

## IN THE FAIR WORK COMMISSION

**Matter No:**

AM2014/196 & AM/2014/197  
FOUR YEARLY REVIEW OF MODERN AWARDS  
PART-TIME EMPLOYMENT COMMON ISSUE  
CASUAL EMPLOYMENT COMMON ISSUE

**Party:**

AUSTRALIAN HOTELS ASSOCIATION  
ACCOMMODATION ASSOCIATION OF AUSTRALIA  
MOTOR INN AND MOTEL ACCOMMODATION ASSOCIATION

### FINAL SUBMISSIONS IN REPLY TO ACTU CLAIMS

1. These are the final written submissions of the Australian Hotels Association (“the AHA”), the Accommodation Association of Australia (“the AAA”) and the Motor Inn and Motels Accommodation Association (“the MIMA”) (collectively “the Associations”) in reply to the variations proposed by the Australian Council of Trade Unions (“the ACTU”) (“the ACTU Claims”) as part of the Casual and Part-time Employment Common Issue Proceedings in the 4 Yearly Review of Modern Awards.
2. The Associations oppose the ACTU Claims insofar as they apply to the *Hospitality Industry (General) Award 2010* (“the Hospitality Award”).
3. The Associations rely on previous Submissions filed on 26 February 2016 and where relevant 12 October 2015, except for any aspect which relies on witness statements which were subsequently withdrawn.

## THE PROCEEDINGS - 4 YEARLY REVIEW OF MODERN AWARDS

4. In our submissions dated 26 February 2016, we referred to the legislative requirements and jurisdictional issues applying to the conduct of a 4 Yearly Review of Modern Awards, and the onus that must be met by a proponent of a variation (See Submissions of the Associations dated 26 February 2016 at [4] – [13]; [21]-[25]).
5. There are three key matters referred to therein that warrant further emphasis.
6. *First*, in *National Retail Association v Fair Work Commission* [2014] FCAFC 118, the Full Court of the Federal Court of Australia held:

*“[T]he purpose of the requirement to review a modern award “in its own right” is to ensure that **the review is conducted by reference to the particular terms and the particular operation of each particular award** rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations.”<sup>1</sup> (emphasis added)*

7. *Second*, notwithstanding the designation of this matter as a common issue, it is submitted that different outcomes in different modern awards may be achieved. In *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (“the Jurisdictional Issues Decision”), a Full Bench of the Commission identified:

*“.....The need to balance the competing considerations in s.134 (1) and the diversity in the characteristics of the employers and employees covered by different modern awards **means that the application of the modern awards objective may result in different outcomes between different modern awards**..... there may be no one set of provisions in a particular award which can be said to provide a fair and relevant*

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<sup>1</sup> ([2014] FCAFC 118 at [85]);

safety net of terms and conditions. **Different combinations or permutations of provisions may meet the modern awards objective.**<sup>2</sup> (emphasis added)

8. *Third*, in the context of the merit argument in support of a proposed variation (the extent of which will depend upon the nature of the variation sought), a Full Bench of the Fair Work Commission made the following observation:

*[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. **The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be.** Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found 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.*<sup>3</sup> (emphasis added)

9. It should therefore be concluded that the combined effect of these matters is that the submissions and probative evidence in support of a proposed variation must be directly relevant to the particular term/s and the particular operation of the particular award which is the subject of review.
10. This is a critical consideration, as the manner in which particular terms operate within a particular award can vary considerably with respect to the characteristics of the industry or occupations covered by the particular award.

## ACTU CLAIMS

11. It is readily apparent from the Final Written Submissions for the ACTU dated 20 June 2016, (ACTU Final Submissions) that their claims are premised on the prevalence of the

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<sup>2</sup> Jurisdictional issues Decision at at [33]-[34];

<sup>3</sup> *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8];

AM2014/196 Four Yearly Modern Award Review: Part-time Employment Common Issue

AM2014/197 Four Yearly Modern Award Review: Casual Employment Common Issue

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supposed “*phenomenon of the ‘permanent casual’*” employee across a broad range of industries and its alleged negative consequences.<sup>4</sup>

12. In particular, the ACTU submits that in “*respect of a significant portion of the workforce, ... the casual label is deployed with the objective and effect of depriving workers of basic safety net conditions*”.<sup>5</sup> (emphasis added)

13. Further, the ACTU submits that the:

*“existing limits on casual employment have not achieved their objective of ensuring that the use of casual employment does not undermine the safety net. It is plain that there is now a widespread practice of describing employees engaged in regular work as “casuals” and paying those employees a casual loading in lieu of the full suite of safety net entitlements. Employees in such a category are sometimes described as “permanent casuals”; the better label may be “false casuals””.*<sup>6</sup>

14. The ACTU submits that *false casual* employment:

- a. “*Involves nothing more than an election by an employer (and in some cases an employee) to replace the safety net of award terms and conditions with a casual loading*”<sup>7</sup>;
- b. “*is a development that should be resisted*”<sup>8</sup>; and
- c. Rejects any contention that a “permanent casual” is a legitimate form of employment.<sup>9</sup>

15. To address this, the ACTU seeks an absolute right for casual employees other than *irregular casual employees* to convert to full-time or part-time employment; increases to

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<sup>4</sup> ACTU Final Submissions at [1];

<sup>5</sup> ACTU Final Submissions at [4];

<sup>6</sup> ACTU Final Submissions at [11];

<sup>7</sup> ACTU Final Submissions at [14];

<sup>8</sup> ACTU Final Submissions at [15];

<sup>9</sup> ACTU Final Submissions at [16];

minimum engagements for casual and part-time employees; and other provisions relating to the engagement of employees.

16. The Associations accept that casual employees comprise the highest proportion of employee type in the hospitality industry and that part-time employment can be more beneficial, however, it is submitted that a fundamental question for the Commission to consider in this 4 Yearly Review of the Hospitality Award, is the rationale behind the prevalence of casual employment in the hospitality industry. In other words, *why* are hospitality employers employing one type of employee over the other?
17. In any consideration of the rationale as to why employers in a particular industry employ a particular category of employee or another, it is necessary to review, as part of that inquiry, the terms and conditions of the particular modern award and their particular operation within the hospitality industry.
18. The part-time employment provision is set out at clause 12 of the Hospitality Award as follows:

*12.1 An employer may employ part-time employees in any classification in this award.*

*12.2 A part-time employee is an employee who:*

*(a) works less than full-time hours of 38 per week;*

*(b) has reasonably predictable hours of work; and*

*(c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.*

**12.3 At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.**

*12.4 Any agreed variation to the hours of work will be recorded in writing.*

*12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.*

*12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.*

*12.7 All time worked in excess of the hours as agreed under clause 12.3 or varied under clause 12.4 will be overtime and paid for at the rates prescribed in clause 33—Overtime.*

*12.8 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20—Minimum wages, for the work performed.*

(emphasis added)

19. The employment of a part-time employee requires the employer and the employee to agree on a regular pattern of work at the outset of the engagement. In circumstances where an employer and an employee cannot agree on a regular pattern of work at the outset of the engagement, a deeming provision provides that the employee will be engaged and paid as a casual employee<sup>10</sup> (“the Deeming Provision”).
20. The effect of the Deeming Provision is that it *legitimises* casual employment in circumstances where the employer and employee cannot agree to a fixed regular pattern of work and does not otherwise impose any fetter or constraint as to the length of time that *that* casual employment may continue.
21. Furthermore, the engagement of casual employees on a regular and systematic basis for a ‘long’ period of time is something that was contemplated by the legislature through the extension of entitlements under the National Employment Standards<sup>11</sup>.

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<sup>10</sup> Sub-Clause 12.6 of the Hospitality Award; *Hospitality Industry – the Accommodation, Hotels, Resorts and Gaming Award 1995* (C No.90061 of 1997) Transcript dated 29 October 1997 at p328-329;

<sup>11</sup> *Fair Work Act 2009* at ss.12, 65 & 67;

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22. It is submitted for the Associations that the primary contributing factor in the level of casual employees in the hospitality industry is the particular operation of current part-time employment provision in the Hospitality Award<sup>12</sup>.
23. It is noted that in cross-examination, Professor Markey disagreed that the Deeming Provision in the Hospitality Award had any impact on the level of casual employees in the hospitality industry<sup>13</sup>, but rather curiously agreed that a similarly worded provision in the Quarrying Award 2010 would have that effect in “*some cases*”<sup>14</sup>.
24. Despite the Deeming Provision appearing in the Hospitality Award (and a similarly worded provision appearing in up to approximately 25-30 other modern awards), the ACTU has not addressed the effect of this provision on the prevalence of casual employment in any way, shape or form. Indeed, in cross-examination, Professor Markey stated that in preparing his reports, no consideration was given as to how the proposed variation to the Hospitality Award would impact its current terms and conditions.<sup>15</sup>
25. It is against this background, and in the absence of any direct evidence pertaining to the particular terms of the Hospitality Award and their particular operation within the context of the hospitality industry, the Associations reject the contentions that:
- a. Casual employment on a regular and systematic basis in the hospitality industry is not a form of legitimate employment;
  - b. Employers are employing casual employees with the objective of depriving them of safety net conditions; and

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<sup>12</sup> Submission of the Associations dated 12 October 2015 at [29]-[31];

<sup>13</sup> Transcript dated 23 March 2016 at PN9807-PN9808;

<sup>14</sup> Transcript dated 23 March 2016 at PN9703-PN9705;

<sup>15</sup> Transcript dated 23 March 2016 at PN9746;

- c. Employment of a casual employee “involves *‘nothing more’* than an election by an employer to replace the safety net of award terms and conditions with a casual loading”.

## **TRADING CHARACTERISTICS OF THE HOSPITALITY INDUSTRY**

26. The evidence before the Commission regarding the trading characteristics of the hospitality industry is compelling.

27. In light of the generally unchallenged evidence of the Associations’ witness (including the propositions put to them in cross examination regarding the unpredictability of the industry) and the evidence of Professor Markey, it simply cannot be in dispute that the hospitality industry is affected by a range of fluctuating trading characteristics which include unpredictability and peak service periods impacted by:

- a. Meal service periods in restaurants/bistros;
- b. Functions/function centre activities;
- c. Accommodation room servicing;
- d. Front desk reception/check-out;
- e. External events such as sporting, entertainment or cultural events.
- f. Weather, climate and seasonality; and
- g. Weekdays, weekends and public holidays<sup>16</sup>.

28. This stands the hospitality industry in stark contrast to a typical 9-5’er or Monday to Friday industry<sup>17</sup>.

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<sup>16</sup> See for example Exhibit 123 at [16]; Exhibit 126 at [11]-[12]; Exhibit 127 at [11]; Exhibit 128 at [12]; Exhibit 129 at [12] and [18]; Transcript dated 23 March 2016 at PN9034; PN9748-9759; PN10219-10220; PN10474; PN10480; and PN10612;

<sup>17</sup> Transcript dated 23 March 2016 at PN10571;



29. Furthermore, and notwithstanding the ACTU's concession that there is a need for labour to deal with short term, irregular and unpredictable spikes in work<sup>18</sup>, they do not in any way attempt to identify any particular industry or occupation that may be susceptible to that. This is despite the preponderance of evidence relating to the fluctuating, short term/peak period trading patterns of the hospitality industry.

## **FACTORS INFLUENCING CASUAL EMPLOYMENT IN THE HOSPITALITY INDUSTRY**

30. As set out in paragraph [22] above, it is submitted that the primary contributing factor in the level of casual employees in the hospitality industry is the particular operation of the particular part-time employment provision in the Hospitality Award.

31. An analysis of the raw data of the ACTU Survey 2015 identifies 80 respondents falling within the Accommodation and Food Services Sector who completed the survey. An analysis of those 80 respondents reveals that the number of respondents that are covered or potentially covered by the Hospitality Award is, at its highest, 67.

32. Due to the limited sample size as a proportion of total employment in the hospitality industry, extrapolating findings based on 67 respondents is highly problematic and should not be given any weight in support of the ACTU's proposed variations to the Hospitality Award.

33. Having said that, in responding to question 7 of the ACTU Survey 2015, namely, "*Why do you, or did you work as a [casual/labour hire]?*" those 67 respondents responded as follows:

- a. 38 respondents selected - it was the only work available, I had no choice;

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<sup>18</sup> ACTU Final Submissions at [4];

- b. 27 respondents selected – I freely choose to work casual because it is more flexible / convenient for me;
- c. 1 respondent selected – I need the higher wage with casual loading; and
- d. 1 respondent selected other “*Health*” reasons.

34. When the trading characteristics of the hospitality industry and the Deeming Provision in the Hospitality Award are taken into consideration, with the effect that employers are in essence compelled to employ employees who do not meet the definition of part-time employees as a casual employee, it is hardly surprising that a larger proportion of those 67 respondents selected the option that “*it was the only work available, I had no choice*”.

35. It is also abundantly clear that a large proportion of employees (27 of the 67 respondents or 40%) seek casual employment because it suits their lifestyle and personal commitments.

36. This is consistent with evidence of the employer witnesses who stated that employees balance their casual employment with:

- a. Family/caring commitments<sup>19</sup>;
- b. University/College/School<sup>20</sup>;
- c. Employment with another employer<sup>21</sup>; or
- d. Other personal commitments<sup>22</sup>.

37. Accordingly, it is clear on the evidence that hospitality industry employers and employees are making decisions about their employment relationship in a way which suits their

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<sup>19</sup> Exhibit 129 at [19]; Transcript dated 23 March 2016 at PN10479; PN10591 and PN10606;

<sup>20</sup> Exhibit 123 at [22]; Exhibit 132 at [8]-[9]; Transcript dated 23 March 2016 at PN10318; PN10407; PN10448 and PN10624;

<sup>21</sup> Exhibit 123 at [28]; Exhibit 129 at [20]; Transcript dated 23 March 2016 at PN10321;

<sup>22</sup> Transcript dated 23 March 2016 at PN10329-10330; PN10406;

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respective needs and is guided or influenced by the requirements of the Hospitality Award. This reinforces our rejection of the ACTU's contentions set out at paragraph [25] of these Submissions.

## **CASUAL CONVERSION CLAUSE**

38. The ACTU's Claims include a proposed variation which would vary the casual conversion clause to provide eligibility casual employees an absolute right to convert their employment to full-time or part-time employment after six months.
39. The ACTU did not advance any direct evidence from employees in the hospitality industry in support of this proposed variation, nor is there any level of industrial disputation in the industry relevant to this issue.
40. In response to this proposed variation, we refer to, and rely on, the Submissions of the Associations dated, 26 February 2016 at [34]-[44].
41. It is submitted that the low number of actual conversions for employees working less than 38 hours per week is not a consequence of any defect in the qualifying criteria or the mechanics of the casual conversion clause, but rather the particular requirement of the part-time employment provision to enter into a fixed regular pattern of work.
42. During cross-examination, Ms Joanne Blair gave the following evidence in relation to a casual conversion request:

*Now you're basically noting that you received a request from a casual employee to be converted to part time. She made the request because she wanted a home loan?---Yes.*

*You declined the request on the basis that you were unable to accommodate the request due to the inflexibility of the part time employment provisions in the award?---Yes.<sup>23</sup>*

43. And continuing:

*And you would have had the capacity to employ someone regularly for 20 hours a week in the position that this employee had, is that correct?---Sorry, say that again?*

*Well, there would have been work in your establishment for this person, 20 hours a week?---There is work of 20 hours a week, yes.*

*For this – in what - - -*

*VICE PRESIDENT HATCHER: So let's be clear?---Yes.*

*You had 20 hours per week work?---Mm.*

*But that wasn't the problem. The problem was that you didn't have the flexibility of when those 20 hours could be rostered during the - - -?---Yes, that's correct.<sup>24</sup> (emphasis added)*

44. Further evidence of the difficulty of accommodating a casual conversion request in conjunction with the current part-time employment provision in the Hospitality Award was given by Mr. Darren Brown. Mr. Brown's evidence about his experience with casual conversion requests was as follows:

*You've said in your statement that you've had some requests by casual employees to convert to permanent?---That's right.*

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<sup>23</sup> Transcript dated 23 March 2016 at PN10325-PN10326;

<sup>24</sup> Transcript dated 23 March 2016 at PN10334-PN10339;

*And in your statement you said you didn't agree to those requests because essentially you don't like the part-time work provision of the Hospitality Award. Is that a reasonable summary of what occurred?---Well, I'll give two examples. One example was that it – the hours that they wished to work certainly didn't suit our business. They wished to go to us, part time. Another one, when we had that same conversation, the particular lady chose herself not to convert because of the amount of hours that I was prepared to look at for part time and that took away from her ability to actually do enough hours, it would take up extra hours which she wanted, so she'd in fact turned it down herself, so they're the only two that I can – that come to mind in an example.*

*But do you understand, in relation to the first person, that the employer and the employee has to initially agree on the pattern of hours, so if the employee puts to you a proposal which is unacceptable, you don't have to accept that and by a process of negotiation you could come to an arrangement that suits you both. Are you aware of that?---Yes, I am, and that particular case there – we didn't come to an arrangement to suit us because the employee wasn't – chose to become inflexible. Where they were flexible as a casual, they were becoming very inflexible as a – with what they wanted part time, which didn't suit the business.*

*All right, so you didn't like the way this particular employee interacted with you in terms of negotiating a pattern of work, is that what you're saying?---It wasn't so much the way they interacted, as what they were looking – what they were seeking to do. They were seeking hours outside of what they'd previously worked, in a different pattern they'd previously worked and it just didn't suit the business.*

*Did it occur to you to maybe offer her a pattern of part time work that reflected her existing casual pattern of work?---She didn't want that.*

*Well, you've said it was - - -?---She was looking for a complete – she was looking for a complete change which was outside of what she'd done before, to fit in with her lifestyle which didn't fit with the business. She was looking for hours of work when I didn't have them.*

*But you've said in your statement that you've had casual employees who've wanted to convert to get a bank loan or access to annual leave and sick leave. Surely if that particular person wanted a bank loan and leave entitlements she would have been agreeable to a pattern of work that reflected her existing pattern of work?---The particular example of the bank loan was the previous*

one that actually declined herself because she wanted to keep her hours at a higher level than we'd discussed permanent part time.<sup>25</sup>

(emphasis added)

45. The following conclusions regarding the interaction of the particular casual conversion clause and the particular part-time employment provision in the Hospitality Award can be drawn from that evidence:

- a. An employer may have an adequate number of hours available to accommodate a part-time employment, but not the flexibility of when those hours are required on a week to week or roster to roster basis;
- b. While casual employees may be flexible during the period of casual employment prior to conversion, upon conversion to part-time employment they may become inflexible, cementing the fixed regular pattern of work as a barrier to conversion; and
- c. Given that the number of hours, actual starting and finishing times are required to be locked in for a part-time employee, and can only be changed with the agreement of the employee, an employer may be hesitant to commit to fixing a higher number of hours in a regular pattern of work.

46. These conclusions are relevant to the ACTU's proposed variation. The proposed variation would provide an absolute right to a casual employee, other than an irregular casual employee, to convert to part-time employment. However, the ACTU has not proposed any variation to the current part-time provision. This means that an eligible casual employee may seek to press their right to convert to part-time employment, but in the absence of the employee and the employer being able to agree to a fixed regular pattern of

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<sup>25</sup> Transcript dated 23 March 2016 at PN10455-PN10461;

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work (against a background where the casual employee did not work fixed days with fixed starting and finishing times), the whole process will collapse as a consequence of the Deeming Provision in the Hospitality Award.

47. Accordingly, and in the absence of the ACTU satisfying the ‘*substantive case*’ requirement envisaged by the Full Bench of the Commission in the *Security Services Industry Award* case, the proposed variation to the casual conversion clause in the Hospitality Award must be refused.

### **MINIMUM ENGAGEMENTS OF FOUR HOURS**

48. The ACTU’s Claims include a proposed variation which would increase the minimum engagement periods for casual and part-time employees to a minimum of four hours, on the basis that that is put as being the point at which attendance at work supposedly becomes viable.

49. The ACTU did not advance any direct evidence from employees in the hospitality industry in support of this proposed variation, nor is there any level of industrial disputation in the hospitality industry relevant to this issue.

50. In response to this proposed variation we rely on the Submissions of the Associations dated 26 February 2016 at [30]-[33] and [46]-[58], in which we make some observations of the rationale for the proposed variation and set out in some detail the lengthy historical application of the current minimum engagement periods for casual and part-time employees in the hospitality industry.

51. These submissions are supported by the evidence from the hospitality industry witnesses which showed shorter shifts in the industry are:

- a. utilised across labour intensive/peak trading periods or a particular task<sup>26</sup>;
- b. utilised to assist in developing and training junior employees on a pathway into the industry<sup>27</sup>;
- c. often worked by employees living locally to the hospitality venue in which they are employed<sup>28</sup>;
- d. often worked by employees who work a short lunch shift and/or a short evening shift to assist with personal/family commitments<sup>29</sup>;
- e. often worked by employees who work full-time elsewhere and seek to supplement their income<sup>30</sup>.

52. The evidence of the impact of increasing the minimum engagement periods is that:

- a. management employees would be more utilised, including working shifts otherwise allocated to casuals<sup>31</sup>;
- b. the number of casual employees engaged at a venue would be reduced<sup>32</sup>;
- c. the number of casual employees engaged per shift would be reduced<sup>33</sup>;
- d. the employer would be forced to redeploy an employee to work in a different section of the hotel, producing many practical difficulties when the redeployed employee may not have the skills or qualifications to complete the required

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<sup>26</sup> Exhibit 123 at [17]-[27]; Exhibit 127 at [16]-[17]; Exhibit 129 at [15]-[18]; Exhibit 132 at [6]-[7]; Transcript dated 23 March 2016 at PN10479 and PN10606;

<sup>27</sup> Exhibit 132 at [8]-[9];

<sup>28</sup> Exhibit 123 at [28]-[29]; Exhibit 129 at [20]; Transcript dated 23 March 2016 at PN10321 and PN10606;

<sup>29</sup> Exhibit 129 at [19]; Transcript dated 23 March 2016 at PN10479 and PN10606;

<sup>30</sup> Exhibit 123 at [28]-[29]; Exhibit 129 at [20]; Transcript dated 23 March 2016 at PN10321;

<sup>31</sup> Exhibit 123 at [23], [25], [30] and [31];

<sup>32</sup> Exhibit 123 at [31]; Exhibit 132 at [11];

<sup>33</sup> Exhibit 123 at [27(a)]; Exhibit 127 at [18]; Exhibit 129 at [22];

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- duties or the employee may be a junior and not legally permitted to enter other parts of the venue or would be otherwise unable to work late hours<sup>34</sup>;
- e. the effectiveness of the business would be reduced as it would be paying employees at times when no work is being performed<sup>35</sup>;
  - f. where a casual employee would be directed to work in other areas of the hotel, existing employee's working in that area would have their hours cut<sup>36</sup>; and
  - g. causing other difficulties such as jeopardising business reputation, being forced to absorb additional costs or risk losing business in the market through passing on costs to clients or reducing the availability of services<sup>37</sup>.

53. It is clear on the evidence that the proposed variation to increase minimum engagement periods in the Hospitality Award would be detrimental to both employees and employers and would detract from the Hospitality Award meeting the modern awards objective.

54. Accordingly, and in the absence of the ACTU satisfying the '*substantive case*' requirement envisaged by the Full Bench of the Commission in the *Security Services Industry Award* case, the proposed variation to increase minimum engagement hours for casual and part-time employees in the Hospitality Award must be refused.

## **OTHER PROVISIONS RELATING TO THE ENGAGEMENT OF EMPLOYEES**

### Proposed Sub-Clause 10.3 (a)

55. In relation to proposed sub-clause 10.3 (a), we refer to, and rely on the Submissions of the Associations dated, 26 February 2016 at [59]-[66].

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<sup>34</sup> Exhibit 123 at [32], Exhibit 127 at [19]; Exhibit 132 at [13]; Transcript dated 23 March 2016 at PN10297-10299; PN10396; PN10606;

<sup>35</sup> Exhibit 129 at [21];

<sup>36</sup> Exhibit 123 at [32(a)]; Exhibit 127 at [20]; Exhibit 129 at [22(b)]; Exhibit 132 at [12];

<sup>37</sup> Exhibit 123 at [27(b)-(d)];

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Proposed Sub-Clause 10.3 (b)

56. It is noted that the ACTU propose an amended variation in their Supplementary Submissions concerning the July 2016 Hearing<sup>38</sup>.

57. Despite this clarifying amendment to the proposed variation, there is no direct evidence that shows that casual employees or part-time employees are unreasonably refused additional hours within the hospitality industry, nor is there any level of industrial disputation which would indicate this.

58. To the contrary, the evidence before the Commission shows that, where possible, hospitality employers are offering additional hours to existing employees.<sup>39</sup>

59. The fact that employers engage in this practice is not a sufficient basis to regulate it via a term of a modern award. As set out in the *Fair Work Act 2009*, the inclusion of terms in modern awards must only be to the extent necessary to achieve the modern awards objective<sup>40</sup>.

60. Accordingly, and in the absence of the ACTU satisfying the ‘*substantive case*’ requirement envisaged by the Full Bench of the Commission in the *Security Services Industry Award* case, the proposed variation to insert sub-clause 10.3 (b) in the Hospitality Award must be refused.

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<sup>38</sup> ACTU Supplementary Submissions at [38]-[40];

<sup>39</sup> Exhibit 127 at [11]-[13]; Exhibit 129 at [13]; ACCI/AIG Joint Employer Survey;

<sup>40</sup> *Fair Work Act 2009* at s.138;

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Proposed Sub-Clause 10.3 (c)

61. As set out in the Submissions of the Associations dated 26 February 2016, clause 10.2 of the Hospitality Award requires an employer to inform their employee of the terms of their engagement and whether they are full-time, part-time or casual.

62. In relation to proposed sub-clause 10.3 (c), there is no direct evidence that shows that casual employees covered by the Hospitality Award are not being informed of the terms of their engagement.

63. To the contrary, and relevant to this particular term of the Hospitality Award and its particular operation, is the evidence of:

- (i) Joanne Blair<sup>41</sup>;
- (ii) Paul Stocks<sup>42</sup>; and
- (iii) Darren Brown<sup>43</sup>.

64. It is clear on the evidence before the Commission that casual employees covered by the Hospitality Award are being informed of their terms and conditions of employment, and therefore, the proposed variation is not necessary to achieve the modern awards objective.

65. Accordingly, and in the absence of the ACTU satisfying the ‘*substantive case*’ requirement envisaged by the Full Bench of the Commission in the *Security Services Industry Award* case, the proposed variation to insert sub-clause 10.3 (c) in the Hospitality Award must be refused.

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<sup>41</sup> Exhibit 123 at [14];

<sup>42</sup> Exhibit 129 at [14]; Exhibit 131; Transcript of 23 March 2016 at PN10602;

<sup>43</sup> Exhibit 127 at [15]; Transcript of 23 March 2016;

Final Submissions in reply to ACTU Claims

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## **ISSUES PAPER**

66. A number of the matters raised in the Issues Paper are covered throughout the Submissions of the Associations dated, 12 October 2015, 26 February 2016, and 5 August 2016.

67. We will further address the matters raised in the Issues Paper as part of our closing oral submissions.

## **CONCLUSION**

68. The Associations submit that the ACTU Claims insofar as they apply to the Hospitality Award must be refused.

**For the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motels Accommodation Association**

5 August 2016