSTRY CONFEDERATION** BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS **CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA** CEMENT CONCRETE AND AGGREGATES AUSTRALIA **COMMERCIAL RADIO AUSTRALIA** CONSULT AUSTRALIA **CUSTOMER OWNED BANKING ASSOCIATION** CRUISE LINES INTERNATIONAL ASSOCIATION **DIRECT SELLING ASSOCIATION OF AUSTRALIA** ECOTOURISM AUSTRALIA **EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA** FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** HIRE AND RENTAL INDUSTRY ASSOCIATION **LARGE FORMAT RETAIL ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA **MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA** NATIONAL DISABILITY SERVICES **NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION** NATIONAL EMPLOYMENT SERVICES ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **NATIONAL ROAD AND MOTORISTS' ASSOCIATION** NSW TAXI COUNCIL **NATIONAL ONLINE RETAIL ASSOCIATION** OIL INDUSTRY INDUSTRIAL ASSOCIATION **OUTDOOR MEDIA ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA** PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION **PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA** RESTAURANT & CATERING AUSTRALIA **SCREEN PRODUCERS AUSTRALIA** VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE