IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 and 197

Fair Work Act 2009

Section 156 - 4 yearly review of modern awards

AMWU'S RESPONSE TO FWC ISSUES PAPER

Date: 14 June 2016

Lodged by:	**Sally Taylor**
Organisation:	**Australian Manufacturing Workers Union**
Address:	**133 Parramatta Road Granville NSW 2142**
CONTACT DETAILS:	
Telephone:	**02 8868 1500**
Email:	**sally.taylor@amwu.asn.au**

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AMWU RESPONSE TO THE FWC'S ISSUES PAPER

The following material is in response to the Commission's *Issues Paper* of 11 April 2016. Additional material in reply to the AI Group submission in reply[1] is contained in a separate submission.

SECTION B. Casual and part-time employment – general

Issue I

B.1 What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part-time employment?

Introduction

1.1 Indicia[2] developed by Australian courts and industrial tribunals ascribing characteristics of casual engagement are contradictory. Arguably there is no fixed conceptual understanding or definition of what a "casual employee" is and that a contract of employment labelling an employee as casual does not a casual employee make.[3]

1.2 A casual employee may be engaged on work that is irregular, intermittent, short-term, informal, uncertain, non systematic and with no commitment regarding future work.

1.3 A casual may also be engaged on work that is irregular with the engagement of the casual considered to be regular. These latter forms conceptually described as a 'true' form of casual work.

1.4 Casual engagement may also encompass systematic, regular work, with no restriction on the number and pattern of hours beyond that applying to ongoing part-time or full-time employees under the relevant industrial instrument. The casual employee may have a legitimate expectation that

[1] AIG Submission in reply, 26 February 2016
[2] See [2010] NSWIRComm 148 @ 36 for a summary of indicia
[3] See for example Doyle v Sydney Steel Company [1936] HCA 66; Williams v MacMahon Mining Services Pty Ltd [2010] FCA 1321

the work will continue into the future. This manifestation of casual work, 'the permanent casual', gave rise to conversion provisions in pre-modern awards.

1.5 Flexibility is often expressed as a conceptual difference between casual and part-time workers with part-time work seen as fixed and casual work as flexibilities. An award's flexible hours provisions, individual flexibility clause, facilitative provisions and definitions of casual work encompassing 'permanent casuals' diminish this conceptual difference. The hours and patterns of work of part-time and casual employees may be indistinguishable until such time as the casual is dismissed without notice.

1.6 The Commission determined in the 2000 Metals Casual Case that "In short part-time employment provides greater financial certainty and predictability of earnings."[4] (Compared to casual employees). The majority of casuals work part-time and conceptually under a fair and effective modern award it stands to reason that casuals engaged on a regular basis who elect to convert, would have access to the benefits of part-time employment.

Discussion-Indicia and award concepts

1.7 The dual concepts of casual employment as both 'irregular and 'regular lead to inconsistent determinations. In *Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union*[5] a FWC Full bench held that reference to a casual employee in the enterprise agreement had the meaning ascribed in the underpinning award or agreement and not the meaning ascribed by the common law. In *Telum* the casual was considered to be casual despite working regular rostered shifts. The Federal Circuit Court in *Rosa v Daily Planet*[6] identified that it can be

[4] *2000 Metals Casual Case;* Print T4991 @ 131
[5] [2013] FWCFB 2434
[6] *Rosa* [2016] FCCA312

difficult determining whether an employee is a casual or part-time and that the Fair Work Act provides for regular casual engagement.[7] *Rosa* summarised common law indicia finding:

> "77. Incidents of the arrangements relevant to deciding if the work is casual or part time include whether it is informal, uncertain or irregular, the description by the parties of the arrangement, the expectation or otherwise of ongoing availability of work, and the expectation of continuity of the arrangement. Ultimately it is a question of fact in individual cases."

In *Rosa* the applicant, worked a regular roster and was found to be a part-time employee despite being engaged under the *Clerks Private Sector Award 2010* which contained the circular definition of a casual employee found in many modern awards:

> 12.1 *A casual employee is an employee engaged as such*

1.8 The above definition is the same as the definition for a casual employees considered by the *2000 Metals Casual Case*. The definition, developed at a time when casual engagement was overwhelmingly irregular, unpredictable, occasional, non-systematic and short term is incapable of meeting the Act's modern award and principal objective in an industrial landscape where the business model adopted by employers includes casuals working under regular rosters for lengthy periods.

1.9 The Commission determined in the *2000 Metals Casual Case* that the Metals Award[8] did not restrict the use, or type of work on which a casual may be engaged and that conditions of employment reflecting this fact were appropriate.[9] The Full bench went on to limit the *"unilateral extension of a casual engagement nominally based on hourly*

[7] *Rosa @ 75*
[8] Metal and Engineering and Associated Industries and Occupations Award 1998.
[9] Ibid @ 69

employment over indefinite periods."[10]The full bench found that the concept of casual employment as a type of employment provided for under the Metals Award did not extend to the concept of "permanent casual" which the bench found if not *"a contradiction in terms, detracts from the integrity of an award safety net*"[11] and was founded on a diminution of workers' rights.

1.10 The concept of "permanent casual" was also viewed in this way in the NSW Secure Employment Test case.[12]

> *229 Secondly, the fact that employers are increasingly engaging casual employees to perform work which was previously performed by permanent employees detracts from and undermines the efficacy of the system of industrial awards which regulates a large percentage of permanent and casual employment in New South Wales.*[13]

1.11 The Metals decision is authority for the conceptual differences between types of employment being understood as based on the "incidents" or entitlements applying to the different "types" as defined in the Award rather than any factual pattern of work the "type of employee" may be engaged on. In the context of the *2000 Metals Casual Case* and *NSW Secure Employment* decisions the conceptual difference between casual and part –time employment is based on a 'diminution' of casual employee's rights compared to ongoing employees, whether part time or full time.

1.12 The main conceptual difference between the two types of employment under the Manufacturing Award is that part **timers are defined by the number and pattern of hours worked**:

[10] T4991 @ 106
[11] Ibid @ 106
[12] Secure Employment Test Case [2006] NSWIRComm 38
[13] Ibid @ 229

"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"[14]

1.13 The part-time definition in effect describes the pattern of work for the casual employees subject of the Union's claim however under the Manufacturing, and most other modern awards casual employees, regardless of the pattern, regular or otherwise, or number of hours worked are defined by their engagement and pay:

"A casual employee is one engaged and paid as such"[15]

1.14 Under the Manufacturing Award the regular casual may also have a legitimate expectation[16] that they can become permanent through the operation of the conversion clause.

1.15 Under modern awards casual employees may be engaged on patterns and perform hours of work that do not differ from those of ongoing employees.

1.16 Despite this conceptual similarity, a part-timer's contract of employment, modern award and NES conditions provide for greater job security with prescribed periods of notice of termination and or redundancy, greater certainty with set hours established through award provisions, greater access to formal (e.g. paid leave) and informal entitlements (e.g. uniform provided, correct classification; training) and workplace conditions. Refer for example to the evidence of Davis Kubli (Exhibit 30, paragraphs 18 and 30) where Mr. Kubli' s unchallenged evidence was that the company required casuals to pay for their overall and boots which were provided free to permanent employees.

<u>Concept of Flexibility</u>

[14] Manufacturing and Associated Industries and Occupations Award 2010, Clause 13.1.
[15] Ibid, Clause 14.1
[16] *AMWU v SPC Ardmona Operations Limited [2011] FWC 4405, paragraph 20*

1.17 Some argue that "flexibility" is a significant conceptual difference between the two employment types with casual employees providing employers with more flexibility and casual employees enjoying more flexibility in pursuing their choices to work on days and hours of their own choosing, however the flexibility provided through the award system, including the part time work provisions, hours of work provisions and individual flexibility arrangements diminishes "flexibility" as a significant conceptual difference. There is significant functional flexibility available to employers regarding rostering of part-time hours. The flexibility available under modern awards was identified by Roe, C in *Ponce v DJT Staff management Services*[17] :

> **[68]** Full-time, part-time and **casual** employees often work on varying days and at varying times. Awards provide wide flexibility in this respect and further flexibility is available through flexibility agreements and through collective agreements. Under many awards ordinary hours can be averaged over a week, a month or sometimes longer periods; ordinary hours under many awards can be worked on any day of the week, and daily hours for full-time workers can vary under many awards from 4 to 12 hours. The fact that an employee works more hours in one week or one month than another and the fact that an employee might have variable start and finish times is not conclusive evidence of **irregular,** occasional, or non-systematic employment or engagement

1.18 The flexibility in awards subject to the AMWU's proposals was also referred to in the oral evidence[18] of Mr. Murphy referring to part-time work provisions under the Manufacturing Award in response to a question from the Bench:

> **PN2988**: It wouldn't necessarily have to be exactly the same every week, they could be averaged over a one week to week with (indistinct), so it wouldn't

[17] PR994968
[18] Transcript PN2988-2989, 160316

have to be the same every week, so the hours could be - (indistinct) employees, they could be two days one week (indistinct).

PN2989: And on different days?---And on different days.

1.19 The evidence also identified that employers were unaware or not utilising the flexibility currently available to them under modern awards. For example Mr. Goodsell for the AIG was unaware of both the facilitative provision in the current award (and proposed variation) to extend the 6 month conversion cut off to 12 months.[19] Mr Goodsell was also unaware of modern award individual flexibility arrangements.[20]

1.20 Any significant difference regarding flexibility between part time and casual work resides more in the ability under awards for an employer to engage a casual with no binding agreement regarding the minimum number of hours to be paid per week and to terminate said casual without notice.

1.21 Conceptually casual workers are seen as having more flexibility than part timers however the only practical additional flexibility casuals have over part time employees is the theoretical ability to refuse hours. For "regular" casuals this is a conceptual/theoretical rather than realised flexibility as to refuse hours may cause unintended consequences such as not being offered further hours. The precariousness of casual engagement diminishes "employee voice". *Abdul Rahim v Murdoch University Child Care Association [2016] FWC 2191 (7 April 2016)* is a recent and stark reminder where a part-time employee "converted" to casual by her employer *" had accepted it because she feared not getting any more work "* (@ 14)

1.22 The unchallenged evidence provided by the AMWU included that casuals were not free to refuse work and had to "apply" for leave.

[19] Transcript PN976-977
[20] Transcript PN957

Vinh Thi Yuen (witness statement) Organiser – AMWU, paragraph "15 - when we went out there, the workers got upset because they had been casual for so long. The workers advised that if they wanted to have a holiday, they would need to resign and then come back."

David Kubli (Exhibit 30) Crane driver, forklift driver, oxy operator and hanger operator, paragraph 13"If I am sick, I am expected to call up the day I am sick and then go to the Doctor and get a doctor's certificate. If I want to take extended sick leave, I have to apply and give three week's notice."

Paragraph 15 "The company has also recently advised us that if we take more than two weeks off, then we have to reapply for our job. This applies to permanent employees too."

Simon Peter Hynes (Exhibit 91, witness statement) Screen Printer's Assistant, paragraph 18 "We were treated like a permanent employee but when it came to shut downs, public holidays, sick leave we weren't paid. They called us "permanent full time casuals".

James Fornah (witness statement) Pasturiser/Sealer at [24]: "I haven't had any paid time off or had a holiday since I started working with the company in 2012. I am too scared to take time off".

[25]:"My mother died on 18 June 2013 in Ghana when I was still working as a casual. I asked to have the time off and I wasn't allowed to go home. I was told that they had no one to do the pasturising, and so I had to stay"

1.23 The lack of flexibility for casual employees was identified in the NSW Secure employment test case:

(3)Whilst some casual employees may enjoy the flexibility of being able to take time off on a more flexible basis than permanent employees, there are nevertheless a significant number of employees who do not want or need that flexibility, and/or who in reality do not have that flexibility because of the virtual permanency of their position. For these employees, casual employment has very little benefit in terms of flexibility[21].

1.24 The conceptual flexibility for casuals must also been seen in the light of evidence which identifies that the majority of casuals didn't choose to be casual and the majority would prefer leave over the casual loading as evidenced by the ABS survey data identified in the AMWU submission[22].

1.25 The ABS[23] has specifically reported on a range of flexibility measures in relation to casual employment compared to ongoing employment.[24] The ABS reports that:

- Casuals were less likely to have flexible working arrangements than employees with paid leave entitlements;
- The biggest difference between casual employees and other employees was in the ability to work extra hours to take time off. Just over half (52%) of employees with paid leave entitlements could do this, compared with less than one-third (30%) of casuals;
- Casuals were also less likely (77%) than other employees (89%) to be able to choose when to take their holiday leave;

[21] Ibid @ 245(3)
[22] AMWU submission 13 October 2015 @ paragraph 96-97
[23] ABS AUSTRALIAN SOCIAL TRENDS 4102.0 JUNE 2009
http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication30.06.095/$File/41020_Casuals.pdf

[24] Ibid, ABS 2009 *How flexible are working arrangements for casuals?,* p.18

- Little difference between casuals and other employees when it came to having a say in start and finish times (40% and 43% respectively);

- Casuals who had some say in their start and finish times were less likely to be able to choose those times on a day-to-day basis than other employees (65% of casuals compared with 74% of other employees). About one in ten casuals with some say in their start and finish times;

- Just over half (52%) of casuals had some say in the days they worked compared with 28% of other employees. This was due to the fact that many casuals work part-time;

- Almost one-quarter of casuals did not have a minimum number of hours guaranteed, while around 11% did have a guaranteed minimum;

- The remainder of casuals **(65%) worked the same number of hours each week;** (emphasis added)

- 53% of casuals had earnings that did not vary from pay to pay.

1.26 In its submission of 13 October 2015, the AMWU provided a significant body of conceptual information and factual evidence to support its draft variations. A summary of those sections of the AMWU submission relevant to the "conceptual" question are provided in Table 1.

Table 1: Material on conceptual differences, AMWU Submission 13 October 2015,
Summary – paragraphs 7-12
Artificial award definition for casual employment- paragraph 311-312,
Tenure of casuals and ongoing employees– paragraphs 314-318
Conceptual and factual position vis legislative requirements– Chapter 2., particularly

2.1-2
Employees fears when seeking conversion – Attachment 5, paragraphs 33-36
Academic paper on the right to request – Attachment 11
Witness Evidence – Biddington – Attachment 12.2, paragraphs 36-38
Witness Evidence – Waite – Attachment 12.10
Witness Evidence – Hynes – Attachment 12.4, paragraphs 6-18
Witness Evidence – Bauer – Attachment 12.1
Witness Evidence – Murphy – Attachment 12.8 , paragraph 22-53, Transcript 16 March 2016, PN2934-PN2990
Witness Evidence – Kaushal – 8-12, 16-18 and attachments, Transcript 15 March 2016, PN1167-1256 & 16 March 2016, PN3478-PN3636
Concept of Flexibility- Attachment 5, paras. 40-48

Conclusion on Conceptual differences

1.27 Despite evidence to the contrary our institutions and legislative arrangements lag behind the growing number of casual employees working regular hours over long periods. Conceptually casual work is still often viewed as “irregular”- short term, occasional or non-systematic yet the evidence is of increasing tenure amongst casual employees whose arrangements regularly mirror those of full and part-time employees.

1.28 The ABS data above and the AMWU and ACTU submissions provide ample evidence of increasing tenure with “permanent casuals” working in permanent jobs. The award definition and indicia for casual employees have not kept pace with the nature of engagement. Continuing to accept an artificial definition based on an outmoded ‘conceptual’ construct of casual employees undermines the integrity of the award safety net “in which

standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals"[25] .

1.29 If award conversion provisions are not strengthened as sought to reflect the workplace reality of merging casual and part-time patterns of work then award definitions and indicia for casual employees require amendment. The Award and NES do not operate as an effective safety net for casuals if their terms enable employers to engage, and keep engaging them as a casual despite their regular, long term employment and desire to convert.

Issue 2

B 2. What are the fundamental elements of part-time and casual employment?

Table 2.Material on fundamentals of part-time and casual employment, AMWU Submission 13 October 2015.
Demographics of casual and ongoing employment- Section 4.2, Attachment 5
Casuals more likely to be award reliant than permanent- paras.258-261
Lower wages, paid at award rate because they are casual – paragraphs 30, 229,328, 357

2.1 Unless indicated otherwise references in the Table below are to the AMWU submission of 13 October, 2015.

https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-sub-AMWU-121015-amended.pdf

Table 3. Fundamental Elements of part-time and casual employment

Part Time: certain, agreement, full entitlements, work family balance, defined by hours worked (less than 38) in regular pattern	**Casual**- conceptually uncertain, defining feature is engagement and method of payment.
Ongoing	Both ongoing (regular) and occasional, non-systematic and/or irregular (irregular defined

[25] The Metals Casual Case, Print T4991; para. 106

	14.4(k) Manufacturing Award)
Part-time employees must give or receive notice to end employment.	No notice required unless contained in applicable industrial instrument
81% of permanent part-time employees are female, 38% of permanent full time are (para 269, Graph 4.8)	64% of part-time employees without paid leave entitlements are female, 32% of full-time (para 270, Graph 4.9)
Hours average less than 38 (13.1, MA10)) Choice- more likely to choose part-time hours 27% of permanent employees want more hours. Only 2% want fewer hours.(Para 32 , source AWRS) 31% of all employees work part time (para.267, source ABS)	Both full (averaging 38) and part-time (averaging less than 38). Majority work part-time (70%) Nearly half (46%) of casual employees want more hours (Para 32 , source AWRS) 24.1% of all employees workers are without leave entitlements (AMWU additional submission, 22 December 2015, Para 5, source ABS)
Certain: Engaged to work on a regular pattern of hours (Clause 13.1 of Manufacturing Award)) 3 hour minimum daily pay. Employer may agree to employee request to work for less than the minimum of 3 hours (13.2 Manufacturing Award) Agreed arrangements in writing regarding number of hours, the days on which they will be worked and commencing and finishing. Agreement may be varied (13.3-13.4)	Uncertain: Casual employee is one engaged and paid as such (Clause 14.1 of Manufacturing Award)) 4 hour minimum daily pay. Employer may agree to employee request to work for less than the minimum of 3 hours (14.2 Manufacturing Award) Employer "informs" the "likely number of hours required" (14.3), Manufacturing Award)
Agreement in writing required to alter agreed arrangements (13.4)	Agreement not required to alter, reduce or remove hours
Flexible work arrangement supporting work/family balance	Negative impacts on ability to plan, balance work and family The AWRS study found that 31.3% of casuals in the manufacturing industry compared to 7.4% of non- casuals

	could not choose when to take holidays (refer Attachment 5) and (paragraph 46)
Greater consistency in weekly income	Less consistency in weekly income McLachlan et al (2013) report that 55 per cent of casual employees reported earnings that varied from one week to the next and 58 per cent had variable hours with no guaranteed minimum (paragraph 33). ABS report 65% work same number of hours each week (ABS 2009 *How flexible are working arrangements for casuals*?),
Entitled to pro rata award terms (13.7)	Excluded from some award terms (e.g. Rest break after overtime Manufacturing Award40.4(b))
Entitled to overtime after agreed hours exceeded unless agreed otherwise (13.8)	Entitled to overtime (not in all awards) consistent with arrangements for full-time workers.
Entitled to full NES (both remuneration and time))	Limited NES entitlement. Loading limited to part compensation for remuneration, no entitlement to take time for annual and personal leave
Average Length of tenure of permanent and casual employees is converging	AWRS data demonstrates that the proportion of manufacturing casuals (15.9%) with tenure of between 2-5 years is the same as permanent employees across industry (16%) and the proportion of manufacturing casuals with tenure between 5-10 years (23%) approaches the proportion of all industry permanent employees (25%).This demonstrates a trend in ongoing permanent style employment for casual employees. and that the tenure for permanent casuals is becoming indistinguishable from that of permanent employees. (*para 316)*
More likely to have a higher rate of pay estimated part-time mean hourly rate is 1.3 x that of casual employee (Exhibit 136, Tables 9 and 10)	More likely to have lower Rate of pay (Professor Withers statement, Exhibit 136, Tables9 and 10. Casual employees (45 per cent) are also more likely to be minimum wage reliant, compared with all other employees (para. 259)

2.2 The data on fundamental elements establishes that casuals fare less well on most fundamental elements of employment.

Issue 3

B.3 What factors lead employers to engage casuals?

Table 4.Material on factors leading to employers engaging casual employees is found in the AMWU Submission 13 October, 2015
Diminution of award rights- paragraph 13
Employers prefer maximum flexibility, but in many instances long term casual employment is based on habit, administrative ease, or probationary screening practices- para. 48.3
Lower wages, paid at award rate because they are casual – paragraphs 30, 229,328, 357
Flexibility- paragraphs328,
Probation- paragraph 90
Control- paragraph 229
Employee choice- paragraph 320, 365

3.1 Material relevant to this query is also found at Attachment 'A" herein.

3.2 The 2000 Metals Casual case considered the reasons employers engaged casual employees. The Bench said:

> **[98]** We accept that a substantial body of evidence demonstrated that there is considerable and justifiable use of casual employment in the industry. Primarily, that use relates to operational circumstances in which uncertainty or contingency preclude an employer's capacity to do other than maintain as much flexibility in the size of the workforce as practicable. The AiG case presented details of a wide range of use and justifications from particular employer's view points of a need for unrestricted access to the "flexible" use of casual engagements. The fact of such use was not controversial. The AMWU's expert witnesses each provided a worthwhile analysis of why employers may have made increased use of casual employment in the metals

and manufacturing industry. In the SA Casual Clerks Case, Stevens DP summarised evidence given by Dr Campbell. Similar evidence was given by Dr Campbell in the hearing before us:

> "In his research on casual employment he had looked at the possible advantages for employers, and found about five different headings. He believed that in certain circumstances casual employees offered cheaper labour costs, they offered greater ease of dismissal, they offered the opportunity to match labour time to fluctuations in demand, they offered greater administrative convenience, and they offered a greater opportunity for enhanced control of employees. He thought there was some ideological attraction for employers to engage casual employees as well as for administrative convenience, particularly for small business employers. He thought that if an employer faced fluctuating work demands, so long as they were regular and predictable, that the employer should be using permanent part-time employment or even perhaps fixed term employment, unless there was an overwhelming need for flexibility".[26] (emphasis added)

3.3 The AIG's survey of members has generally been shown to have little probative value. The deficiencies in the JES were highlighted in the AMWU's objections (dated 10 March, 2016) to Mr. Waugh's witness statement (Exhibit 58), Mr. Tegg' cross examination of Mr. Waugh[27], Mr. Tegg' statement[28] of 23 March, 2016 and Attachment C attached hereto. Demonstrably AIG members did not understand the terms (such as "regular", "irregular") about which they were asked to provide opinion. However, the qualitative comments in response to the survey questions " Why does your organisation employ casual employees on an irregular basis/ regular full-time/regular part-time" (where they are not clearly based or diminished by a miscomprehension of the terms and the

[26] Print t4991@ para. 98
[27] Transcript 18 March, 2016 commencing PN5238
[28] Witness Statement Warren Tegg, 23 March 2016 ; https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014-196-197-WS-tegs-230316.pdf

Union's claim) can be used to identify a range of factors guiding employer choice. The comments are recorded in the AIG survey and attached to their submission dated 26 February, 2016.[29]

3.5 AIG members include and expand on the 5 reasons identified by Professor Ian Campbell above in the *2000 Metals Casual Case* and *NSW Secure Employment Test Case*. Their responses can be categorised under the headings below. The comments and material below are not exhaustive but a sample drawn from the following Joint Employer Survey (JES) attachments to the AIG submission of 26 February, 2016 and to Mr. Waugh's witness statement :

- **Attachment 11G**-the Food, Beverage and Tobacco Manufacturing Award 2010[30] (Food Award),
- **Attachment 11I**- Graphic Arts Printing and Publishing Award 2010;[31] (Graphic Arts) and;
- **Attachment 11M**- The Manufacturing and Associated Industries and occupations award 2010[32]

1. **Probationary screening mechanism**:

Food Award: **5485**[33]- "As a means of seeing if suitable for full time employment"; **5473**- "to assess where they are (sic) is a full-time job and to assess the individual over a period of time "

Graphic Arts Award: **3641**- "only while on probation"

[29] Refer section 3.2 of AMWU submission of 13 October, 2015AIG Submission

[30] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/Ai%20Group_Reply%20Submissions_%20Casual%20and%20Part-time%20Employment_Attachment%2011G_final.pdf

[31] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/Ai%20Group_Reply%20Submissions_%20Casual%20and%20Part-time%20Employment_Attachment%2011I_final.pdf

[32] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/Ai%20Group_Reply%20Submissions_%20Casual%20and%20Part-time%20Employment_Attachment%2011M_final.pdf

[33] The numbers refer to the "Respondent ID"

Manufacturing Award- 1926- "casual employee until end of probation with consideration of full time employment should they be the right fit for the company"; **2154**- "This is due to probation period and work load requirements."; **75**-"They commence as Casuals, and subject to successfully completing a Qualifying Period, they are then offered permanent positions"

2. **Employee preference**:

Food Award: 92- "The employee is good but doesn't want reduction in take home pay when made full time"

Graphic Arts Award: **945**- "We have a small percentage of casual employees who regularly reach full-time hours each week. Most of these people like the flexibility of casual and do not actually wish to move across to permanency; they make far more money this way, but the work is there for a full-time person most of the time";**1016**:" As this employee does not want to work school holidays and requires flexibility to fit around her family".

Manufacturing Award: **127**- "after discussion employee preferred casual"; **724**- "Because they are really full time staff members but they have elected to stay employed a casuals (sic)to get the casual loading in their pay rate; **5506**- "All production employees commence casual as part of probationary period. After 6 months we offer conversion for full time. The casuals we currently have opted to stay casual."

3. **Reduce employment costs /Avoid Award and NES obligations**

Food Award: **2934**- "To avoid having to pay holiday pay and sick pay and to give us the flexibility of being able to close down or cut back production. Also because switching them now to permanent would involve a pay cut for them and they wouldn't like that; **2543**- "To avoid unnecessary sick days and discipline issues"

Graphic Arts Award: **1118**- Particular skill sets required for short/medium term tasks. Easier to employ and wind up"; **1268**-"Small business owners everywhere are fed up with "Fair Work" and its medieval, punitive restrictions on business owners. Fair Work is hurting employees and increasing the unemployment rates because the smart business owner (or general manager) will not employ someone full time unless there is no alternative. That's why part-time casual is the better option"

Manufacturing Award: **709-"**UNFAIR DISMISSAL LEGISLATION**"; 5750**-" Plus, the costs involved in paying a Perm Part Time person all of their leave entitlements including sick leave, carers leave, leave loading, holidays etc makes me sick to the core. At present, the only winners are the employees and the poor business owners get 1/10th of nothing"*; **41-** No game to employ any more full time staff as it is to hard to make them redundant when the work level drops away"; **1064**-"Flexibility. The IR laws in Australia are too restrictive for employers so we choose not to employ as full timers. This allows us also to respond to seasonal fluctuations in requirements; **1846**-"A LOT we need to have the flexibility that if there is a massive downturn in work we can let the casual workers go without the need for redundancy that permanent employees are entitled to as that is a massive cost (especially when it is usually a short term thing and we hope to get our casuals back ASAP"

4. **Flexibility with their labour requirements/spikes/demand.**

Food Award:**383**- To assist with the fluctuations of our workload.**2606**-" Flexibility"

Graphic Arts Award: **1016**-"Flexibility to meet peak demands of the business and to allow for flexibility for the worker to have school holidays off"; **1542**-"peak demand"

Manufacturing Award: **52**- “Good question! It theoretically gives more flexibility, which we often don't make use of”; **53**-The uncertainty of the Manufacturing market, prevents us from keeping a full quota of Full Time Employees

5. **Cover absenteeism, leave**

Food Award**: 88- “**replacement for missing FT employees”; **1305**-“To cover permanent employees annual/persona leave”

Graphic Arts Award: **2046**-“to cover additional work loads or cover for staff on leave”; **5545**-“to cover the temporary full time work available due to employee on leave or an employee leaving the organisation and until a fulltime employee is hired etc.”

Manufacturing Award: 81-Usually to overcome a short term requirement, or vacation or project requirements; **498**-“Only used to fill short term needs such as covering for leave or until a permanent vacancy is filled”; **515**-“to cover for permanent and part-time employees on annual leave, sick leave and long service leave (response to irregular) and “-To cover for maternity leave, which can be more than 12 months - To cover for long term sick leave - To cover for long service leave and extended holidays”(response to regular full-time)

6. **To fill a skill gap on short or long term basis**

Food Award: **361**- To utilize skills sets in different parts of the business”; **5762**- “Some are trained on specific lines to have certain skills”

Graphic Arts Award: **4913-**“to meet production demands have some skills but are unable to work FT hours”

Manufacturing Award: **361**-“To utilize skills sets in different parts of the business”; **515**-“For a specialist technical skill””

7. **Greater control over worker**

Food Award: **2298**-"easy to manage"; **2574**-" seasonal nature of activity, management of staff poor performance"; **5730*-** "…We have had many employees who are fine for the first few months and then become very lazy in their work-the threat of having their hours cut is usually enough to stop this from happening" (emphasis added)

Graphic Arts Award: 1118- "easier

Manufacturing Award: **516-"**Our Industry is such that we do not attract good staff to work on our sorting lines etc. So we hire casuals and if they work out well then only we offer permanent employment**."; 1546**-Who is running my company me or you?

8. Deficit in management skill and capability

Food Award:

Graphic Arts Award: **1046**- We have one staff member that I inherited on arrival and have not been able to push his manager hard enough to make a decision about his employment. We understand that for all intents and purposes he has full rights as a permanent member of staff.

Manufacturing Award: **52**- Good question! It theoretically gives more flexibility, which we often don't make use of; **614**-This would increase administration when "groups" of employees would be on differing terms of employment. Even for casuals with fairly fixed hours, they tend to vary from time to time, and administering leave arrangements when hours may vary for part timers is time consuming"

3.6 The reasons employers engage casual employees on an irregular basis were more often driven by flexibility requirements regarding seasonal or uncertain production than the reasons cited for engaging regular casuals on a full or part-time basis. Regular casuals, particularly part-time, but also full time, were more often reported as being engaged as casuals due to employee preference or for

other reasons not linked to production e.g. avoidance of award obligations or probation. The different employer motivations explain why a significant number of employers reported there would be no problem with converting regular casuals to permanent work after 6 months. See for example respondent **2543** (Food Award) who engaged irregular casuals as *"Staff are required to come in when needed and our business is very unpredictable*". Regular part-time casuals were engaged by this respondent however "*To avoid unnecessary sick days and discipline issues* ". This respondent answered "*None* "to the survey question on impact of the Union's claim.[34]. Respondent **4045** (Food award) engaged casuals on an irregular basis "*To help with unexpected peaks in manufacture* ". The response to the impact question was "*None. If an employee is working full time there is no reason to deny them permanent employment*". Refer also to additional JES extracts at Attachment 'A'.

3.7 The survey responses are support for the Union's contention that the claim for casuals engaged on a regular basis to convert by election or deeming balances the somewhat competing provisions of the modern award objective. Irregular casuals are not caught by the claim and continue to provide flexibility required or sought by employers. Conversion after 6 or 12 months provides a suitable probationary period and is of sufficient duration to assess demand factors. Casuals who choose to remain casual are also excluded. The claim does not create a major disturbance in the context of the reasons employers identify. Avoiding award and NES obligations as a reason for engaging regular casuals in ongoing jobs has been rejected by this Commission as being a valid reason consistent with the role of the safety net.

3.8 A closing note on this query: Survey respondent's regularly conflated "permanent" with "full -time" and their responses as to the impact of the Union's claim was based on having to convert a casual to full-time hours regardless of the hours they were regularly working prior to conversion. This

[34] AIG Survey question: "If casuals were given the right to convert to permanent full-time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation"

point is illustrated by respondent **2746 (**Food) who engaged casual employees on an irregular basis as they *"Need a flexible workforce for due to the seasonal nature of the work. Extra employees are needed during the busy times & also to cover when full time employees are absent*". The respondent engaged both regular full and part-time casuals but did not record their reasons for doing so. Regarding impact ID 2746 responded *"Would most likely have to change casuals every 6 months or look at putting them part time. I think the employer must have some say in the matter as the business circumstances may not warrant another full time employee".* Respondent **644** (Manufacturing Award) responded to the impact question "*Because our work is uncertain, this would impact us greatly as we cannot afford to put everybody on full time employment. Our full time employees would suffer as a consequence*.(See also respondent 361 (Food); 4913, 5445 (Print Award); 1602, 2108 and 3525, 4913, 5433, 5630 (Manufacturing Award).

3.9 There are numerous other examples of employer's response being underpinned by an inaccurate understanding of the claim. Many employers did not realise that conversion is not automatic where the employee chooses to remain casual. Some respondents cited adverse impacts predicated on having to convert an employee against their will. (Refer attachment 'C' hereto, for example respondents 518, 1001, 2049, 2108, 5419)

Issue 4

B.4 What are the positive/negative impacts of casual work on employees?

4.1 Consistent with many real world outcomes a set of facts or occurrences may result in a positive outcome for one person and the same occurrence and facts generate a negative perception for another. The references in the Table

below are to the AMWU submission[35]regarding positive and negative impacts of casual work on employees

Table 5.Material on positive/negative impacts of casual work , AMWU Submission 13 October 2015
Fewer and lesser award and NES – paras. 19,
Experience of being a casual- Chapter 5
Casuals more likely to be award reliant than permanent- paras.258-261
Lower wages, paid at award rate because they are casual – paragraphs 30, 229,328, 357

4.2 There is little question that some members of the workforce see work that is not performed within a permanent employment relationship as a one–sided bargain, with job insecurity affecting their own schedules, the capacity to bargain with employers and the ability to borrow and make plans for the future.[36] Other employees, particularly young and older workers and students prefer casual engagement.

Table 6. Positive/negative Impacts of casual work

Negative	**Positive**
Do not choose to work casual, prefer permanent Sixty per cent of ACTU survey respondents and 79% of the AMWU survey respondents work as a casual because they were not offered any other choice (*refer Paras. 2, 95 and Attachment 5*) The ABS report that a majority of casual employees identify they would prefer annual and/or personal leave entitlements over a loading, even at the cost of reduced income (*para. 96*)	**Prefer casual engagement** 50% of casuals are content with their employment type (*ACTU Survey, para 27*) Older people (aged 55 years or more) (37%) and younger people (aged 15-24 years) (46%) were the least likely to prefer paid leave entitlements over a higher rate of pay.*(ABS 2010; 1370.0)*
Flexibility	Liberty to choose whether or not to work hours offered

[35] AMWU Submission AM2014/96 and 97 ; 13 October, 2015 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-sub-AMWU-121015-amended.pdf

[36] Productivity Commission Report, *Workplace Relations Framework*; Vol 1, p.108

Fear of reprisal for refusing shifts offered (*para. 75-77, 295, 348-349,386, 411-412, 457, 461, Attachment 5, paras 33-36*). Similar proportions of casual (40%)/non casual (43%) report having some say over hours *(ABS Attachment 5, Table 5.5)*	however note that nearly 60% of all employees have no say in start or finish times (*PC report Vol 1, Table 2.1, p98*) Even amongst workers with irregular hours (the workers who it might be assumed had the greatest flexibility and control over when they work) there was little evidence that workers were in control of their flexibility. Only 34% (ACTU Survey, Question 18, n = 438) of workers in this category had control over when they worked, with the remainder having little or no say over which shifts they worked.*(Attachment 5, para 42)*
Earnings The problems associated with casual tenure identified by McLachlan include that "fluctuations in weekly pay can make it difficult for people to meet weekly household expenses and to secure loans and build up superannuation." 52(*Paragraph 33*) Liam Waite's statement details how he was required to obtain a letter from his employer in order to apply for a home loan. It also details the higher costs associated with the loan as a result of his casual employment status*.(para 475*) Proportionally **lower wages** and earnings than permanent employees. More likely to be paid at award rate by virtue of being casual, 29% of respondents in the manufacturing industry said they typically paid casuals at the Award rate. Casuals were even more likely than apprentices to be paid at the award rate in all but small businesses where half of all employees were paid at the award rate. Unlike apprentices, casuals were not identified as moving from the award rate to a higher rate. Research compiled using data from the AWRS study identified that the second most prevalent reason nominated by employers for paying the award rate was that the employee was a casual, regardless of job specification, requirement or skill*(para 30, source FWC*	

<table>
<tr><td>6/2013, AWRS)</td><td></td></tr>
<tr><td>Casuals earn less (inclusive of 25% casual loading) and controlling for age, occupation, education, hours and industry. (refer Table 10, Statement of Professor Withers, Exhibit 136)
<table>
<tr><td>Full Time casual/permanent

Manufacturing Industry
$21/$31.69
50.9%</td><td>Part time casual/permanent

$17.12/26.91
57.18%</td></tr>
<tr><td>Cert III/Cert V

19.92%</td><td>10.17%</td></tr>
<tr><td>Technicians and Trade workers

25.97%</td><td>27.74%</td></tr>
</table></td><td>Receive 25% loading in addition to award ordinary rate- it is arguable however that the 25% does not cover the loss of award and NES entitlements forgone and that the reduced hours, increased length of casual tenure) award rate and incorrect classification are not fully accounted for within loading.</td></tr>
<tr><td>Job satisfaction is lower. The majority of casual workers in the manufacturing industry are men and significant number work full time hours. Wooden and Warren 2004 found that while lower rates of satisfaction occurred among some casual workers, marked differences were limited to males working full-time. (PC report at p.106)

In a meta-analysis of over 70 studies, Wilkin concluded that casual and labour hire workers were less satisfied with their work than permanent employees. Other studies have shown that those who experience lower work satisfaction also experience lower life satisfaction (Para. 357)</td><td>The AWRS data shows no difference between casual and permanent employees overall but there is more dissatisfaction with job security identified by casual employees (para 357)</td></tr>
<tr><td>The lack of leave availability creates particular difficulties for casual employees. This is often a compounding problem for casuals working hours and patterns of work which are indistinguishable from permanent workers, as it creates uncertainty as to the security of their employment when they return, and creates a perception that leave may break the regularity of employment.(, paras 407-413, Exhibit 30-Statement of Mr.Kubli,</td><td></td></tr>
</table>

Attachment 12.6), James Fornah's statement details how as a casual he was denied leave when his mother passed away(*Attachment 12.3*). Refer attachment D *Summary of evidence,* cell 18 Deborah Vallance; Refer Attachment 13 Catalogue of Disadvantage re Cheema v Venture DMG Pty Ltd[2013] FWC 1795 (terminated for taking leave which had employee been permanent he would have been entitled too) 65% of casuals/75% of non casuals can choose when to take leave; 23% of casual can work extra hours for time off compared to 40% non casual(*ABS; Table 5.5, Attachment 5*)	
Reduced access to award and NES entitlements Similar proportions of casual and permanent workers have between 3-10 years service with the same employer. This suggests that many casuals are in fact permanent but denied access to the same entitlements as permanent workers (*para 46)* No paid personal, annual, redundancy; no notice of termination (*paras 384-395)* Fewer award entitlements *(Part 5.2, Attachment 4)*	Legislators have deemed it fair to give regular and systematic casuals the same entitlements as other workers because they are engaged regularly and systematically, like full and part-time employees (in respect to matters such as parental leave and unfair dismissal jurisdiction (*Mr Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic (2010) FWA 2078 @ 67).* Note however that casuals do not fare as well even though they theoretically have the same access with compensation regularly reduced for casual as they are "casual". A poor outcome in light of the tenure of casuals approaching the tenure of permanent employees *(refer Attachment 13 catalogue of disadvantage).* Also note the reasoning in *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridges tg Australia Pty Ltd [2004] SAIRComm 13* where it was found a labour hire agency had a valid reason to dismiss an employee of 4 years service due to "the fact that [the respondent] no longer sought that the applicant be supplied" following a period of leave for injury. This effectively denies unfair dismissal in circumstances where the labour hire employer could be said to be simply responding to a request that the individual worker no longer be provided. *(para 450)* Also note HREOC survey findings that casuals are far more likely than permanent employees to leave work prior to birth and not return following pregnancy due

	to discrimination.(*para.43)*
Job insecurity, lack of "voice" at the workplace. " Access is not limited to the prescribed inclusion or exclusion to an entitlement, but access predicated on security of employment, employee voice and concerns regarding employer response. 7 Eleven is a current example of what happens to vulnerable workers fearful of claiming and/or unaware of their rights *(para 75)* Member B had worked as a casual for 4 years and stated that he had been given no consideration for permanent work and that he was too fearful to ask. "No one gets the sack in the industry, they just get starved out of the job" (*para 455*) "Another woman then said, "Oh talk to the employer? That is another way of us getting out the door."(*para 461*) JES respondent 5730*- "…We have had many employees who are fine for the first few months and then become very lazy in their work-the threat of having their hours cut is usually enough to stop this from happening*"(Attachment 11g; AIG Submission 260216)*	
Poorer work, health and safety outcomes . *(Para 462-464 and witness statements 12.9 and expert witness 12.13*)	
Receive Less Training The AWRS First Findings report detailed that the majority of those who had taken part in training were permanent (85%) with only 9% of casuals identifying they had undertaken training *(para.39)* "Part of the problem of insecure work is the short-term focus of employers while employees must find ways of growing their knowledge and skills. This is in part an issue of saving for future investment or in anticipation of risks" *(Statement of Brian Howe, Exhibit ?)* Many casuals (ACTU, 14%; AMWU, 26%	

refer Attachment 5) believe that they do not get access to promotions or reclassification due to their employment as a casual employee. Casual manufacturing workers had even lower levels of training (38%), significantly less than permanent workers. The AWRS data suggests that the higher rate of concern expressed in the AMWU survey around training is justified. *(para 107)*	

4.3 By any reasonable analysis the balance of advantage lies in permanent employment. This is why conversion provisions and limitations on long term casual engagement appear in modern awards. The decisions in the *2000 Metals Casual Case, NSW Secure Employment Test Case, AMWU v SPC Ardmona [2011] FWA 4405* and *AMWU v Fonterra Brands (Australia) Pty Ltd [2013] FWC 1057* recognise the "higher value attaching to full or part-time work as opposed to casual employment"[37] . Not because of a theoretical or unsupported ideological persuasion that permanent employment is better but because "employees with less secure employment after a qualifying period of service in that capacity can improve their status"[38].

4.4 Reviewing the positive and negative aspects of casual engagement against s.134(1)supports the grant of claim.

Issue 5

B.5. Does the evidence demonstrate any change over time in the proportion of casual employees engaged including via labour hire businesses?

5.1 The AMWU's submission at *Section 4.2-* Demographics and additional submission of 22 December, 2015 provide a comprehensive discussion of this issue. The evidence demonstrates that casuals are around 20% of all employed persons, including owner managers of incorporated (OMIEs) and

[37] *Fonterra* @ 43
[38] *Ardmona* @ 21

unincorporated (OMUEs) enterprises. Employers often use the "employed person" cohort rather than "employees"[39] to diminish the incidence of casual employment. For the purpose of the matter before the Commission it is more appropriate to identify the proportion of casuals from the cohort of all employees, excluding OMIE and OMUEs. It is nonsense to argue that OMIEs and OMUEs will ask themselves, or be deemed to convert from casual to permanent and they should therefore be excluded.

5.2 From the latest available statistics[40] at August 2014 employees without leave in main job comprise 24.1% of employees**.** Casuals in the manufacturing industry comprise 18.9% of industry employment[41] a significant increase from the 14.9% at the time conversion was introduced into the pre modern manufacturing award.

5.3 Casual employment as a proportion of all employees grew steadily peaking at above 25% (31.1% of females, 19.9% of males) in 2000.[42]. There was a steady decline from 2000 through to 2010-11 with a blip upwards during the GFC. The decline in the proportion of casual employees was led by the decrease in the number of female casuals, male casual employees increased but at a lower rate than the decrease in female casuals. The steady decline flattened from 2010/11-2013 with a gradual increase from 2014-2015. In 2013 the proportion of casual employees was 23.9% down from the 2000 levels with women's share decreasing to 26.7% from the 31.1% high and the proportion of male casuals increasing 1.3% from the 2000 share to 21.2%.

5.4 Approaching 1 in 4, (24.1%) casual employees comprise a significant share however for the purpose of the case before the Commission the incidence of casuals working regularly for longer than 6 months is the relevant point.

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[39] Refer AIG submission of 29 February, 2016 @ 38, Statement of Withers

[40] AMWU additional submission 22 December 2015 referencing ABS, Characteristics of Employment, 6333.0, August 2014, Table 3, para 7)
.https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-sub-AMWU-221215.pdf

[41] AMWU additional submission, Ibid, para 6.

[42] PC Report, Vol 1, Table 2.8, p.108

Professor Markey's review of HILDA data identified that 60 per cent of all (self-identified) casuals both have regular shifts and have worked for their current employer for at least 6 months. This equates to over 1.3 million Australian workers. Of this casual cohort as many as 28 per cent were regular casuals who had worked for their employer for at least 3 years, equating to over 600,000 workers[43].

The ABS Characteristics of Employment Survey *(C of E*) finds that 59% of casual employees had been with their employers for longer than 1 year, compared with 60% in the ACTU survey. (*para. 4, AMWU submission 22 December 2015)*

5.5 The growth of casuals within manufacturing is seen most significantly within the food, beverage and tobacco manufacturing sub-sector where the proportion of casual employees rose sharply from 21.8% in 2000 to 31.3% in 2013. Increases were also seen in the print, publishing and recorded media and machinery and equipment manufacturing sub sectors.[44]

5.6 There is no evidence that the proportion of casual employees continues to decline or remain steady, in fact the opposite is observed in the industries within the coverage of the modern awards where the AMWU's claim is proposed.

LABOUR HIRE

5.7 The AMWU's submission of 13 October *(section 5.2*) and 22 December, 2015 (*paras.12-18*) explores the recent data on labour hire. Between 1990 and 1995, the combined share of total employment of the four industries that are more likely to use labour hire (manufacturing, wholesale trade, transport and storage, finance and insurance) declined from 40 per cent to 31 per cent (Morehead et al. 1997). This explains why changes in the employment structure of the economy over that period slowed the growth in the

[43] Statement of Professor Markey, Exhibit ?, @ 2.2, p.14
[44] AMWU submission , para 263, p.117

incidence of labour hire. Econometric modelling indicates that changes in industry structure have unambiguously lowered the proportion of workplaces using labour hire and the economy-wide rate of labour hire use. [45]

5.8 The *ABS C of E Report*[46] indicates that there are currently 124,000 persons in Australia that are currently being paid by a labour hire firm or employment agency. This represents 1% of employed persons in Australia.

There is no data on the proportion of these labour hire workers that are employed on a casual basis, though anecdotal evidence would suggest that it would be the majority. The most common occupation among labour hire workers is labourer (26,600) followed by technical and trades workers (23,300).

5.9 The manufacturing industry is the single largest user of labour hire workers, (23,507). This represents 2.5% of the employed persons in the manufacturing industry. This data, produced by the ABS for the first time, highlights just how relatively insignificant the labour hire industry is, when compared with casual employment in Australia.

5.10 The current evidence is that casuals comprise nearly 1 in 4 Australian workers. The proportion of labour hire employees ebbs and flows with the share of the industries in which they are predominantly engaged. There is no evidence that conversion clauses caused an increase in the number of casual employees following the introduction of conversion clauses in awards from 1998.

5.11 Despite the introduction from 1998 of conversion clauses in the Graphic Arts, Manufacturing Award and other Awards of the Commission, casualisation of the Australian workforce continued to increase from 2000 to 2004. Award 'election' based conversion clauses had little impact with the 2000 cohort of casuals aged 15-19 more likely to remain casual as they age than the 1992

[45] The Growth of Labour Hire Employment in Australia Productivity Commission Staff Working Paper, February 2005
[46] AMWU Additional Submission 22 December, 2015

and 1998 cohort. Since 2000 there has been sporadic examination regarding 'permanent casuals. From 2000 to the mid 2000's the issue of permanent casualisation occupied some academic interest with research academics supporting an upgrading of awards to include deemed permanent provisions after identified periods (Refer para.51 of AMWU 13 October submission)

SECTION C Casual conversion- *General concepts*

Issue 6

Is it appropriate to establish a model casual conversion clause for all modern awards?

6.1 Generally it is appropriate to have a model clause for all modern awards, which, in the way of many award "test cases" may be amended where a party is able to present a case for fine-tuning supported by industry or other specific circumstances.

6.2 Existing modern award conversion clauses contain differences, notably as to the period prior to when an election to convert can be made. The conversion provision[47] in the Horse and Greyhound Training Award 2010 provides a right for casual employees to elect to convert with no ability for employer refusal whilst other modern awards enable an employer to consent or refuse an election to convert. Current conversion provisions vary and have all, prima facie, been determined to meet the modern award objective. The Commission recognises there *" may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective*".[48]

[47] Clause 10.4(d) https://www.fwc.gov.au/documents/documents/modern_awards/award/MA000008/default.htm

[48] [2014] FWCFB 1788 at [34].

6.3 The ACTU and AMWU have sought different conversion processes based on a number of factors including but not limited to:

- industry circumstances-including patterns of production, casual/permanent mix, part-time/full-time mix, tenure of casual engagement;
- existing industry standard of conversion provisions;
- the experience of casuals seeking to convert under current provisions; and
- previous Commission consideration of casual conversion provisions in the subject award.

6.4 Professor Withers[49] contrasts spikes in demand throughout the day characteristic of the service industries with the generally 9-5/ 5 day week of industries such as manufacturing. There are industry circumstances which may support the fine tuning of a model clause.

6.5 The ability to vary a model clause should not be seen as an opportunity to re-run a case based on industry circumstances against the principle of conversion by opting in (ACTU) or opting out (AMWU). Any variation to a model term should be limited to a fine tuning of the elements determined, for example the period prior to conversion and any facilitative provision extending that period.

6.6 The Commission's statement of December 2014 directed that the casual case common matter proceedings were the appropriate venue for material and evidence to be brought forward regarding the common claims and award specific issues regarding casual and part-time award provisions. The AIG provided little or no evidence and certainly no probative evidence directed at

[49] Exhibit 136 @ 102

the Union's proposals in the context of the industry covered by the Manufacturing, Graphic Arts and Food Awards.

6.7 The AIG submission[50] in reply to the Union's applications stated:

- it would be inappropriate to formulate a common claim[51]; and
- its submission did not deal with all award-specific claims in which Ai Group has an interest and submissions on the remaining award-specific claims would be filed as soon as possible[52].

6.8 Parties have had the opportunity to run their case in respect of *'the modern award(s) in which they have an interest'* for both common and award specific matters. It is not open to parties to subsequently re-run the case against a standard determined by the Commission. This is consistent with the Commission's decision in the recent minimum wage case where the decision to level up the casual loading was made inter alia :

> [635] "….to ensure that the casual employees covered by this modern award are treated equitably, relative to other casual employees"[53].

6.9 The above reasoning has equal force applied to a model clause developed during the current proceedings particularly as parties have had the opportunity during proceedings to identify and argue industry circumstances.

Issue 7

Should the establishment of any model clause be subject to the right to apply for different provisions or an exemption in a specific modern award based on circumstances peculiar to that modern award?

7.1 See above response at 6.

[50] AIG reply Submission, 26 February 2016
[51] Ibid @ 5
[52] Ibid @ 9
[53] [2016] FWCFB 3500

Issue 8

Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?

8.1 The current and claimed provisions are silent on the specific "job" to which the converted contract is to be applied. The job may be the same or it may be different as long as it is consistent with the skills and training of the employee and consistent with the work the casual employee was engaged to perform. For example it could be seen as a constructive dismissal to convert a tradesperson to a cleaning job. Prima facie the employee would continue in the same job they were in prior to conversion.

8.2 The decisions in *Fonterra* and *Ardmona* identify that a different job may be provided as a consequence of conversion:

- There need not be an existing vacant full time job for the employee to move into*(Fonterra @ 43)*;
- A change in the mix of full and part time may be required *(Ardmona @ 24);*
- Work may require redistribution amongst resultant permanent employees *(Ardmona @ 25);*
- Training may be required to support conversion *(Ardmona @ 26*

8.3 The award provisions in respect of casual employment including casual conversion, tend to proceed on the notion that the employee is doing the same "job" both before and after conversion. However, we do not see it as necessary or desirable to specify this. Were the clause to specify that it was a casual employee's continuous engagement in a particular casual job which gave rise to the right to convert to a permanent version of that job, that may invite the mischief of reclassifying casual employees into new "jobs" so as to subvert the operation of the clause.

8.4 Provided that the conversion clause does not operate to interrupt an employee's continuous service, then the issue of whether the "job" remains the same before and after conversion is better left unsaid. The conversion clause operates in the context of a continuing employment relationship both before and after conversion.

Issue 9

Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which currently exists for that casual employee?

9.1 No.

9.2 Attachment 3[54] to AMWU submission of 13 October, 2015 contains a current and claimed Manufacturing Award conversion clause comparison. Current casual conversion provisions at Clause 14.4 provide for eligible casuals to:

- have their contract of employment converted to part-time or full time employment (14.4(a). The right for eligible casuals to have their contract of employment converted is retained at Clause 14.4(a) of proposed variation;

- discuss with their employer whether they will convert to part-time or full time and if converting to part-time the number and pattern of hours as per the part-time work provisions (14.4(f) whilst retaining the right to the same number and pattern of hours unless otherwise agreed (14.4(g)). These provisions are retained in the proposed variation respectively at 14.4(f) and (c).

9.3 The current and proposed provisions encourage and facilitate the parties at the enterprise to determine the arrangements that best suit the employee

[54] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-AMWU-Attach3-131015.pdf

and employer needs. There is considerable flexibility within the Manufacturing, Food, Graphic Arts and Vehicle Industry Awards including individual arrangements, agreements to make and vary part-time hours, hours of work, flexible working arrangements, TOIL, substitute RDOs and rostering of hours on an averaging basis for both part and full-time employees. The hours and pattern of work arrangements discussed at conversion time, as well as the ongoing engagement of the employee occurs, within the framework of the award as a whole.

9.4 The only "requirement" inherent in the current and proposed provisions is that the number and pattern of hours cannot be reduced or altered in the absence of agreement by the employee. The employer evidence is that casuals are being converted where they request[55]. There is no employer evidence that the current provisions regarding hours and patterns of work have created any problems.

9.5 There is no current or claimed requirement for the employer to convert a casual employee to a permanent position with a pattern of hours which is different to that existing for that casual employee prior to conversion. One would expect however that the required discussions would facilitate a review of the current hours and work patterns to assess whether they meet mutual objectives.

Issue 10

Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part-time work under the relevant award?

10.1 Yes. Current conversion provisions are not effective for the reasons identified in our submission of 13 October, 2015. Our evidence is of increasing tenure for casual engagement and of casuals being strung along for extended periods with a promise of permanent work. Some employers find it difficult

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to accept conversion clauses. Some employers provide reasons which do not pass the 'unreasonable 'test imbedded in conversion clauses. The vulnerable nature of casual engagement makes the current election model unsuitable .

Table 5.Material supporting the Union's claim for a provision requiring employers to convert a casual to permanent on their election (opt in or out) is contained in the AMWU Submission 13 October 2015.
Number of casuals who elect, their reasons for electing, for not electing and employer response– Attachment 5,paras. 30-39, 3014-305
Casual tenure demonstrates increasing incidence of 'permanent casual'- para. 80. Table 1; paras. 161, 164, 288, 291, 305,316,-319 The tenure of casuals is approaching that of permanent employees-para 316, Attachment 5, Graph A5.52, Attachment 5, paras 3-5,
Policy position behind inclusion of conversion provisions was to maintain integrity of safety net and discourage trend of 'permanent casual'- para 318
Current definition inadequate to provide effective safety net- paras. 330-333
Right to request is an inappropriate method to implement policy position behind conversion provisions- paras. 76-81, 387
Witness evidence in Attachment 12

Commission principles regarding conversion clauses

10.2 There have been few determinations regarding award conversion provisions. Many casuals do not request due to fear of reprisal. This is a realistic perception given the number of JES respondents asserting they would sack a casual prior to the conversion period being reached. Whilst this response does not establish what an employer would actually do, it is indicative of the power relationship at the workplace.

10.3 In addition to the principles identified in the *2000 Metals Casual Case and NSW Secure Employment Test case*, the Commission's consideration of the concepts inherent in award conversion clauses can be derived from the

statements and recommendations of Commissioner Hampton regarding *Christie Tea*[56] , Vice President Watson in *Ardmona*[57] and Commissioner Gregory in *Fonterra*.[58].

10.4 The decisions support the current ability for an employer to refuse conversion being replaced by a requirement to convert on employee election. The decisions identify the unfairness accruing to casual employees under the current model. In reviewing the conversion clause in the Food and Tobacco Manufacturing Award 2010 (the Food Award) Commissioner Hampton in *Christie Tea* found that :

- the purpose and intent of the provision should be considered in light of the AIRC decision which led to the clause being applied within the manufacturing sector more broadly (@ 8);
- That is, it is the policy of modern award to encourage and facilitate the conversion of eligible casuals to full and part-time positions;
- the fact that the employees concerned have several years of regular and systematic employment, and the fact that the nature of the supply contracts is not in itself unusual, Christie would need to demonstrate something well beyond inconvenience and the need to introduce some additional administrative structure in order to justify its position (@ 15)[59];

10.5 At a further report back in *Christie Tea* the Commission observed[60]:

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[56] *Christie Tea* [2010] FWA 10121 https://www.fwc.gov.au/documents/decisionssigned/html/2010fwa10121.htm

[57] *Ardmona* [2011] FWA 4404 https://www.fwc.gov.au/documents/decisionssigned/html/2011fwa4405.htm

[58] *Fonterra* [2013] FWC 1057 https://www.fwc.gov.au/documents/decisionssigned/html/2013fwc1057.htm

[59] Christie Tea denied the request of 4 long term casuals to convert

[60] [2011] FWA 905 https://www.fwc.gov.au/documents/decisionssigned/html/2011fwa905.htm

- I would observe that there remains some potential to advance option 3, perhaps on the basis that an Individual Flexibility Agreement as contemplated by clause 7 Award Flexibility of the modern award could provide some mutual flexibility on the operation of part-time hours so as to facilitate some or all of the conversions.[61];

10.6 The results for the casuals requesting conversion at Christie Tea was that their employer refused to convert them. Mr. Hynes was 'detached' in 2014 after 7 years full-time engagement. Other casuals refused conversion left after 10 years. Some were given flowers but no redundancy.

10.7 *Christie Tea* is a good example of seasonal work or unknown future supply contracts being unreasonable reasons for denying conversion. Many JES respondents stated in their impact response that redundancies may be required later down the track if casuals were converted. Many stated that that ongoing work cannot be guaranteed. This may be correct as at Christie Tea but is it fair that something which 'might' happen, or happens decades down the track is used to deny casuals the right to convert and gain access to redundancy and other entitlements available to permanent employees. (Refer to the uncontested evidence at Exhibit 91, statement of Simon Hynes and Exhibit 35, statement of Peter Bauer)

10.8 Regarding the concepts inherent in award conversion provisions regarding conversion, his Honour Vice President Watson determined in *Ardmona* that:

- The concept involved is that employees with less secure and regular employment than full-time and part-time employees who serve a qualifying period of employment can elect to convert the status of their employment to full-time or part-time status subject to the consent of the employer. <u>The wording of the clause connotes more than a right to request a conversion. It is phrased</u>

[61] Ibid @ 9

as an election of the employee which must be actioned unless the employer has reasonable grounds to refuse the request (@ 19, emphasis added);

- It is clear that the natural consequence of the operation of the clause is that conversions will result in a change in the mix of what the Agreement describes as permanent employees (full-time and part-time) and seasonal employees. The same is true for the operation of the clause regarding casual employees. The underlying concept is that employees with less secure employment after a qualifying period of service in that capacity can improve their status unless the business cannot sustain that outcome or there is some other reasonable reason to refuse an election to convert. In my view it is not open to SPCA, having agreed to the creation of the right, to interpret and apply the clause in a way that fundamentally undermines that right and the purpose of the clause (@21, emphasis added);

- In my view the notion of a downturn in business affecting the ability to convert a seasonal employee only has substance if it is demonstrated that there is likely to be insufficient work for the resultant number of permanent employees. The ongoing use of seasonal employees in some numbers undermines SPCA's reliance on this reason.(@ 24);

- In my view something more must be established than the change would disturb management's desired labour mix. Adverse operational or other consequences must be demonstrated. SPCA has not done so.(@ 24);

- There is no doubt that there has been a decline in labour requirements and that this is expected to continue…… However in order to qualify as a reasonable reason for refusing an election for

conversion it must be demonstrated that the impact of the reduction means that the existing level of permanent employees is at or close to the maximum sustainable number.(@ 25)

- The final reason concerns the number of jobs performed by Ms Nash over the past year and the suggestion that in some instances these are unlikely to continue. SPCA has not explained how Ms Nash, with her extensive experience in the operation could not be trained in the new technology along with other employees in the event that no work is available consistent with her current skills (@ 26).

10.9 *Ardmona* is support for employers to be required to convert electing casuals. Current conversion clauses are imbued by *Ardmona* with a weight and expectation routinely disregarded by employers.

10.10 In *Fonterra* Commissioner Gregory was considered "What does casual conversion require of the employer and the employees"[62]. In that matter the conversion provisions of the EBA were consistent[63] with those of the Food Award with the exception of a 9 (EBA) as opposed to 6 months (Award) qualifying period of regular engagement. The Commissioner determined:

- An employee who has been engaged for a sequence of periods of employment during a period of nine months shall have the right to elect to have his/her contract of employment converted to full or part-time. Several things can be said about this provision. Firstly, it does not require a consistent pattern of work during the entire nine-month period, but simply a sequence of engagements during that period. These can obviously fluctuate in terms of the numbers of hours worked from time to time and may involve some periods when no work is performed, however, the intent is

[62] Ibid *Fonterra* @ 36
[63] Ibid @ 37

that an ongoing relationship can be demonstrated over that nine-month period (dot point 2@ 38)

- However, an employee who has not been notified, as required, might remain unaware of his/her right to elect and so not act on that entitlement. The requirements of the employer to notify was clearly intended to ensure an employee would not be deprived in this way (@ dot point 4 , 38);

- The casual conversion provisions also impliedly recognise the higher value attaching to full or part-time work as opposed to casual employment, and provide that casuals should be able to elect to convert, with any such election not being unreasonably refused (@ 43);

- In those circumstances an election to convert can be made and the employer should not unreasonably refuse. This does not require, as a precondition, that there be an existing vacant full-time position. It instead requires the employer to consider, consistent with the preference accorded to full or part-time work, whether that casual employee can be converted in response to his/her election (@ 43)

10.11 The JES identifies that employers cite reasons for not converting which are inconsistent with the principles and requirements inherent in current conversion clauses (refer section 11 below). Our submission data on tenure identifies that the 'flexibility' and the 'unknown demand' cited by employers is a blunt response inconsistent with the ongoing work they provide to their regular casuals.

Issue 11

What would be the consequences for employers if "regular" casuals had an absolute right to convert to non-casual employment (after 6 or after 12 months)?

1.30 According to the employers' submissions it would be catastrophic however a more nuanced and reasoned review of the evidence and submission on merit identifies that the impact on employers is reasonably balanced with the benefit to employees and the economy of improving security and earnings of casual employees.

1.31 The Union's submission of 13 October, 2015 reviews the impact of our claim against the criteria found at s.134(1)(f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.* Our submission at paragraphs 200-211 concludes that balanced against the impacts of not providing greater security for casuals seeking it and the benefits flowing from conversion, positive impact's out weigh any perceived or projected negatives.

11.3 The expert evidence of the Union's economist is that if employers are engaging casuals for flexibility reasons "as a compliment to permanent staff due to their greater flexibility, then no significant negative cost impacts from the conversion of 'permanent' casual staff to permanent staff can occur. If such impacts did occur, it would be direct evidence that employers are retaining casual employees on a 'permanent' basis to lower costs (once entitlements are considered) rather than to meet fluctuating labour demand or other demands for flexibility"[64] The evidence of several employers indicates that engaging casuals is not driven by flexibility requirements but as part of a business model to achieve financial and commercial results for shareholders. (Kaylene Gayle Neill , PN2924 whose business was almost exclusively made up of casual employees).

[64] AMWU Submission 13 October, 2015 @ 328

11.4 According to the employers' submissions casuals either do not elect to convert[65] or alternatively employers agree to conversion when requested[66] On this basis the consequences for employers are minimal as casuals will not access their "absolute right" and the majority of employers already grant requests to convert.

11.5 Employer evidence in the NSW Secure Employment Test case was that conversion could be managed and included:

- "Mr Phillip Lloyd, Vice President Human Resources of ABB Australia Ltd, who deposed that in most circumstances the claim would have minimal effect, stating that casuals are originally employed to fill a short term need and, should they be employed for longer than six months, the reality is that the manager should be changing the workload or converting the role to permanent.

- Ms Julie Owen, Employee Relations Manager of the Australian Retailers Association, who conceded that there was no risk associated with converting a casual working 20 hours per week to permanent part-time working the same number of hours.

- Mr Simon Billing, National Industry Manager of the Australian Mines and Metals Association, who deposed that casual conversion would have minimal impact on the mining industry".[67]

11.6 The Joint Employer Survey (JES) asked respondents:

[65] Witness Statement – Recruitment and Consulting Services Australia – Jane Baremans [9]; Witness Statement – Recruitment and Consulting Services Australia – Adele Last [14]; and Consulting Services Australia – 12 October 2015 Submission – para [51]; Refer evidence of Robert Blanche, Transcript PN733; Aig Submission 26 February, para 161

[66] Witness Statement – Recruitment and Consulting Services Australia – Adele Last [16]; Aig Submission 26 February, 2016

[67] Ibid at 124

> "If casuals were given the right to convert to permanent fulltime or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation? "[68].

Extracts from those responses are attached and marked "A"

11.7 The responses in many cases are observed to show a lack of understanding as to the question being asked and by corollary the Union's claim

The JES query clearly identifies that conversion is to full or part-time however the responses often conflate conversion with full-time employment as referred above at 3.8.

11.8 Mr. Goodsell from the AIGroup also misunderstood the Union's claim conflating conversion to permanent work with full-time work stating that:

> "That analysis assumes that people only - people will always be employed and they will only be employed full time or casual" (reference PN992 of transcript, 14 March 2016).

Mr Goodsell understood the impact of the AMWU's claim as requiring employers to convert eligible casuals to full-time work. This is clearly not the case.

11.9 Many employers identify that there would be "none", nil" or "little impact" with those using regular casual employment as a probation period often falling into this category. Some employers thought the award already required this or alternatively may have been covered by an EBA where eligible casuals had the right to convert. Many respondents fall into the "no impact" category as the casuals they employed preferred casual engagement and therefore were understood to elect not to be deemed permanent. (Refer Attachment 'A')

[68] See Attachment M to AIG Submission of 29.02.16

11.10 Some employers identified there would be an administrative cost however it must be recalled that the decisions of Gregory, C, Hampton C, Watson VP and the NSW Secure Employment Full Bench[69] referred to above determined that additional administrative tasks do not detract from a right to convert. Employers are already required to keep track of a casual's service for the existing conversion entitlements, parental leave, unfair dismissal, long service leave. The evidence demonstrates there is minimal administrative cost to managing conversion arrangements. The AMWU reviewed the employer evidence provided on the impact of administering casual conversion and found amongst other matters that 63% of employer respondents had never had a casual convert, only 8 RCSA members responded identifying conversion was not an issue for RCSA members. And witness evidence from Jan Baremans suggests that the process of notifying casual employees takes 15 minutes per employee (paragraph 11)[70]. Any impact on administrative requirements is not in our submission a persuasive argument to reject our claim when balanced against fairness to employees and maintaining the integrity of the safety net.

11.11 A significant number of responses indicated that they thought the claim would have a negative impact as they employed casuals to avoid award and NES entitlements accruing to permanent employees. Engaging casuals for this reason is inconsistent with the modern award objective. The policy position behind conversion is that engaging casuals on a permanent basis undermines the integrity of the safety net.[71] Respondent 5750 described the impact as:

> "more psychological than anything i.e. long service leave provisions must now be catered for because we provided our employees with a

[69] NSW Secure Employment Test Case, Op. Cit.at 95 (29)

[70] AMWU submission in reply 22 February, 2016, para. 2.2- https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-sub-AMWU-22022016.pdf

[71] See 2000 Metals casual case @ 106 and NSW Secure Employment case @ 243

job". (Refer Attachment 'B' hereto- JES responses identifiying that motivation for engaging casuals was to avoid award or NES obligations.)

11.12 Some respondents identified that they could access other flexibilities. For example fixed term (614, 1144, 2046) or TOIL. Respondent 4412 responded that "Currently FT employees convert overtime to time in lieu and this is used for extended leave during the off season". The same employer however believed this could not be done for converting casuals.

Any impact can be ameliorated by existing flexibilities and/or accessing enterprise bargaining arrangements and employer and union parties would be communicating relevant information to their members regarding such arrangements.

11.13 Some employers identified that they would not employ any more casuals and the impact would be have a huge effect (ID .981). This respondent, and some others identifiying a big impact did not engage regular casuals. Some respondents describing an impact engaged neither irregular nor regular casuals and these responses could be considered as "overstated" or irrelevant (refer for example ID 901, 2061, 2605, 3531). Some respondents described the impact as an objection to any, or any more legislation, interfering with their right to run their business and control their employees (refer ID 1044) who engaged 100% of their casuals on a full-time basis. As Watson, VP observed[72], employer reliance on claims that flexibility is required (casuals) due to seasonal factors or unknown/lost orders is diminished where the employer continues to engage a significant cohort of "flexible" employees. The evidence of Mr. Skladzien[73] is that the likely response for employers facing a down turn is not to terminate their "converted" casuals but to reduce the number of non converted casuals.

11.14 Many respondents stated that they would have to make people redundant if the work ran out or that they did not know how long the work would

[72] Op. Cit. @ 24
[73] Transcript PM11307 - PN11308, Attachments D, row 5l

continue. The statements were often linked to "seasonality" of work, or "fluctuating" demand. These statements are equally applicable to any permanent employee engaged by the respondent. The language of the responses was mostly hypothetical: "if" demand changed. In many cases this reason is being used to engage casuals for years on the basis orders "might" reduce. In effect this impact is a less explicit way of stating that a reason for engaging casuals is to avoid award and/or NES obligations. NES redundancy provisions do not operate before the completion of one year of service. Regular casual engagement for a year or more is prima facie evidence that seasonal work or unknown demand is not a barrier to permanent engagement. The evidence on casual tenure and evidence from Vinh Thi Yuen and Simon Hynes (casual for 7 years and refused conversion) for example makes it clear that casual engagements often extend well beyond 12 months, and in some cases, beyond periods of five or six years[74]. Attachment B identifies respondents who engaged casual to avoid award and NES obligations.

11.15 Some respondents, provided clearly considered responses to the impact query. For example, respondent ID515 who described the impact as:

> "Longer term the company would be over-resourced and would need to do redundancies. This would have a financial impact on the business and employee morale" (Attachment A, respondent ID 515).

11.16 The impact described could equally apply "longer term" to permanent employees in the absence of any conversion entitlements. Longer term anything could happen, orders could increase. Reviewing the reasons given by this respondent enables their 'impact' statement to be unpacked. Respondent 515 engaged 67% of their regular casuals on a full-time basis for:

[74] Witness Statement – Vinh Thi Yuen – Para [14]. Witness statement Simon Hynes, paras 3 and 12 , Exhibit 91

- Flexibility
- To cover for peak periods, e.g. to deliver customer orders over several months. Once the order has been delivered, the business can not longer support the additional resource.
- To cover for maternity leave, which can be more than 12 months –
- To cover for long term sick leave - To cover for long service leave and extended holidays

11.17 The flexibility requirements identified above can be managed by the existing award flexibilities, bargaining or fixed term contracts covering the leave matters identified. Peak periods if they have a life of 6-12 months are not within the scope of what is reasonably known as "peak". The respondent identifies that "peak" is "over several months" and therefore would not establish eligibility. Known periods of maternity leave can be managed by fixed term employment, the majority of other leave is less than 6 months and casuals engaged to fill the gap would not become eligible.

11.18 Respondent 515 engaged 33% of their regular casuals on a part-time basis for similar reasons as those cited for engaging full-time and irregular casuals e.g. to replace permanent employees on leave; for a specialist technical skill; university students preferring casual work whilst developing technical skill; work demands. These motivations are managed by existing award flexibilities or bargaining. The preference of student workers for casual work indicates they will not elect to be deemed permanent.

11.19 There are various reasons employers engage casuals on a regular basis. The Union has no wish to make life hard for employers or add to their burden however choosing a business model based on keeping labour fluid and/or avoiding award and NES responsibilities cannot be seen as a more

worthy or weighty consideration under s.134 than the fairness to be accorded to employees in managing their work and outside work lives.

11.20 Weighing the impact on employers in light of significant employer evidence that the impact will be 'nil' or can be managed supports the Union's claims. The impact statements provided by many respondents often referred to seasonal factors or uncertain demand. Precedent is that under the current conversion provisions a refusal to convert is only reasonable where real adverse operational or other consequences can be demonstrated *(Ardmona*); the nature of supply contracts is not unusual and does not constitute a valid reason in itself (*Christie Tea*); something well beyond inconvenience and the need to introduce some additional administrative structure do not constitute grounds for reasonable refusal (*Christie Tea)*; the notion of a downturn in business affecting the ability to convert an employee only has substance if it is demonstrated that there is likely to be insufficient work for the resultant number of permanent employees *(Ardmona).*

11.21 At anyone workplace not all casuals will wish to convert, not all casuals will be eligible and not all casuals will be eligible at the same time. The AMWU appreciates that our claim creates additional requirements however with agility, use of current flexibilities improved planning and longer term focus coupled with productivity benefits accruing from increased fairness, trust and good will the net result of the Union's proposal benefits both employers and employees.

Issue 12

Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the Fair Work Act 2009 and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?

12.1 The evidence is that the majority of casuals (refer 1.44) work regular hours so it should not be difficult for employees to understand when their obligation arises. There is no significant evidence that employers find it problematic determining when the entitlement arises.

12.2 Employers are required on engagement to inform casuals of the likely hours (Clause 14.3 Manufacturing Award). This provides further certainty for the employer as they have had to use their management planning skills to identify the work on which casual is to be engaged. When the modern award was made this provision was seen by the Full bench as supporting clarity around the conversion process:

> **[183]** The casual employment clause in the exposure draft of the Manufacturing award has been supplemented by requiring an employer engaging a casual employee to advise the employee of such matters as their type of employment and classification level. The supplementation was requested by the MTFU. The supplementation is relevant to the application of the casual conversion clause and a similar clause was previously agreed by AiGroup[75].

12.3 The deeming approach sought by the AMWU (opt and) provides further certainty as employers know that an eligible casual who wishes to convert will be required to be engaged as permanent at 6 months.

12.4 Modern award dispute resolution clauses, made under section 146, typically provide for consent arbitration (see for example sub-clause 10.3 of the *Manufacturing Award*). In the scenario that a casual conversion clause is varied to provide for automatic operation, rather than a mere right to request, a dispute in respect of casual conversion could either utilise existing dispute resolution clauses in relevant awards, or conceivably have a dispute resolution mechanism within the casual conversion clause itself.

[75] [2008] AIRCFB 1000

12.5 Employers disputing eligibility under an election to, or deemed conversion, are entitled to have that matter resolved in a court of competent jurisdiction. This is the process an award reliant employee must go down now in pursuing their right to request conversion in the face of employer refusal. Reversing the onus is appropriate given the unequal power arrangements and evidence going to worker insecurity.in the workplace.

12.6 The current and proposed criteria for conversion under the Awards the AMWU has proposed a deeming clause is that the employee is not an ' irregular' casual as defined and has been engaged by their employer for a sequence of periods under the award during a period of 6 months.

12.7 The AMWU is not proposing additional tests or conversion criteria prior to deeming occurring and can see little utility in doing so as the effluxion of time and engagement as a casual on a regular basis are the only conditions to be satisfied. The issue of what is "regular" is discussed below at 17.

Issue 13

Would changes to the part-time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part-time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?

13.1 The AMWU's application was made in recognition that a significant proportion of casuals engaged on a regular basis preferred more consistent hours and incomes. Importing into part-time work provisions casual like vagaries regarding hours and income does not satisfy the issues raised by the AMWU in support of our proposal. The AMWU's submission of 13 October, 2013 included a discussion of matters relevant to this query. In particular our submission reviewed material identifying that an employee's need for flexible working arrangements is not the same as a need for an insecure job with

unknown hours and income. The table below identifies where the issue is addressed in our submission.

Table 6.Material on query regarding making part-time provisions more flexible, AMWU Submission 13 October 2015,
Majority of employees without leave prefer leave over loading– paras. 95-97, 104,
The majority of manufacturing industry employees are full-time. Part-time workers are 15% (122,000) of manufacturing Industry employees, (31% across all industries). Of these workers 54% are engaged as casuals- paras 139 and Chapter 4. Manufacturing casuals are more likely to work full rather than part-time- para. 142 and Chapter 4
Flexible jobs are not defined by employment type- paras 190-192,

13.2 The *NSW Secure Employment Test*[76] case considered an Employers First application seeking a relaxation of part time work regulation on the basis it was necessary in order to expand the utilisation of part-time workers. The Commission is hearing a similar application during current proceedings in respect of Awards in the hospitality and retail industries.

13.3 The employers ' claim was rejected by *the NSW Secure Employment Test Case* Full Bench because the application blurred the distinction between casual and part-time work and altered "the nature of part-time employment so as to subject such employees to the uncertainty of casual employment without compensation for the consequent lack of benefits"[77]. Further reasons for refusing the Employer's First application included that current part-time work arrangements contained flexibility for employers and employees to make suitable agreements and that employers were unaware of or chose not

[76] 670 Secure Employment Test Case [2006] NSWIRComm 38 @ 669
[77] Ibid @ 670

to pursue existing flexibilities for 'various reasons unconnected to the efficacy of the provisions themselves or the need for more flexible part-time arrangements"[78]. The Full Bench also found that to increase insecurity and uncertainty as to hours and income for part-time workers would reduce employer benefits arising from 'reliability, consistency and commitment to the job'.[79]

13.4 These findings are consistent with ones we submit are operative in the current proceedings. There is no evidence before the Commission regarding the use of part-time work provisions. The AIG submit[80] that part-time work provisions in the Manuafcturing Award are restrictive and inflexible on the basis that parties have to agree to the hours and pattern to be worked. It is a somewhat startling submission given the methods of arranging ordinary hours of work under the Manufacturing Award are predicated on "agreement" at either the majority or individual level (refer clause 36.5). AIG do not acknowledge the flexibility within the part-time clause itself, to vary agreed arrangements or to the broader hours of work flexibilities regarding averaging of hours. AIG have provided no evidence to support their submission part-time provisions operate inflexibly in the Manufacturing, Graphic Arts or Food Award.

13.5 It would be inappropriate to introduce further flexibilities in the absence of evidence that existing flexibilities are being utilised or that the existing flexibilities are inadequate as they apply to part-time work. Using the existing flexibilities would facilitate casual conversion to part-time work. Casuals converting to part-time engagement have their work arrangements subject to broader award flexibilities including but not limited to:

> Clause 7.1- the ability to enter into an individual arrangement concerning arrangements for when work is performed, overtime and penalty rates, allowances and loadings;

[78] Ibid @ 677
[79] Ibid @ 680
[80] AIG Submission In reply Ibid @ 480

Clause 13.2- agreement to vary minimum daily hours for part-timers

Clause 13.3- agreement to vary the hours and days of work of part-time workers;

Clause 36.2(a) averaging of hours over 28 days

Clause 36.2(b) working ordinary hours on the weekend;

Clause 36.2(c) variation to the spread of hours for day workers

Clause 36.(a) methods of arranging ordinary hours including the ability to average hours over 3 months for day workers and 12 months for shift workers and rosters specifying start and finish times;

Clause 40.1(c)- TOIL

13.6 The evidence in the manufacturing industry is that the majority of casuals who would be deemed permanent work a regular pattern of hours that could be accommodated using the existing part-time work and other award flexibilities.

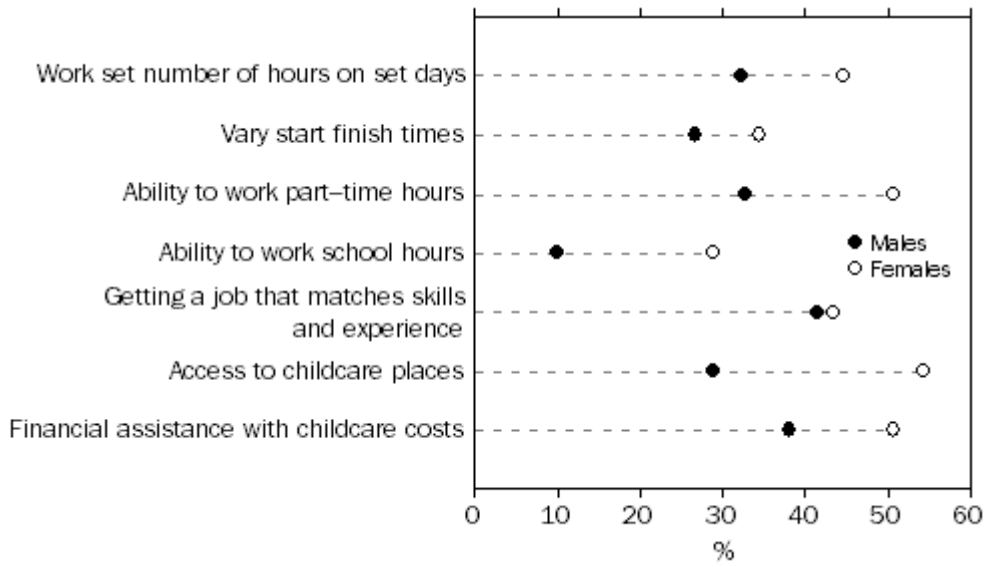
13.7 Diminishing part-time work provisions is likely to have a negative impact on workforce participation and be inconsistent with s.134(1)(c) regarding promoting social inclusion through increasing workforce participation. The ABS[81] survey investigating barriers to workface participation identified the following as high value to employees in their decision making regarding participation or increased participation in the workforce:

- the ability to work part-time,
- set hours and days,
- work school hours; and

[81] 6239.0 - Barriers and Incentives to Labour Force Participation, Australia, July 2014 to June 2015

- vary start/finish times

SELECTED INCENTIVES TO JOIN/INCREASE PARTICIPATION IN THE LABOUR FORCE, By sex, 2014–15



6239.0 - Barriers and Incentives to Labour Force Participation, Australia, July 2014 to June 2015, Table 13

13.8 The existing award provisions and flexibilities described above are a good match for the matters supporting increased participation identified by employees and potential employees. Casual work is not identified in the ABS survey results and importing uncertainty around hours and income into part-time provisions encourages neither ongoing nor casual part-timers into, or increased, workforce participation.

13.9 The esteemed group of 34 leading Australian academics from 16 Universities organised as the *Work and Family Round Table* identify that 'casual like' flexibility in the number and rostering of part time hours, where such flexibility undermines part-time workers conditions, is arguably a breach of

Australia's obligations under ILO Part Time Work Convention (NO 175)[82]. In addition to cruelling participation, the introduction of casual like hours provisions for part-time workers would diminish the integrity of the award safety net and Australia's adherence to our ILO obligations.

Issue 14

Does the exclusionary expression "irregular casual employee" provide a workable basis for the operation of a casual conversion clause?

14.1 The expression "irregular casual employee" provides an appropriate and workable basis for the operation of the casual conversion clause. It should be noted from the outset that the expression is supplemented by sub-clause [b] in casual conversion provisions which states "an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis". This provides further clarification and direction.

14.2 There has been significant arbitral and common law precedent surrounding the meaning of "regular and systematic" in relation to casual employment. The term has been used, along with its derivatives, to distinguish casual employment which is "itinerant, occasional, non-systematic, or irregular".[83]In this sense, the definition of "regular and systematic" is well established.[84] Further, its expression in the "exclusionary" form is not unusual, as in *Cetin v Ripon Pty Ltd* the term was used in conjunction with terms such as "informal, uncertain or irregular".[85]

14.3 The expression should be maintained for the purposes of consistency with the legislative scheme, as unfair dismissal,[86] flexible working arrangements,[87]

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[82] http://www.workandfamilypolicyroundtable.org/wp-content/uploads/2016/05/Work-Care-Family-Policies_Online_s.pdf @ p.8
[83] *Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078, [65].
[84] *Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078; *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339.
[85] *Cetin v Ripon Pty Ltd t/as Parkview Hotel* (2003) (PR938639)
[86] *Fair Work Act 2009*, s. 384(2)(a)(i).
[87] *Fair Work Act 2009*, s. 65(2).

and parental leave [88] all rely on a categorization of "regular and systematic". This was also acknowledged in *Ponce v DJT Staff Management Services Pty Ltd* [2010] FWA 2078 at [65] as referred earlier.

14.4 It needs to be noted however that whilst earlier considerations of the concepts of 'regular' and 'systematic' are relevant the context of their consideration has not been within the award incidence of 'casual conversion'. The language of the entitlement in which the terms are embedded affect their application. In the current and sought conversion provisions the language is that the casual employee other than an 'irregular casual' is engaged *" for a sequence of periods of employment under this award during a period of 6 months'*. This is not the same application used in for example s.383(a) where the minimum period required is *" 6 months ending in the earlier of…."*.

14.5 The definition of casual employment in many modern awards allows for any pattern of engagement, regardless of the regularity, to be classified as "casual", provided that the employee is "engaged and paid as such". In *Nardy House v John Perry* [2016] FWCFB 1621, the Full Bench said the definition of casual employment in the relevant award "is properly construed as a limitation on the concept of casual employment for employees under the award".[89] In *Nardy House* the definition of a casual required the Full bench to first consider whether the casual employee was in fact a part or full time employee as the relevant definition for casual employee"… will not include a part-time or full time employee[90]

14.6 The utility in retaining the expression 'irregular' is that it allows for a broader consideration of the hours worked, and patterns of employment. Modern Awards frequently allow for rostering arrangements and hours which are averaged over a period of time.[91] Permanent employees also access paid

[88] *Fair Work Act 2009*, s. 67(2).
[89] *Nardy House v John Perry* [2016] FWCFB 1621 at [27].
[90] Ibid @ 17
[91] *Manufacturing and Associated Industries and Occupation s Award 2010*, cl. 36.2(a).

forms of leave, including rostered days off. This indicates that even the hours of permanent workers are prone to fluctuations, yet there is no question as to the over-arching regularity of their engagement. The expression "irregular casual employee" allows for similar fluctuations to be properly considered in the context of the wider casual employment relationship, and in accordance with principles in *Reed v Blue Line Cruises* (1996) 73 IR 420 that "it is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual**".**[92]

14.7 Given the arbitral understanding and precedent surrounding the term "regular casual employee", along with its reflection in the *Fair Work Act*, the term does provide a workable basis for the operation of the clause. It is the most appropriate basis for the operation of the conversion clause as the regularity of the engagement is the hallmark of determining a permanent engagement**.**[93]

14.8 An assessment of the regularity of a casual engagement can identify and target "permanent casual" employees. It is these employees, rather than irregular casuals, who are the intended beneficiaries of the casual conversion and deeming provisions. It has been recognized that "permanent casual" employment is a "contradiction in terms" and "detracts from the integrity of the award safety net".[94] Categorisation of casual employment on the basis of regularity is an accurate mechanism for identifying and targeting those employees who are in fact permanently casual.

Issue 15

Should any casual conversion clause contain a more specific and certain definition of what is an "irregular casual employee"? If so, what should that definition be?

[92] *Reed v Blue Line Cruises* (1996) 73 IR 420 at [425].
[93] *Cetin v Ripon Pty Ltd t/as Parkview Hotel* (2003) (PR938639) at [59].
[94] Print T4991 at [108].

15.1 There is no arbitral or judicial uncertainty regarding the term "regular and systematic" in relation to casual employment, and therefore no need to amend the definition arises. There is a substantial body of precedent going towards the meaning of the term.[95]

15.2 No evidence or submissions have been advanced suggesting that a more specific and certain definition is required to assist the general public's comprehension of the term. However, there is strong evidence suggesting that many permanent casual employees are being "strung along" with the elusive permanent position forever in front of their nose. Employers often acknowledge that the employee will be made permanent "soon", but all too often this never materializes. James Fornah[96] was told on engagement in 2012 he would become permanent after 6 months. Two years later with the intervention of the AMWU he was converted. David Kubli[97] was also told on engagement he would be made permanent 6 months down the track. AMWU organizer Aaron Malone recounts how a casual of 7 years' engagement had received assurances she would be made permanent however remained a casual.[98]

15.3 Mr. Simon Hynes' witness statement demonstrates that many employers recognize the regularity of shift patterns and hours of work – "We were treated like a permanent employee but when it came to shut downs, public holidays, sick leave we weren't paid. They called us 'permanent full time casuals'" (emphasis added).[99] Implicit in this practice is that the employee has already met the requirements of regular and systematic employment and that employers are able to interpret the Award.

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[95] *Cetin v Ripon Pty Ltd t/as Parkview Hotel* (2003) (PR938639); *Reed v Blue Line Cruises* (1996) 73 IR 420; *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339.
[96] AMWU Submission of 13 October, 2016 Attachment 12.3, paras. 16, 19
[97] Exhibit 30 at [21-23]
[98] Aaron Malone –Exhibit 53 at [35].
[99] Simon Hynes – Witness Statement 13 October 2015 – at [18].

Issue 16

Should the concepts of regular and irregular casual employment be understood, for the purpose of consideration of the casual conversion issue, in the same way as the concept of regular and systematic engagement referred to in s. 11 of the Workers Compensation Act 1951 (ACT) was interpreted in Yaraka Holdings Pty Ltd v Giljevic (2006) 149 IR 339 (In that decision Crispin P and Gray J stated at [65] that "it is the engagement that must be regular and systematic; not the hours worked pursuant to such engagement" and at [69] that "the concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required" and Madgwick J said at [89] that "it is clear from the examples that a 'regular …basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all."

16.1 *Yaraka Holdings Pty Ltd v Giljevic* [2006] ACTCA 6 is an appropriate conceptual basis for an understanding of 'regular and systematic engagement'. The decision states:

- "It should be noted that it is the 'engagement' that must be regular and systematic; not the hours worked pursuant to such engagement' at [65];

- "The absence of any contractual requirements for the respondent to work at set times or of any assumption that he be present on a daily weekly or monthly basis unless told otherwise did not preclude a finding that his engagements had been regular and systematic" at [67];

- "The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged" at [69];

- "Engagement under contracts on a 'systematic basis' implies something more than regularity in the sense just mentioned, that

is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan" at [91]

16.2 It should be noted that the above statements accord with other judicial and arbitrated decisions concerning regular and systematic engagements. In *Ponce v DJT Staff Management Services* Roe C referred to *Yaraka Holdings* in concluding that "if the number of hours worked is small and the gaps between days and times worked is long and irregular this means that there needs to be other evidence that the employment of a casual is regular and systematic…if there is a clear pattern or roster for the hours and days worked then this would be strong evidence of regular and systematic employment".[100]

16.3 *Yaraka* also refers approvingly to the *Reed v Blue Line Cruises*; a foundational decision explaining the characteristics of casual employment as involving the "informality, uncertainty and irregularity of the engagement".

16.4 Yaraka is also consistent with the conversion decisions in Christie Tea, *Ardmona* and *Fonterra* discussed above.

Issue 17

If the interpretation in Yaraka Holdings is to be applied, how does an employee/employer determine what hours are to be used in a right to convert to part time employment?

17.1 There is already a tremendous level of flexibility afforded to employers under Modern Awards to structure hours and patterns of work that most efficiently suit their business needs. The *Manufacturing and Associated Industries and Occupations Award 2010* allow the ordinary hours of day work to be "an average of 38 hours per week but not exceeding 152 hours in 28 days".[101]Roe C in *Ponce* noted hours' flexibility in awards as referred at 1.18 above. Employers also have flexible arrangements in relation to award flexibility

[100] *Ponce v DJT Staff Management Services t/a Daly's Traffic* [2010] FWA 2078 at [75].
[101] *Manufacturing and Associated Industries and Occupations Award 2010,* cl. 36.2.

provisions, and accessing enterprise bargaining to better suit their businesses.

17.2 This flexibility allows for the integration of a converting employee into a roster which is either the same, or substantially similar, to one previously worked as a "permanent casual". An assessment of the requisite hours could be made on the basis of reviewing the hours of work over the relevant period (that is, the past 6 or 12 months pending on whether an extension has been agreed on) and integrating that within an "averaging" system available in the modern awards. The averaging system would need to apply an allowance for paid annual and personal leave that could have been taken during the 6 or 12 month period. This is consistent with the approach adopted by Lewin, C [102] in *Mr Aleksandar Lacevski & Mr James Tolevsky v Linfox Australia Pty Ltd* where in determining whether the converting casual was full or part-time adjustments for leave were made. As stated[103] in our submission the casual loading is part compensation for the monetary loss of the benefit, it does not compensate for the "time" permanent employees are entitled to on leave. Mr. Hynes statement identifies the disadvantage occurring where computed hours for casual conversion do not include an allocation for leave.

17.3 The model deeming provision also provides at (c) that "both full and part time employees are deemed to convert on the basis of the same number of hours and times as previously worked unless other arrangements are agreed to by the employer". This indicates that there would be discussions as to the hours worked, predicated on the agreement of the employee and allows for any problems associated with the deeming to be considered by both parties. This is consistent with the objective set out in the 2000 case of "an approach which builds time and an opportunity to consider and discuss the conversion process".

[102] **2012 FWA 6713**
[103] AMWU submission 13 October, 2016 @ 360

17.4 It is also worth noting that employer witnesses have not identified that determining the set of hours to be used is likely to be an issue. Indeed, half of the casual and labour hire employees surveyed by the ACTU were employed on a regular or rotating roster.[104] This indicates that the calculation of hours is unlikely to be a significant impediment for employers.

17.5 Refer to our submission at query 12 above

Employer Notification

Issue 18

Having regard to a number of factors, including the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?

Table 7. Material supporting Union's claim for provision requiring employers to convert a casual to permanent on their election(opt in or out), AMWU Submission-in-reply 22 February 2016,
Literacy skills required to understand a Modern Award – paras 18, 19, 20, 21, 22, 23, 24.
Who is best placed to interpret a modern Award – paras 29, 30, 31, 32, 33, 34, 35.
Misunderstandings as to the rights of casual employees – Attachment 13 of October 2015 Submission (catalogue of disadvantage), Ch. 5.3 of October 2015 Submission.

18.1 The AMWU, in addition to the response below, relies on our submission in reply (22 February 2016) to the Australian Industry Group's substantive claim to remove notification requirements.

[104] Attachment 5, at [41].

18.2 Gregory, C determined[105] that the notification requirements regarding conversion were intrinsic to the conversion provisions:

> **[38]** ……That is acknowledged, however, an employee who has not been notified, as required, might remain unaware of his/her right to elect and so not act on that entitlement. The requirements of the employer to notify was clearly intended to ensure an employee would not be deprived in this way. *(dot point 4)*
>
> **[39]** The notification requirements of that clause are clear and should be complied with by the Respondent so that eligible employees are not denied the right to be made aware of their entitlement to elect to convert to a full or part-time position when that right of election arises.

18.3 Commissioner Gregory noted that had the casual employees in question been informed of their right they would have had the opportunity to elect to convert at that time.[106]

18.4 The removal of the requirement to notify eligible casual employees of their right to convert will result in a lack of awareness of the entitlement, conversion periods passing "unnoticed" by the employee, and reduced opportunities for workplace planning and discussions surrounding the conversion to permanency. Simply providing a copy of the relevant modern award is plainly inadequate, and cannot be a sufficient alternative to notification.

18.5 An Australian Industry Group report[107] noted that employers are reporting issues such as poor completion of workplace documents (42%) and teamwork and communication problems (28%) as impacts of low levels of literacy and numeracy. It also reports that workplace literacy training to address such

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105 [2013] FWC 1057

106 Op Cit @ 60

107 Tackling Foundation Skills in the Workforce – January 2016. See AMWU Submission in Reply at [19] – [22].

issues is low, with a reported 7% of respondents engaging in such training.[108]It is also clear from the OECD Skills Outlook that those employees with already low literacy levels are less likely to receive literacy and numeracy training.[109] This indicates that casual employees with a low level of literacy are, at the very least, at risk of not sufficiently comprehending a Modern Award, especially in light of the technical reading required for terms such as "regular and systematic". In this circumstance, it is clear that the employer is in the best position to provide notification. Employers have immediate access to timesheets and rosters, and can therefore more easily assess whether the requirements of casual conversion have been met.

18.6 A broader lack of understanding as to the rights of casual workers is also evident in arbitrated decisions.[110] In *Betty Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547, the respondent company believed that a casual employee could be dismissed at any time – regardless of the length or regularity or service. The applicant believed that once a casual employee was to be engaged for a sufficient period of time, and with reasonably regular service, then they were automatically deemed to be a permanent employee. In *Marie Axman v Global Players* believed *Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719, the respondent company that unfair dismissal laws did not apply. In this context, removing the notification requirement will at best result in confusion as to when a casual employee has been regularly and systematically engaged and at worst, mean that casual employees will be simply unaware that such an entitlement exists at all.

18.7 Witness evidence suggests at PN5334 – Benjamin Waugh on 18 March 2016 that there are many employers who are unaware as to which award covers their organization and employees. It is highly unreasonable in the circumstances to expect an employee of such a business to understand their entitlements as a casual under an unknown award. This indicates that despite

[108] Ibid page 18.
[109] AMWU Submission in Reply – at [24].
[110] AMWU Submission – at [425] – [429].

the obligation to provide a copy of the relevant award to employees, many employers are unaware as to which award applies – let alone any obligation to notify of an upcoming conversion.

18.8 This fundamental lack of understanding of the rights of casual employees demonstrates the importance of engaged employers and management. Determining an employer's obligation to notify an employee as to the terms of their employment, the Full Bench in the 2000 case said "the Award in its contemporary setting would be incomplete if it does not place a duty on the employer to inform employees of details that may be essential to the employee for various purposes".[111] The AMWU respectfully agrees with that statement and submits that it is equally applicable to notification prior to casual conversion.

18.9 The deeming proposal has additional merit in this regard as it will motivate employers to provide notice of the entitlement to convert. The evidence is that while some employers manage the process other employers fail in this important responsibility.

Issue 19

Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for example, requiring all casual employees to be notified upon first being engaged, or by defining 'irregular casual employee' in a way which provides clarity as to who is required to be notified)?

Table 8. Material in response to query regarding whether notification requirement can be made administratively simpler - AMWU Submission-in-reply 22 February 2016, Transcript
Notification requires a modest administrative requirement – 22 February 2016 submission, paras 15, 16 and 17.

[111] T4991 at [122].

19.1 The casual conversion notification is a modest administrative requirement, and has not been shown to be an unreasonable burden for employers. The AMWU reply-submission notes that the notification requirement would take only 1% of the time of a full time employee over the course of one year – if the company employed nearly 100 new casual employees each year**.**[112]

19.2 One of the key reasons for the notification period is that it allows both parties to discuss and facilitate the conversion process, with the Full Bench stating in the 2000 case that "we favour an approach which builds time and an opportunity to consider and discuss into the conversion process".[113]A further rationale is for the employee to be made aware as to when they have met the engagement requirements. Both of these objectives are severely undermined if the employee is notified only at the commencement of employment. A casual employee may commence employment on an irregular basis, and transition to a regular and systematic basis of employment during a period of employment. (i.e. 6 months, 12 months)..

19.3 As noted, the term "irregular casual employee" has a long understood arbitral and judicial meaning. Any attempt to amend the term is unlikely to assist in clarifying it. Furthermore, employer evidence does not suggest that identifying regular and systematic casual employees is a concern. In fact, the evidence of Jan Baremans makes only passing comment, and shows a process of identifying eligible casual employees on the basis of their pay slips.[114]

19.4 The evidence[115] identifies that employers are able to harness payroll systems to set up automatic reminders linked to each casual employee. Scheduling and administrative technology will make the task easier however most employers and employees will know whether the engagement has been regular.

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[112] AMWU Submission in reply 22 February 2016 – at [16].
[113] T4991 at [118].
[114] Jan Baremans – Witness Statement (RCSA) at para [7].
[115] Exhibits 67 and 69

Period prior to conversion

Issue 20

Is a 6 month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?

20.1 The AMWU submission of 13 October 2015 included material relevant to this question.

Table 9. Evidence on appropriateness of 6 month period, AMWU Submission 13 October 2015
Evidence of tenure of requesting casuals – paragraph 27
HILDA and AWRS data on tenure– paragraphs 28
Conversion process considered during 2008 modernisation proceedings– paragraphs 251-254

20.2 A six month period is of sufficient length to account for seasonal and production "spikes". During cross-examination, Mr. Goodsell noted that a spike in production :

> **PN972**: "..could be nine months in theory. It could be 13 or 15 months. I grant that would be unusual, but I have dealt with members that say that they have seasonal peaks and troughs and some of those peaks have gone on longer than six months; seven months, eight months, nine months".

20.7 The rationale for the six month period, extendable to 12 months, in the 2000 decision was that "a high proportion of casual engagements are completed within four to eight weeks", but that "the potential adverse impact on younger and less advantaged employees of having a lower limit" warranted a

longer time frame.[1] The approach which "builds time and an opportunity to consider and discuss the conversion process" was deemed preferable.[2] There is nothing in the employer group's evidence to suggest that the six month timeframe is an insufficient length of time for casual deeming to operate. Mr. Goodsell' s evidence indicates that a "spike" in employment can extend for a lengthy period of time, but at the same time suggests that it would be "unusual" in the circumstances for it to extend to "13 or 15" months. There is no pressing reason to depart from the current 6 month arrangement, with the option to extend the period of employment to 12 months offering sufficient flexibility to counteract any inconvenience to employers.

20.8 It is worth noting that the current conversion clause requires that an employer demonstrate "something well beyond inconvenience" in order to refuse to grant a conversion to permanency.[116] In *SPC Ardmona* Watson VP said that a downturn was an insufficient reason in itself to deny conversion.[117]This indicates that even under the current conversion clause, seasonal factors of themselves are an insufficient basis to deny conversion.

Issue 21

Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?

21.1 The decision in *Rahim v Murdoch University Child Care* [2016] FWC 2191 gives a starting point in determining the relevant period for the casual conversion entitlement to arise. In that case, the relevant period of employment for the purposes of s. 384 was not considered to be the

[1] T4991 at [116].
[2] T4991 at [116].
[116] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Christie Tea Pty Ltd* [2010] FWA 10121 at [15].
[117] *Ardmona* at [24]

immediately preceding 6 month period. Rather, the period was judged to be dependent on the interaction between the period of service and the period of employment. Sams DP referred to *Shortland v The Smiths Snackfood Co Ltd* [2010] FWAFB 5709 at [12]:

> "Any given *period of service* in such a contiguous series of *periods of service* will count towards the employee's *period of employment* only if the requirements in s. 384(2)(a)(i) and (ii) are met. Section 384(2) is concerned only with determining which *periods of service* in such a contiguous series count toward the employee's *period of employment* with the employer for the purposes of s. 382(a)"

And at [13]:

> "Continuous service by a casual employee who has an established sequence of engagements with an employer is broken only when the employer or the employee makes clear to the other party, by words or actions that there will be no further engagements. <u>The gaps between individual engagements in a sequence of engagements should not be seen as interrupting the employee's period of continuous employment within the meaning of s. 384. In particular, a period of continuous service within the meaning of s. 384(1) is not seen as broken by a period of 'leave' or an absence due to illness or injury</u>". (Emphasis added)

21.2 As submitted at 14.4 above, the language of the current and proposed provisions is that the casual employee is engaged *" for a sequence of periods of employment under this award during a period of 6 months'*. This is not the same application used in for example s.383(a) where the minimum period is " 6 months ending in the earlier of….". The requirement under the current and proposed provision is that the casual is not an irregular casual and has a sequence of engagements during 6 months. The period for considering whether the "sequence" has occurred commences on engagement and

'floats' with the casual employee over their continuous service. The evidence of employers regarding notifications identifies that employers apply the current provisions in this way sending conversion letters at the 6 or 12 month conversion period prescribed in the relevant award. (Refer: Exhibit 67, statement of Adele Last, para. 12; Exhibit 69, statement of Stephen Noble, paras. 9, 12(b)).

As per *Ponce* engagement may have been irregular during the period but that period does not damage eligibility if at 6 months the employee satisfies the eligibility criteria.

Issue 22

Are existing or claimed casual conversion clauses intended to give a one off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?

22.1 The operation of the casual conversion provision is intended to give casual employees a continuing entitlement to casual conversion, provided that they meet eligibility at the time of election. An amendment to the proposed variation(Attachment 1 to our 13 October 2016) is attached and marked "E" clarifying conversion is not a once off proposition.

Employer capacity to refuse

Issue 23

Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?

23.1 In its submission of 13 October 2015, the AMWU provided a significant body of evidence to support its draft variations, which do not contain an employer right to refuse. A summary of those sections of the AMWU submission that relate to this question are provided in Table 1.

Table 10. Evidence on employer right to refuse, AMWU Submission 13 October 2015
Summary – paragraphs 7-12
Context – paragraphs 76-79
Discontented non-requesters – paragraphs 333-338
Deficiencies of current employer right to refuse provisions – paragraphs 430-434
Employees fears when seeking conversion – Attachment 5, paragraphs 33-36
Academic paper on the right to request – Attachment 11
Witness Evidence – Biddington – Attachment 12.2, paragraphs 36-38
Witness Evidence – Waite – Attachment 12.10
Witness Evidence – Hynes – Attachment 12.4, paragraphs 6-18
Witness Evidence – Bauer – Attachment 12.1
Witness Evidence – Murphy – Attachment 12.8 , paragraph 22-53, Transcript 16 March 2016, PN2934-PN2990
Witness Evidence – Kaushal – 8-12, 16-18 and attachments, Transcript 15 March 2016, PN1167-1256 & 16 March 2016, PN3478-PN3636

23.2 The evidence provided by the AMWU shows that a casual conversion clause with an employer right to refuse creates an illusory entitlement that many casual employees are simply unable to access. This inability to access casual

conversion rights may come from employees who wish to convert, but do not make a formal request (discontented non-requesters) or employees who request and are denied, but are unable to practically challenge the "reasonableness" of their employers decision. There was further evidence, drawn from the surveys conducted by the ACTU and the AMWU, which showed that a proportion of employees were worried about their job security if they were to ask for casual conversion (AMWU Submission, 13 October 2015, Attachment 5, paragraphs 33-36). This shows that the inclusion of an employer right to refuse will reduce the number of employees willing to seek conversion, as well as the number that are successfully granted conversion. Refer Attachment D *Summary of Evidence* .

23.3 As noted by Ms Biddington in her evidence (paragraphs 36-38) many employees are dissuaded from applying for casual conversion. The risk of this behaviour is increased where the employer can simply threaten to deny the request, regardless of the reasonableness of that denial, placing the onus back on the employee to raise a dispute about the matter. The model sought by the AMWU, with eligible employees deemed permanent, subject to opt-out provisions, without an employer right to refuse, avoids these potential pitfalls and ensures that all eligible casual employees that would like permanent employment are able to obtain it.

23.4 It is also reasonable to ask why an employer should be given a right to veto an employee's access to a workplace entitlement. There are only two areas under the Fair Work Act where employers are given the final say about whether or not an employee has workplace entitlement or not: flexible working arrangements and a period of unpaid parental leave greater than 12 months. In the Manufacturing and Associated Industries and Occupations Award 2010, the Food, Beverage and Tobacco Manufacturing Award 2010 and the Graphic Arts, Printing and Publishing Award 2010 the right to casual conversion is also subject to an employer right to refuse.

23.5 It is very unusual for an employer to have the final say about whether or not an employee can access a workplace right or not. In the overwhelming majority of cases employees simply have rights to certain benefits of employment, based solely on the fact that they are employees of a certain type. Some rights have a qualification period (parental leave, unfair dismissal protections), some require agreement before they can be accessed (annual leave, long service leave) but the rights themselves are intrinsic to the employment relationship and not subject to the approval of the employer.

23.6 The Commission should approach the concept of an employer right to refuse with scepticism. By allowing workplace rights to be expressed in these terms, the Commission risks undermining the Award safety net. The terms of the Award should apply, as much as possible, to all employees equally. They should not rely on an employee having the ability to bargain for those rights. When determining the 2000 conversion provision the Commission noted that:

> "Casual employment in the Award, and in many other awards, was and still is, in form, an exception to standard full-time and indefinitely continuing employment. We consider that, as far as practicable, the fundamental legal elements of that exception and the major incidents of it need to be specified or incorporated by reference in the definition of the type of employment, and in associated provisions. If that is not done in the award, the exception may subvert the norm. At worst, the width of the exception may cause observance of the norm to become optional, or enforceable only by informal, market, or non-award based means".[118]

23.7 The bench made these comments in the context that they thought the deeming permanent clause determined by Marsh, SDP "has much to commend it for the purposes of this Award"[119]. Extrapolating for the purpose

[118] T4991 @ 95
[119] T4991 @ 112

of the query- the 2000 Metals' casual decision thought deeming (no right of refusal where casual elects to be deemed) was appropriate and that definitions and award incidents for casual employees need to be specified in order for the award to operate effectively. This is the claim brought forward now.

23.8 It is worth noting that it is women who are more likely to use these employer-controlled workplace rights. Of the women who took leave at the birth of their child, 18% took leave that was greater than 52 weeks[120], excluding women who left employment prior to the birth of their child. These women would have had to seek permission from their employer to take this additional leave. Women with children under 2 were also much more likely to use flexible working arrangements after the birth of a child, with 85% of women using some flexible arrangements, compared with only 1 in 4 of their partners[121]. Again, women seeking to access those workplace entitlements needed to seek approval from their employer to do so. If casual conversion clauses were to also be subject to employer right to refuse, then it would likely be female employees that would be disproportionately effected, as 26.7% of female employees are casual, compared to 21.2% of male employees (AMWU Submission, 13 October 2015, paragraph 41).

Issue 24

If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:

24.1 Before continuing to the specifics of the examples provided by the Commission it is worth making a few general points about the assumptions that should underpin any casual conversion provision.

[120] ABS, Pregnancy and Employment Transitions, 4913.0, November 2012, Table 10.
[121] ABS, Pregnancy and Employment Transitions, 4913.0, November 2012, p 7-8.

24.2 The AMWU submits that there is little point creating a new right for employees, unless it is expressed in such a way that would allow it to be practically used. As Watson noted in *AMWU v SPC Ardmona* employees have a legitimate expectation of conversion and it is inappropriate that the clause operates in such a way that "fundamentally undermines that right and the purpose of that clause.[122]" The AMWU believes that the employer right to refuse creates such an outcome.

24.3 The principles in *Ardmona* are that, for a refusal to be reasonable, there should be clear and relevant reasons why converting an individual employee from casual to permanent would create a clear and significant problem for the employer going forward[123]. The issues outlined at 24.1, 24.2 24.4 objectively fail (on the information provided) to meet this test and as such it would be unreasonable to reject an application to convert. The issues described at 24.3 and 24.5 also fail to meet the required standard, but more detail is provided to explain why below.

24.1 *Where an employee has been working close to full time hours over a 6 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?*

See 24.

24.2 *Where an employee has been working close to full time hours over a 12 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?*

[122] *AMWU v SPC Ardmona Operations Limited [2011] FWC 4405, paragraph 21*
[123] *AMWU v SPC Ardmona Operations Limited [2011] FWC 4405, paragraph 24-27*

See 24.

24.3 *Where the employer can demonstrate that the work requirement which has been met by the casual employee will not be continuing over the next 6 months and adjustment to the remaining casual pool is unable to meet normal or likely fluctuation in work demand?*

24.4 The decision in *Ardmona* is that casuals meeting eligibility requirement have a legitimate expectation of conversion. A change in the mix of employment types may be required. A downturn in business "only has substance if it is demonstrated that there is likely to be insufficient work for the resultant number of permanent employees."[124] The ongoing use of casual employees in the scenario provided would undermine the implication that no work could be found for the casual employee. The current conversion provision requires an employer to be "reasonable" and review an adjustment to both casual and permanent positions.

24.5 Employers are constantly seeking new work opportunities. The amount of work scheduled one day will not be the same as the next. The scenario seems to assume there is a zero sum hours of available work whilst the reality is that work and contracts are constantly turning over, being finished , being started, being found being lost. Under the variation sought by the AMWU, the employer and employee can agree to extend the qualification period to 12 months to assist employers and employees to reach a common understanding of what may be entailed in the role. The deeming provision also allows employers to engage in better workforce planning – employers will know the date on which an

[124] Ardmona @ 24

employee will become permanent and can make appropriate arrangements regarding their employment mix.

24.6 By agreement with employees and employers, the Manufacturing Award (Clause 36.5) allows for averaging of hours over a period up to three months (day work) or 12 months (shift work), rosters that set starting and finishing times, the use of Rostered Days Off to assist employers to match their employee availability to their needs. Similar provisions exist in the Food Award (clause 30.5) and Graphic Arts Award (clause 30.7). All three awards also enable the creation of individual flexibility agreements (clause 7, all awards) and part-time employment (Manufacturing Award clause 13, Food Award clause 12, and Graphic Arts Award clause 12.3).

24.7 With the arrangements outlined above, it is extremely unlikely that the hypothetical scenario outlined in this question will occur very often, if at all. Given the resources available to employers in these circumstances, it would be **unreasonable** to refuse conversion under these circumstances.

24.4 Where the pattern of on-going part-time hours required to meet business needs is able to be accommodated by the part-time provisions of the relevant award?

See 24.

***24.5** Where the pattern of on-going part-time hours required to meet business needs is unable to be accommodated by the part-time provisions of the relevant award?*

24.8 Given the variation sought by the AMWU does not apply to irregular casual employees, the AMWU believes that any casual employees seeking conversion would be working in a pattern that

could be replicated by the part-time employment flexibility clauses of the Awards.

24.9 The Manufacturing, Food and Graphic Arts Award require part-time employees to be notified of the number of hours they will work (13.3 (a), 12.3 (a) and 12.3 (b)(i)(A) respectively), but in all cases these can be altered by agreement with employees and employers (clauses 36.5, 30.5 and 30.7 respectively)).

24.10 As such, there are no circumstances in which the on-going part-time hours required to meet business needs would be unable to be accommodated by the part-time provisions of the relevant award. It would therefore be **unreasonable** to refuse an application on these grounds.

Issue 25

If there were to be an absolute right to convert, or a right subject to an exemption mechanism, should that right be limited or defined by reference to the circumstances in (24) above?

25.1 No, the right to convert – subject to a defined period of regular and systematic engagement as a casual employee – should not be limited or defined in reference to the scenarios set out in issue 24. The only limitation on conversion, subject to eligibility, should be the employee's desire to convert, either by electing to convert (the ACTU claim) or choosing not to opt out of being deemed to be a permanent employee (the AMWU claim).

25.2 As outlined above, there are many flexible working arrangements that can be used, as well as in-built flexibility around the qualification period built in to the AMWU's proposed variations. Beyond these, there is no need for additional exemptions from the proper operation of the award conditions for casual conversion. Employers over many years have argued for the inclusion

of these Award flexibilities it is incumbent and to their benefit, to make use of them in managing their workplaces.

25.3 The current system, which provides for an employer right to refuse, does not work to achieve the policy goal of the casual conversion clause and any system which seeks to reimpose one, through whichever means, should be avoided. (See response to issue 23 for further detail on why the employer should not be given the right to refuse). The Union's evidence identifies why election with a right of refusal is not an effective mechanism for ensuring an effective safety net for casual employees.

25.4 Evidence from Vinh Thi Yuen – Witness Statement at [9] and [10] regarding fear to request based on employer reprisal.

25.5 Evidence of Aaron Malone (Exhibit 53, at [35] regarding a 7 year casual engagement because the company preferred it that way.

25.6 Evidence of Heidi Kaushal (Exhibit 7) at [18] that all casuals requesting conversion received the same rejection letter, except for the personal details of the employees. This indicates that the company had not reviewed the patterns of a requester's past or prospective work.

25.7 The evidence of Simon Hynes (Exhibit 91) regarding his years of regular full time casual engagement and his employer's choice not to convert.

25.8 The evidence of AMWU organisers Stephen Murphy (Exhibit 25) and Clinton Lewin (Exhibit 26) regarding employer obstruction to having long term casuals converted**.**

25.9 The ACTU survey, academic and witness evidence is that insecurity and fear of jeopardizing their employment act to dissuade requests to convert.

Issue 26

If employers retain the capacity to refuse to convert employees to non-casual work subject on reasonable grounds, should the employer be

required to engage in a discussion with the employee about the issue before making a decision about conversion?

See 25.

Issue 27

Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?

27.1 Where an employee elected to convert and the employer opposed the election the employer could apply to a court of competent jurisdiction challenging the eligibility of the employee to convert. The reality is that if an employer refused to convert it would require an application by the casual employee to enforce their rights.

Small Business

Issue 28

Is there a case for excluding small business employers from a casual conversion clause in the same way as for redundancy entitlements?

28.1 The AMWU believes that unfair dismissal is a better workplace right to use as a comparison than redundancy provisions. That is because redundancy has a clear and unequivocal cost implication, which both unfair dismissal and casual conversion provisions do not. Both casual conversion and unfair dismissal are rights that, after a qualification period, accrue to the employee for the duration of their employment. Neither of them entitle an employee to additional payment, nor do they impose an additional cost on the employer. Given these similarities, the AMWU has analysed the small business clauses of the Fair Work Act that relate to unfair dismissal and set out how they can be used to reach a conclusion about how the Commission should deal with small businesses and casual conversion.

28.2 The explanatory memorandum for the Fair Work Act briefly discusses the reasons behind the 12 month qualifying period for unfair dismissal protections for employees of small businesses. It states "there will also be special assistance for small business employers through the Small Business Fair Dismissal Code and a 12 month qualifying period for small business employees. Therefore, small businesses will have 12 months in which to assess the performance of an employee and terminate their employment if necessary.[125] The legislation is clearly drafted with the expectation that a 12 month period is sufficient for small businesses to assess new employees and ensure that they are suitable for the role that they have been engaged to fulfil.

28.3 The explanatory memorandum goes on to highlight that "small businesses tend not to have the resources to employ dedicated human resources professionals to help them manage dismissals.[126]" The Small Business Fair Dismissal Code (the Code), to which the above comments relate was "designed to provide small business employers and employees with clear guidelines to minimise the extent of unfair dismissal action.[127]" The policy intention of the Code is clearly to assist small businesses, rather than to limit an employees workplace rights.

28.4 As such, the AMWU submits that the relative lack of human resources personnel in small businesses was not seen by the drafters of the legislation as a reason to deny workplace rights of this type to an employee. This feature of small businesses was instead seen as a reason to provide additional support (through the Code) to ensure that small businesses properly understand the rights that their employees have. Therefore, it would be contrary to the legislation to use it as a reason to exclude these employees.

28.5 Under the variations sought by the AMWU, employers and employees can reach agreement to increase the qualification period to 12 months. Small

[125] Fair Work Act 2009, Explanatory Memorandum paragraph 216.
[126] Fair Work Act 2009, Explanatory Memorandum paragraph 217
[127] Fair Work Act 2009, Explanatory Memorandum paragraph 226

businesses have the same access to flexibility provisions in the award and their employees should have the same entitlement to converting to permanent employment as other employees.

Issue 29

Alternatively, is there a case for a longer than standard period of employment before casuals employed by a small business employer may exercise any conversion rights?

See 28.

Labour Hire

Issue 30

Have casual conversion clauses encouraged, or will they encourage, employers to source *labour from labour hire businesses?*

Table 10. Material on query regarding labour hire and whether casual conversion / deeming would encourage employers to source from labour hire businesses, AMWU Submission 13 October 2015, Transcript
Prevalence of deeming / opt-in provisions in Enterprise Agreements / Graphic Arts, Printing and Publishing industry – para 236, 237, 238, 239, 240, Attachment 6, Attachment 9.
Percentage of labour hire in Australian workforce – Ch. 5.4, paras 437, 438, 440.
Dismissal and labour hire employees – Ch. 5.4, paras 445, 446, 447, 448, 449, 450, Attachment 13.

30.1 It is unlikely that current casual conversion clauses or a putative deeming provision has or would result in an increase in the use of labour hire employees as opposed to directly engaged casual employees. In 2002, directly after the introduction of the casual conversion clause in to the *Metal, Engineering and Associated Industries Award 1998*, labour hire engagement

accounted for 3.9% of the workforce.[128] This figure dropped to 1.25% of the workforce in 2008.[129]Even accounting for WorkChoices period, levels of labour hire engagement were not affected by the introduction of casual conversion into 26 modern awards, and deeming into the *Horse and Greyhound Training Award 2010*.[130] A spike in labour hire has simply not occurred, despite the prevalence of conversion and deeming provisions throughout this period.

30.2 Whilst many JES respondents stated they would not employ casuals anymore and would outsource this claim was also made in the 2000 conversion case and did not materialize. Rather than paying the additional premiums to source labour through an agency employers are more likely to take advantage of other flexibility provisions available such as negotiating an enterprise agreement, award flexibility, averaging monthly hours, and fixed term contract arrangements, if more flexibility is genuinely needed.

30.3 The introduction of the proposed conversion provisions may influence the decisions and contractual arrangements between labour hire companies and their client "hosts". Conversion arrangements are already embedded in some contracts as evidenced by JES respondent 3089, a labour hire company:

> "Our terms provide that after 12 months full time employment, any casual should be offered a permanent opportunity unless they are on a specific project. Generally the casuals we provide to our clients "long term" (other than project or specific terms), are offered permanent work either after 3 months or 6 months"

30.4 It should be noted that many enterprise agreements within the printing industry contain deeming provisions through either incorporating the *Graphic Arts – General – Award 2000* or creating a separate stand-alone

[128] AMWU Submission – para [437].
[129] AMWU Submission – para [437].
[130] AMWU Submission – para [14].

provision.[131]When the 12 week deeming provision was introduced into the 2000 award, Marsh SDP noted that the provision would limit "the long-term, permanent and improper use of casuals in the industry, whilst allowing flexibility".[132]This comment was made in the wider context of the labour hire industry experiencing rapid growth of up to 15.7% per year, which has since declined.[133]

SECTION D. Allocation of Additional Work

Issue 31

In relation to the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?

31.1 This isn't an issue where a significant amount of guidance is likely to be required. The AiG employer survey shows that fewer than 8% of businesses answered "never" when asked "Before you increase the number of casual and part-time employees in your business, do you currently offer the hours to be performed by that casual or part-time employee to existing casual and part-time employees performing similar work." (AiG Reply Submission, 26 February 2016, Attachment F to the Statement of Ben Waugh). This leaves more than 92% of employers having a process where they offer existing staff more hours before they hire new employees. This includes nearly 40% who always do it. Clearly there is a preference amongst employers to give extra hours to existing staff where that is possible. Set out below is an example of what could be provided as guidance to employers who were concerned about the operation of the new provision, but in most cases, it would simply be a matter of continuing to operate in the manner to which

[131] AMWU Submission – Attachment 8.
[132] AMWU Submission – at para [238]. Print R7898 at [102].
[133] From 1990 to 2002. Source: Growth of Labour Hire in Australia – Productivity Commission Staff Working Paper – page 4 (2005)).

the business is already accustomed. Community and relative industrial standards require the 8% of casual and part-time employees to have access to the additional hours in circumstances where many part-time and casual employees are underemployed.

31.2 The results of this question are also support for the AMWU's submissions that employer claims they will terminate casual employees prior to 6 months and engage another is overstated. Firstly there is a clear preference to have existing employees perform work. Secondly the response implies that work is envisaged to continue after the 6 months as another casual will be required to do it. This weakens employers' concerns regarding having employees converted in the absence of work for them to do. It exposes that permanent casualisation is being used as a business model to avoid award and NES obligations.

31.3 The clause addresses under employment and increases the number of hours being worked by casual employees. The Australian Workplace Relations Study conducted by the Fair Work Commission showed that nearly half of casual and permanent part-time employees wanted to work more hours (AMWU Submission, 13 October 2015, paragraph 139-143). ABS data shows that an average casual or permanent part-time employee will work between 14 and 26 hours a week, depending on their gender and their method of employment (AMWU Submission, 13 October 2015, Attachment 5, table A5.10). As noted in the AMWU submission, casual and part-time workers earn significantly less than full-time workers (AMWU Submission, 13 October 2015, paragraph 132-138).

31.4 Giving existing casual and part-time workers more hours will assist these low paid workers to improve their standard of living (134.1(a)). This is also unlikely to have a significant negative impact on workforce participation (134.1(c)), as the AiG survey of employers shows that the majority of employers currently follow this practice (see answer to 31). The existing practices (to offer more hours to existing workers) within the overwhelming

majority of businesses mean that this will also have a very minor impact (if any) on productivity, costs and regulatory burden (134.1(f)). Finally, research detailed by Dr Tom Skladzien (AMWU Submission 13 October 2015, Attachment 12.12) in his expert evidence shows that inequality is a significant impediment to economic growth. By providing additional hours, and the associated additional incomes to low paid, part-time and casual workers, this clause will assist the modern awards to meet their goal of improving the performance and competitiveness of the Australian economy, which then leads to additional employment growth in the long term (134.1(h)).

31.5 The employer would be said to have discharged their obligation under this clause if they communicated with relevant employees (that is, employees who are available to work in the required location and who have the required skills) via their usual method (notice board, email, SMS, etc.), asking them if they are available to perform additional hours for the duration that is required (an extended absence, a peak in production, a summer trading period, ongoing work, etc.).

31.6 Once employees were given a reasonable time to respond (which would depend on the time frame in which a replacement needs to be found) the employer can either assign the hours to the staff that volunteered or attempt to find a new employee if they are unable to fill the additional hours with existing staff.

Issue 32

Is there anything in the modern awards objective in s.134(1) of the Fair Work Act which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?

32.1 The main objective which needs to be addressed in respect of this question is subsection (c) *the need to promote social inclusion through increased workforce participation*. However on its own, there is nothing to say that

the conversion of existing employees from casual to permanent would lead to reduced casual employees being employed from a group of persons who would not otherwise participate in the workforce. Where the criteria for conversion are satisfied, it is not at all obvious that such employees would necessarily be drawn from a more precarious group of persons who would otherwise not participate in employment.

32.2 Likewise, there is no evidence that engaging a casual employee leads to the engagement of additional employees not currently participating in the workforce. The JES data referred to above identifies that the majority of employers allocate additional work to existing staff. For this reason, in the absence of data to the contrary, it would seem a hollow claim to submit that the proposed casual conversion clause worked against objective 134 (1)(c). The principles within the existing conversion clause are consistent with the modern award objective. The principles within the proposed clause are no different.

32.3 The evidence identified in paragraph 13.7 above regarding influences on workplace participation was that known days and hours encouraged participation. That sort of certainty is associated more with permanent rather than casual engagement and as such award conversion clauses effectively enabling eligible casuals to convert into permanent work would be an encouragement for an unemployed or other potential new employee to participate or increase their participation in the workforce..

SECTION E. Casual Minimum Engagement

Issue 33

Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?; and

Issue 34

Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?

34.1 AMWU submission material relevant to this query is identified in the Table below

Table 11.Material on query regarding appropriateness of standard 4 hour engagement and/or a shorter minimum , AMWU Submission 13 October 2015, Transcript
Majority of casuals prefer more not less hours- 61-64, 140-142
4 hour minimum is the standard- paras. 64, 152,
Costs of attending work- paras. 61-62, 137-138,
Facilitative provisions reducing minimum engagements require a floor- paras.59. 64, 152

34.2 The facilitative provisions in the Manufacturing Award provide a suitable mechanism and safeguard for varying the daily minimums. The current safeguards are that the request for a shorter minimum is at the election of the employee to meet their personal circumstances and that any agreement to allow the reduced minimum must be placed on the employee's record. What is required to ensure a suitable safety net is that a floor be placed on the extent to which the minimums may be varied. Modern awards would not provide a safety net if there was no specified minimum hour. Zero hour contracts are not characteristic of a safety net.

34.3 Variations to the minimum may be argued on a specific industry or sub industry basis. Our response to query 6 above is also relevant to this query. The Graphic Arts Awards for example provides for a 4 hour minimum engagement however casuals in publishing have a 3 hour minimum and if the publishing department of a newspaper a 2 hour minimum daily engagement.[134]

END

[134] Clause 12.4(b).

NONE OR LITTLE IMPACT AND/OR THOUGHT THAT EMPLOYEE PREFERENCE FOR CASUAL WORK OVERIDDEN

Response ID	Does your organisation employ casual employees on an irregular basis?	Why does your organisation employ casual employees on an irregular basis?	What % of your employees who are employed on a casual basis regularly work full- time hours?	Why does your organisation employ regular full-time casual employees?	What % of your employees who are employed on a casual basis regularly work part- time hours (fewer than 38)?	Why does your organisation employ regular part-time casual employees?	If casuals were given the right to convert to permanent full- time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?
13	No		100	Unsure if permanent work will be ongoing	0		Basically this is happening now.
27	No		0		100	overflow	prefer 12 months due to flexibility
41	Yes	To meet the needs of work flow	100	No game to employ any more full time staff as it is to hard to make them redundant when the work level drops away.	0		None
44	No		0		2	To assist with busy periods and	This is already the case under our Modern Award
59	No		80	YES	20	SUITS EMPLOYEE	NO EFFECT, AS IT IS THE EMPLOYEES WHO ELECT TO STAY AS
71	No		100	To cover the work load at the time	1	To suit the business and the employees	unknown
75	No		100	They commence as Casuals, and subject to successfully completing a Qualifying Period, they are then offered permanent positions	0		As long as their performance levels were acceptable. Performance issues identified during the initial
76	No		10	It suits us because of the time of year and gives us the ability to alter hours because of workload.	100	Doesn't	No impact providing I am satisfied with there performance.
235	Yes	Seasonal nature of industry	0.5	No particular intention to do so.	2	Student and seasonal	Minimal as we don't have a lot of casuals
251	No		100	Employee is working on a casual basis during a trial period.	0		Very little
255	Yes	for busy times	100	We are very busy for the last 3 months of the year	0		none
271	No		15	Not normally. At present have 1 employee off on Personal Leave due to shoulder surgery. We have to complete a large project prior to Christmas.	0		NIL
368	No		100	Usually these people are on a trial period for a permanent position.	98	These people only work when the work is there	not sure, probably none
398	Yes	Due to the seasonal work we do, such as powerstation outages. Our sites generally conduct these at the same time so we have very busy times and lulls.	30	they will go from one project to another. The work is not known and they travel around Queensland doing breakdowns, maintenance and outages. They do not have secure work	0		Already have this right. It doesn't come up. If it did, we would probably struggle to approve it due to the unknown workloads.
488	Yes	Not enough work for another full time person so a casual helps keep work deadlines on track.	100	Generally they work full time hours but on a short term basis	0		We always trial new employees on a casual basis before offering permanent full time work. The trial period is generally about 3
525	Yes	Some employees prefer to be casual. Also we sometimes need to reduce hours and it is easier if they are casual.	100	Because we can remove a night shift when we need to reduce stock. Also some employees prefer to remain casual even though they are full time.	0		Not a problem.

Response ID	Does your organisation employ casual employees on an irregular basis?	Why does your organisation employ casual employees on an irregular basis?	What % of your employees who are employed on a casual basis regularly work full- time hours?	Why does your organisation employ regular full-time casual employees?	What % of your employees who are employed on a casual basis regularly work part- time hours (fewer than 38)?	Why does your organisation employ regular part-time casual employees?	If casuals were given the right to convert to permanent full- time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?
564	Yes	To fill the gap in the labour requirements during busy times	50	To fill the labour gap in busy times	50	To fill the labour gap in busy times and for specific jobs that are not ongoing	Generally don't have casual employees for this length of time. If they are still employed for this length of time the aim is for them to employed as a full time employee.
580	Yes	We employ casuals when we have a large one off project. They ensure that our full time employees can provide service to our regular customers.	95	Enables flexibility for the employee as well as the company.	5	Flexibility of work hours for employee (requested).	None. The sole long term casual employee is casual at his request - enables him flexibility
601	Yes	To fulfill backlogs	10	To fulfill backlogs	0		Nil
604	Yes	Short term excess workload for full-time employees needs to be completed. The employee wishes to be casual as they place more importance on $$$ in hand rather than sick leave or holiday pay.	100	The employee wishes to be casual as they place more importance on $$$ in hand rather than sick leave or holiday pay.	0		Nil
629	No		4	to fill positions previously held by full time employees	0		none
638	No		100	To gain a full understanding of the employees abilities for future permanent employment. Also some employees prefer that form of employment.	0		No impact that I can see
654	Yes	as required extra staff mainly when other staff are on leave	0		100	it suits the employee who is very ill and enquires regular medical treatment.	no impact
679	No		60	To match the peaks and troughs in the business. To secure creative staff who are not seeking permanent employment.	40	To match the peaks and troughs in the business. To secure creative staff who are not seeking permanent employment.	It could have a huge impact since casual staff is employed as and when required. Having said that, a lot of our casual staff is not seeking permanent employment.
723	No		0		100	Their choice	nil
733	No		0		10	Their availability suits us and the business	NIL impact
734	Yes	to meet seasonal needs e.g. stock take, provide relief during permanent staff holidays, because some employees prefer to be casual or have other jobs	50	We have one and he has another full-time job and so only wishes to work when he is rostered off on his real job	50	To provide support during periods of heavy workload or where the workload is not sufficient or stable for permanent employees. We have had to make 15% of our staff redundant since 2013.	This would restrict the flexibility of dealing with changes in workload and increase costs. None of our casuals has ever asked for conversion to full time and most of them do not work on a regular basis.
779	No		4.2	For flexibility	4.2	For flexibility of operational requirements	Would have to be accepted
820	No		70	we have no regular full time casual employees	100	not enough work to full fill full time hours in the quiet	no impact

Response ID	Does your organisation employ casual employees on an irregular basis?	Why does your organisation employ casual employees on an irregular basis?	What % of your employees who are employed on a casual basis regularly work full- time hours?	Why does your organisation employ regular full-time casual employees?	What % of your employees who are employed on a casual basis regularly work part- time hours (fewer than 38)?	Why does your organisation employ regular part-time casual employees?	If casuals were given the right to convert to permanent full- time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?
945	Yes Yes	A lot of the work we have available fluctuates depending on the time of the year, so we have a large pool of casuals who work fairly regularly, but at times don't work at all. It gives us the flexibility to roster according to the work load we have and manage times where there isn't much work available.	5	We have a small percentage of casual employees who regularly reach full-time hours each week. Most of these people like the flexibility of casual and do not actually wish to move across to permanency; they make far more money this way, but the work is there for a full-time person most of the time.	60	Again, same as for those who generally work full-time hours. We have work available, and generally for those who have regular shifts like the money they receive and prefer the flexibility that casual offers.	This would reduce our flexibility of managing the seasonal periods. We don't always have a set period of hours each week available, and although a lot of our casual employees do regular hours, there is never a guarantee that we will have work coming in.
1001	Yes	On agreement with the employee, at their request.	0		100	To suit the specific (confidential) circumstances for this employee.	A business must retain the ability to employ casuals on a needs basis. Where a need is seasonal, or project dependent, then the staff engaged are not required permanently. This form of employment suits both businesses, and people who don't want to be tied down.
1016	Yes	Flexibility to meet peak demands of the business and to allow for flexibility for the worker to have school holidays off.	0		10	As this employee does not want to work school holidays and requires flexibility to fit around her family.	We would not be able to provide the flexibility that this employee requires in order to work.
1174	Yes	DEPENDS ON ORDER RECEIVED EXTRA STAFF IS REQUIRED - FACTORY	100	OFFICE STAFF AND SMALL FACTORY MACHINERY HAND	0		IT SHOULD BE AN OPEN OFFER
1192	No		0		35	our market is seasonal and it suites the workers – who prefer a casual rate to holidays and benefits and it suites all most all gap year student workers	Don't know - most want a casual rate of pay with the loading not permanent rate with benefits
1211	No		1.8	Employee prefers this at this point	1.8	Uni student requires flexibility	None
1313	No		0		1	At the request of the employee involved.	Nil
1333	Yes	Used seasonally to cover Xmas and other holiday trading times	0		0		Not applicable
1356	No		100	To supplement our current workforce when orders require.	0		This is how we currently operate anyway. Minimal impact.
1357	No		66	Because they have requested to stay on casual	0		none at the moment
1682	Yes	1.To cover workload fluctuations. 2. These employees want to work casually as they have other commitments and 3. Manage employment costs. We cannot afford to have permanents who may not be fully productive	0		100	None are employed on a regular basis.	Currently our casuals are irregular so this is not an issue. If we had sufficient work for a permanent FT or PT position we would create it rather than use casuals regularly.
1772	No		100	In case of a slow down in work	0		Nil

Response ID	Does your organisation employ casual employees on an irregular basis?	Why does your organisation employ casual employees on an irregular basis?	What % of your employees who are employed on a casual basis regularly work full- time hours?	Why does your organisation employ regular full-time casual employees?	What % of your employees who are employed on a casual basis regularly work part- time hours (fewer than 38)?	Why does your organisation employ regular part-time casual employees?	If casuals were given the right to convert to permanent full- time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?
1941	Yes	Depends on current/short term workload requirements.	50	Depends on current/short term workload requirements.	50	Depends on current/short-term workload requirements and availability of uni students.	We tend to only hire casuals depending on our workload at the time, or for student engineers to undertake paid vacation work. Our casuals would most likely not clock up 6 months of regular employment, usually only around for a 3-4 months and dependent on workload/uni availability. Some students may come back at a similar time the following year/s to continue their previous casual arrangement.
2020	Yes	Some casuals used seasonally for sale events, some employed on an adhoc basis weekly depending on work available	0		100	For jobs that only require a few hours per week	Minimal - we could potentially have one or two employees that this would apply to. The main impact that it would have would be to limit flexibility.
2034	Yes	Occasional work fluctuation or special need	98	Projects of less than 12 months requiring full-time hours on commissioning or construction rosters.	0		Minimal as those casuals would be terminated at the end of the Project for which they were employed in any event.
2053	Yes	We only employ casual employees for trial periods.	10	We employ for trial to establish if they will fit within our operations	0		no effect provided that provided that termination was also an option
2059	No		100	the ability to flex down work force with sales demand	0		difficult to flex down, this may introduce forced redundancy's
2068	Yes	Work is up and down (No continuity)	100	They will work 100% of a week or two then we may not require	0		We would then be up for termination payments and possibly
2073	Yes	To have the ability to effectively manage the output of the factory	80	To have the ability to reduce the work force in relation to demand for product	20	To retain skills specific to our needs	It would lessen the degree of flexibility in our operations
2084	Yes	To cover highs and lows in our work load. Which allows running the manufacturing with lower overheads, I could employ another full-timer but again at various times they would be just standing around costing money producing nothing.	0		11	To cover highs and lows in our work load. Which allows running the manufacturing with lower overheads, I could employ another full-timer but again at various times they would be just standing around costing money producing nothing.	If I was using the person regularly over 6 months, I see no real effect upon the organisation. We would have established there work ethics by then and presume that if they lasted that long then converting to part-time would be no real effect on us.
2103	Yes	To cover for staff on leave and/or to cover peaks in our work orders and to cover weekend work	80	To cover for staff on longer term leave and/or to cover peaks in our work orders	20	Weekend work where additional staff are required to supplement existing workforce	Typically casual employee selection procedures are not as through as that of engaging permanent staff therefore the company would either increase the casual pool to ensure there is a higher turnover of staff or increase the level of the selection
2107	Yes	work load	100	short term employment and employee did not wish to change to full time employment	0		no impact
2134	Yes	To help with product demand	15	Product demand	0		some impact
2154	Yes	Depending on work load from week to week.	70	This is due to probation period and work load requirements.	30	Work load changes per department.	Minimal as we usually convert to full time if asked to.

Response ID	Does your organisation employ casual employees on an irregular basis?	Why does your organisation employ casual employees on an irregular basis?	What % of your employees who are employed on a casual basis regularly work full- time hours?	Why does your organisation employ regular full-time casual employees?	What % of your employees who are employed on a casual basis regularly work part- time hours (fewer than 38)?	Why does your organisation employ regular part-time casual employees?	If casuals were given the right to convert to permanent full- time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?
2239	No		0		5	To review performance before permanent part time.	Not really
2553	Yes	we may need to have a casual trainer take a course as a fill in for a trainer who is off unexpectedly	0		0		no, we would accommodate
2867	Yes	Casual staff required to fill in for short term vacancies, and vacancies due to leave by F/T & P/T employees. Some employees cannot/won't commit to working on a regular basis.	0		85	Casual staff required to fill in for short term vacancies, and vacancies due to leave by F/T & P/T employees. Not all work by casual workers is on the same shift. Some work is based on work demand.	Some difficulty as some employees are employed to cover staff on Maternity Leave, Workers Compensation or other leave. Will cause rostering difficulties as some 'regular casuals' work over a range of different shifts - there may be some problems with how may contracted hours need to be offered and what happens if these cannot be guaranteed.
2915	No		100	They are employees on trial for full time employment	0		none
2947	No		100	Probation period to ensure suitability for the position	0		Very little
3050	No		100	to cope with seasonal variations	0		no effect
3077	Yes	Work requirements differ all the time.	50	Can lead to full time employment if they work out and the job requirement is there.	25	Suits the employee and the company to have them in for part time hours only. Job requires small blocks of work.	Would affect the review of casuals before the 6 months is up to see if we want to keep them.
3092	No		10	They prefer to stay as a casual	5	That suits the work required for that position and the people working those hours	no impact at the moment
3327	No		8	The employee prefers to remain casual and this allows some flexibility in times when work levels vary.	4	To help meet excess work requirements.	Minimal effect
3529	No		60	irregular work hours due to change of seasonal work	40	flexibility for the employee	no impact
3611	Yes	For peak work times, to top up staff numbers, and to also provide employment for some staff who don't want a full time position, but we still want access to their skills.	0		100	We don't, but we may do in the future.	it would not affect us greatly - if we haven't worked out that a casual employee is no good by 6 months, that is our problem. Our biggest problem would be working out what percentage of full time they have actually worked, so on what basis the part time position would be provided.
3616	No		100	most employees on probation are employed as casual employee	0		employees who do not pose the right fit to the company would be terminated prior to 6 months employment
3641	No		10	only while on probation	90	To keep worthwhile/skilled workers on hours that suit them.	minimal
3764	No		0		50	Our business is at is most busiest over the summer	not sure

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3779	No		100	Casual employment is carried out while on probation period	0		No effect, we offer full time employment after the six month probation period. We don't expect our employees to request it and know the award. As we manage HR we know the award and offer the transfer.
3904	Yes	Casuals are usually hired in peak season, then let go when it slows down. We also put new employees on casual for a period of 6 months and if they are happy to stay they are then made permanent	98	All employees work 38 hour week whether perm or casual. After a qualifying period, casual may transfer to permanent employment if they wish	2	just to do help out with some odd jobs that don't get done during the course of the day	Can not see it being a problem as most requests are granted
3921	No		100	to get specific skilled labour	0		none
3978	Yes	seasonal demand	0		0		little
4042	No		50	To balance out seasonal work loads	50	Flexibility	We would have known their suitability before the 6 months term
4262	No		100	because they want to remain as casuals	0		none
4308	Yes	mutual short term benefit	3	their choice	0		no effect
4316	Yes	TRUCK DRIVER NOT REQUIRED FULL-TIME	50	CURRENTLY THEY ARE NEEDED FOR THE EXTRA WORK TO BE DONE	50	FOR OFFICE WORK	CURRENTLY NONE
4558	No		0		1	Requested by employee	None for Direct Employees Would be issue with Labour Hire companies used
4753	No		0		100	We only employ 1 casual, who is semi retired	No change
4763	Yes	needs of the business order loads plus "sorting out" of suitability of prospective permanent employees	90	see above needs.... and "suitability"	1	Skills and business needs	some

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4796	Yes	Mostly required as extra help when we receive/sent containers.	90	Most casual staff prefers to remain casual due to the higher hourly rate. It is more their own choice rather than our choice. others are casual as the business needs to have the flexibility of	10	More to fill gaps in staff either due to increase workloads or absenteeism.	Not concerned as we do not retain casual staff that we do not consider worthy to put on permanent.
4833	No		0		100	People with circumstances that can't work full time due to study or looking after young children	None
4949	Yes	To cover busy periods and keep production flowing	33	The employee does not wish to be a full time employee as he often needs to take weeks off at a time for his own personal business	0		Nil
4981	No		100	Because the employees prefer to be casual	0		nil
5031	No		20	they are long term employees who don't want a FT contract	70	they don't want to go on a PT contract	it would be an issue if the casual is underperforming
5364	Yes	because of the work flow, when we are busy we need extra staff. It also can get to see how this person will fit in to our work environment	80	some are on trail, some prefer the high wage that being casual gives them	5	to accommodate a employee who needs to be part-time due to study	not sure
5365	No		0		100	Probation until after 3 months	Nil
5410	Yes	Contract manufacturers.	90	Employee preference	10	To cover fluctuating demand	None
5419	Yes	Depends on the volume of work we have	75	They are put on as a casual initially, then after probationary period may be moved to full time.	10	Work volume & often students	It would make it difficult for the students we employ.
5421	No		5	They prefer that option	10	No work on I can send them home	zero impact
5541	Yes	When there is staff turnover, we source casual employees initially and then convert to full time if there is a good fit for both parties.	100	generally with a view to replace a former employee, so need to know they can work full time.	0		none
5446	No		100	that's what they want to do	0		nil
5556	Yes	usually required to replace an existing staff member that has left the company. The casual period is a trial for both partiers to confirm a good fit.	100	we have the need to cover full time activity	0		no impact as we will make a commitment within the three month period
5691	Yes	When workflow increases it is easier to hire casuals during thistime.	0		100	It suits are workflow arrangements. When the work level decreases it is easier to stop their work. I guess cost is the main factor.	None

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5782	Yes	extra workers are required for larger contracts	50	we have offered FT employment but they like the casual rates	50	Employees job share	After much discussion, we do not think it would have a huge impact, but is it necessary?

Avoidance of Award and NES Obligations

Response ID	Does your organisation employ casual employees on an irregular basis?	Why does your organisation employ casual employees on an irregular basis?	What % of your employees who are employed on a casual basis regularly work full-time hours?	Why does your organisation employ regular full-time casual employees?	What % of your employees who are employed on a casual basis regularly work part- time hours (fewer than 38)?	Why does your organisation employ regular part-time casual employees?	If casuals were given the right to convert to permanent full-time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?
28	Yes	My business provides labour hire services to a diverse range of industries - catering for peaks in demand for host employer businesses.	80	The casual assignments may be for a period of time to cover absence or peak in demand at a host employer site.	2 0	The casual assignments may be required to cover a select range of duties that maybe achieved in hours less than 38hrs per week. Also, there may be a need to supply a short notice, fill in worker due to host employer absence or peak in demand.	This would have a significant impact on host employers who have peaks in demand for workers. I feel this could lead to casual workers loosing their positions when they are close to reaching 6 months, and new casuals replacing them - simply because the cost of a permanent worker due to payment of public holidays/annual leave for small/medium businesses in particular, is quite significant. The outcome of this could be that more businesses would fail, the cost of products would need to increase and more people become unemployed.
93	No		0		2	Job sharing, work load sharing	it doubles the hourly rate when covering for sick leave and holiday leave
156	Yes	We only hire casuals when workload increases	0		1 0 0	Convenience to have labour only when needed	We would lose the casuals before 6 months. Can't be forced to put on staff we can't afford.
183	No		0		0		We wouldn't employ as the workload is not fixed and could end up paying for an employee that would not be required for work that day.
491	Yes	fluctuations in work levels	10 0	difficulty in dismissing underperforming or troublesome employees, difficulty in forecasting work levels	0		major it would restrict our hiring of new employees as we can't afford to pay redundancies if work levels drop
720	Yes	To assist during busy periods and to complete work that does not need to be done regularly.	10 0	They are only working full time hour while demand requires it. Once demand slows they will work less/nil hours.	1 0 0	To assist infilling employee gaps during busy periods and to cover full-time employees who are absent from work on leave.	we would not hire a casual employee for more than 6 months. i.e. we would cancel their services prior to them serving 6 months.
1044	Yes	Fluctuating business demands and ability to change workforce as required	10 0	Flexibility. The IR laws in Australia are too restrictive for employers so we choose not to employ as full timers. This allows us also to respond to seasonal fluctuations in requirements.	0		We would ensure that no casual employee was employed for more than 6 months. We employ casuals for flexibility. If we lose one more right as an employer it makes you wonder why you would bother employing in Australia.

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1846	Yes	increased need for workers temporary increase in work	50	they are good workers who prefer casual rates over permanent, especially as they are rarely sick	0		ALOT we need to have the flexibility that if there is a massive downturn in work we can let the casual workers go without the need for redundancy that permanent employees are entitled to as that is a massive cost (especially when it is usually a short term thing and we hope to get our casuals back ASAP)
2068	Yes	Work is up and down (No continuity)	100	They will work 100% of a week or two then we may not require them to work for some time. The work is spasmodic	0		We would then be up for termination payments and possibly unfair dismissal claims.
2374	No		100	We currently have a need. All production employees start off as casuals	0		We could end up with more staff than we need and may have to offer redundancies in the future
4938	Yes	Cover peak demand periods, cover absences on holidays and sick leave.	100	Cover peak demand periods, cover absences on holidays and sick leave	0		Increased costs for leave entitlements, public holidays etc. Loss of expertise as casuals would be finalised before the 6 month term
5252	Yes	NATURE OF THE WORK AND INFLUX - ALSO KEEPS YOUR FT HEADS EMPLOYED	0		100	NATURE OF THE BUSINESS	REDUNDNACY RISK
5366	No		0		2	Not sure	-Greater costs and turnover of casuals, as most of the time our casuals are only required for a maximum of 12 months.
5494	Yes	as per business need	10	as per business need	2	as per business need	labour cost may be unsustainable
5750	Yes	Due to the retail market we are in, we have massive swings between seasons and school terms with regards the sale of school uniforms.	0		100	As we are a new business, we are still trying to find our feet and determine what is the right mix of staff, what are our busy and what are our lean sales periods and then we can determine who we shift to Part time roles etc. Plus, the costs involved in paying a Perm Part Time person all of their leave entitlements including sick leave, carers leave, leave loading, holidays etc makes me sick to the core. At present, the only winners are the employees and the poor business owners get 1/10th of nothing!	It would have some effect, more psychological than anything i.e. long service leave provisions must now be catered for because we provided our employees with a job! All we do is constantly put our hands in our pockets to pay for employees!

ATTACHMENT 'C'

Clearly confused, and/or conflate permanent with full-time, and/or ignore employee preference

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60	Yes	Depend on projects and jobs required.	10	Just needed for project to meet our needs.	0		Additional costs as casual always paid with loading and higher pay rate.
361	Yes	To meet fluctuating operational manning requirements and for absence coverage.	10	To utilize skills sets in different parts of the business	90	To meet operational requirements and to meet casual availabilities.	Would increase the FTE of our business significantly without the business having the ability to review demands.
518	No		0		100	School student Employees unable to work long hours on a regular basis Employment on a trial basis	This would not suit our casual employees as they do not wish to work regular hours each week
554	Yes	To meet spikes in production demand	0		100	To meet spikes in production demand and keep costs down when demand drops off again but we always offer full days of work	The definition of 'regular' is unclear but the result would more than likely increase costs if 'regular' means on a weekly basis and have been working for more than 22.8 hours per week
937	Yes	Due to work load - primarily in our production and warehouse area where we may have increased volume and/or we are scheduling for stock builds (generally our production is to order).	37	In this area it is usually to ensure that the employee has time to assess if this is work they wish to do, prior to organizing an apprenticeship and to ensure the regular work patterns have stabilised prior to converting to permanent.	13	Generally these are students who are working hours that fit with their study requirements but give them experience in a work environment.	Significant impact as those that have not been converted when they have elected to have been kept as casuals due to uncertainty of ongoing work. If they were automatically converted this may lead to redundancy in the short-term should work levels reduce.
1016	Yes	Flexibility to meet peak demands of the business and to allow for flexibility for the worker to have school holidays off.	0		10	As this employee does not want to work school holidays and requires flexibility to fit around her family.	We would not be able to provide the flexibility that this employee requires in order to work.
1046	Yes	We have peaks and troughs in our business and are able to increase staff from the casual pool as required.	1	We have one staff member that I inherited on arrival and have not been able to push his manager hard enough to make a decision about his employment. We understand that for all intents and purposes he has full rights as a permanent member of staff.	0		This would not suit our business. 99% of our casual employees are used on a "need" when we are busy. They are not rostered to work unless we are busy. To have to guarantee regular part- time work in our quieter season would be very expensive.
1315	Yes	peaks and troughs in workload	25	this is a starting appointment arrangement which many prefer to retain.	75	preference of staff, length of shift, demand.	would require additional staff to be employed in order to cover the taking of annual leave. Would increase the administration costs.

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1602	Yes	We have a cleaner who works here approx. 3 hours one day each week	0		1	Regular hours are suited between employee & employer	A full time cleaner is not required by the business and would not be wanted by the employee. The employee would leave on their own accord.
2049	Yes	flexibility for demand and supply	60	client demand	1 0	client demand	The organisation covers many awards. Almost all casual employees do not want to convert to permanent employment as it would mean a 25% reduction in pay. If compulsory the impact would be huge - as a labour hire employer it would have difficulty recovering the additional accrued costs from clients. It would result in short fixed term contracts and a prohibition on extensions for those employees.
2108	Yes	to push out work that is required and to fill in gaps when needed when full time employees are on extended leave / AL	3	in case the work dies down and they are not required	5	to get through high volume of work orders / seasonal work	the business will have no choice but to recruit casuals on a full time basis when the work is adhoc.
3525	Yes	We employ casuals on both regular and irregular terms. Irregular casuals are employed due to seasonal requirements of manufacturing, for ad hoc tasks, for additional tasks that we are notable o fill with overtime labour, for maintenance shutdown tasks where a limited amount of time is available to access the machinery	72	Regular full time casuals are employed at short notice to fill roles required within the business, with the intent for these to become full time employees. Regular casuals are also employed when production volumes change for extended (up to 4 months) periods of time.	8	To supplement additional workloads for short periods of time. Also to backfill for annual leave.	It would increase the turnover of casuals prior to the 6 month mark, to prevent the business being forced in to a position of having to convert them to full-time employment when there may not be eth ongoing need for the role.
4286	Yes	Demand fluctuations	100	Demand. Casuals are employed on full-time hours for the duration they are employed, generally 1-2 months.	0		We would not employ any casual for longer than 6 months so that such a clause could not be invoked. There are employed as casual because we only want them for a short period of time.
4913	No		80	to meet our production schedules that cycle up and down. So they may work FT for 2 to 3 months then not work for a few weeks	2 0	to meet production demands have some skills but are unable to work FT hours	A huge impact as our casuals will work in blocks but come and go and we cannot just keep converting casuals to FT. Many have regular work for 9 months and then production for us is slow in Dec, Jan & Feb
5128	Yes	The only position we offer casual employment for is labourer labourer type position - varies from project to project.	100	We require them on an irregular basis for manual labour.	0		We would not hire casuals.
5433	No		50	Because we are not confident enough in the future of our markets. It gives us some flexibility to reduce our total workforce during a yearly cycle.	5 0	To fit with shift arrangements. (ie we run 3 nights/week) To fit employee personal preferences To fit with production cycles	I would seek a way to avoid the change to full time. Realistically we don't need any more full time employees to operate our business over a full 12 months

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5593	Yes	To cover shipment of goods from our manufacturing branches to be put away. A spike in orders to be picked and packed.	5	No	9 5	Both parties need flexibility around work loads and family commitments.	It would have a significant impact as we are busy between Xmas and Easter and then quiet for the next 6 months
5630	No		1	work load seasonal work	1	work load	There are casual because of the work load, if we had to employ them full time, we would have to pay them even if they didn't have work to perform. Very costly to the

AMWU Witness Evidence – Summary

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
AMWU - Preference for permanent employment	**Stephen Murphy**	**Brent Ferguson - AiG**	**NSW Assistant State Secretary**	**16-Mar-16**	**PN2953**	"One of the objectives you pursue in your dealing with companies is to promote permanent employment in favour of casual employment, is that right? --- Permanent jobs where the jobs are 38 hours a week and ongoing, yes."	
Regular Engagement	**Stephen Murphy**	**Brent Ferguson - AiG**	**NSW Assistant State Secretary**	**16-Mar-16**	**PN2957**	?---There's a couple of issues that came up: one was that they had regularly been working those hours for the whole period; secondly was the work was continual and ramping up.	
	Stephen Murphy	**Brent Ferguson - AiG**	**NSW Assistant State Secretary**	**16-Mar-16**	**PN2958 / PN2959**	You don't mention anywhere in your statement that you undertook any review of the pay records of the specific workers involved, I assume you didn't? --- There was no examination of those records. No, it was just based on what they told you? --- And what the employer had stated as well.	
	Tom Skladzien	**Brent Ferguson - AiG**	**AMWU Economist**	**24-Mar-16**	**PM11307 - PN11308**	"I just put it to you, then, they would be more likely to terminate the individual than if the person was on a casual basis - engaged on a casual basis - and there was some capacity to not engaged them on that day? --- No, I would say that the business is more likely to decrease its use of casual employees and keep the permanent employee, the person who has been deemed and was formerly a casual employee, and find work for them, because they have an - as you said, they have an obligation to pay the person whether they're working or not." Yes? --- And they have, on the other wise, access to flexible labour casuals. And so they would use the access to flexible labour to manage those ups and downs and they would pay their casual employees as they obliged to. Casual employees would continue to do their work."	
Safety and Health Outcomes	**Deb Vallance**	**Brent Ferguson - AiG**	**AMWU Health and Safety Officer**	**17-Mar-16**	**PN4807 - PN4808**	"Dr Vallance, can I take you to paragraph 33. Would you agree that the negative consequences you've referred to there would not be applicable to employees engaged as long term casuals working on a regular and systematic basis for employers other than labour hire providers? --- Again, I'd say that the evidence is variable. It depends upon the relationship between the employer, the employees and the casual arrangements. Because someone is in a long term arrangements, doesn't necessarily mitigate against all the factors that have been cited in my statement. But you'd agree that not all casual employees experience those negative consequences? --- As said previously, for the individual employee, it will depend upon individual risk factors, but as a group, these are well known risk factors which increase the propensity for poor health and safety outcomes".	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
					PN4803	"Yes, thank you Dr Vallance. Can I just take you to paragraph 21. You say there that participation in work place consultative arrangements is difficult to secure workers for a variety of reasons. It's quite a general statement. You aren't suggesting that all casual employees have difficulty participating in workplace consultative arrangements, are you? --- I'm saying that for people in casual employment arrangements, participation is often harder for a variety of reasons. For any individual worker, of course they may or may not - all of those factors may or may not apply. But as a general category, those are the factors which do not impact on consultation. Would you accept that the statement is not applicable in the context of long term regularly engaged employees for an employer other than a labour hire provider? --- No. Would you accept that long term regularly employed casuals may have less concerns about their job security? --- That would depend on the circumstances. If you look at the evidence, even if people are in long term arrangements, they are still nervous about raising issues because that means that they do jeopardise their relationship with their employer or the labour hire"	
					PN4816	"Can I just take - sorry, I'll let you answer that. But I just wanted to add, that some of the factors that you suggest, lead to problems with health and safety seem to be related to - would be equally true of part-timers, wouldn't they? As well as - so is the contrast between people who only work in workplaces on a part time basis and therefore aren't around so much, and people who are full time employees, rather than whether they're casual or part-time? ---- I now understand the question, your Honour, thank you. Sorry, in terms of some of the factors, they will be mitigated, but it's actually you can't actually say just because that if someone is - it's about the re-employment relationship and how they're viewed in the workplace. So if someone is a permanent part time employee, there is a tendency for those persons to be regarded as a permanent employee. Well they are regarded as a permanent employee which is different to if you're a casual or someone who is not permanently at the workplace. So the arrangements about health and safety representation, the arrangements about consultation, the concerns about lack of job security. If you're permanent part time, will not necessarily apply to you, so I don't think you can equate part time work with casual or insecure work. They're different."	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
	Dr Elsa Underhill	Brent Ferguson - AiG		22-Mar-16	PN7893	"COMMISSIONER ROE: Dr Underhill, can I just get a bit more clarity on the issue that Mr Ferguson asked you about concerning the issue of those who choose casual employment. In paragraph 10, you talk about those who choose it for lifestyle reasons. You talk about those where employment is secondary to other activities such as educational studies. You also talk about young people who choose it. Does that mean you believe, or the research suggests, that anyone who chooses casual employment is likely to have better health outcomes?---The strongest evidence is around those who choose casual employment for lifestyle reasons. In effect, the employment is secondary to the other issues around the lifestyle that they've chosen and it supports them in that lifestyle choice, and they do have better health outcomes. Others who are doing casual employment as part of supporting their educational studies are more likely to be transitioning through casual employment and are less likely to be employed casually for a longer period. As result, you wouldn't expect the adverse health outcomes to be as bold."	
					PN7894	"When you say these categories have better health outcomes, better than what? Do you mean better than other categories of casual employees or better than all employees?---Casual employees who choose it for lifestyle reasons have better health outcomes than your average - your casual employee who is doing it because of lack of choice. As to whether their health outcomes are the same or better than permanent employees, I honestly cannot recall. I'd have to check the research findings on that."	
					PN7917	(In reference to the article - 'Are Casual and Contract terms of Employment Hazardous for Mental Health in Australia by Sue Richardson, Laurence Lester and Guanyu Zhang") "They also found that women tend to have better mental health outcomes if employed in full-time casual arrangements, as opposed to part time employment. Are you familiar with that outcome? --- No. In fact, it surprises me, because firstly the evidence around part-time employment is that thee are better health outcomes than full-time."	
					PN7945 - PN7948	"I have copies for the bench - Page 240. Just bear with my one minute Dr Underhill, while the bench - I take you to the last paragraph of that page where it states: *Employment conditions, and precarious employment in particular, are determined to a large extent by macro level structures and processes, including macro level power relations. Yet, existing research on global labour markets and population health remains in it infancy.* How do you reconcile your statement at paragraph 2 with that conclusion? --- The conclusion that is drawn on page 240 is referring to global labour markets and population health. It's referring to a much more macro level of analysis. The links between casual employment and poor health and safety outcomes is well established through literature which studies specifically casual and tempo employment, and health and safety".	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
					PN7964 - PN7966	I'll take you to paragraph 6 of your statement, if I may, Dr Underhill. You talk there about various characteristics of employment insecurity that contribute to workplace injuries amongst casual employees. Would you agree that the factors you identify in that paragraph may have less relevance in the context of long-term regularly employed casuals working for a direct employer?---Not necessarily. There are a range of factors that would apply irrespective and in particular it would be issues like access to information about workplace health and safety environment, including and particularly low levels of training and instruction. Whether or not they're included or excluded from consultative processes, and that's particularly the case if you have particular shifts that are predominantly casual. So it would be a matter of degree, but you would need to understand the extent to which the longer term casuals have become integrated and offered the same level of support that permanent employees have. When you say it's a question of degree, would you say that there would be some reduction in the level of risks likely as a result of a longer tenure of employment by a casual with a regular direct hire employer?---On the one hand you would certainly hope that over time they had better access to training, information, consultative processes so that they were at lesser risk of injury from incidents, but at the same time if you have the instability or the insecurity of being a casual over a longer period, then duration isn't going to change that fact. Duration of casual employment is not going to change the financial insecurity and it's not going to change the potential threat of dismissal or redundancies without redundancy payments. But it would potentially affect the protection the worker has from dismissal, wouldn't it?---Well, it would. I mean, you would assume that they will be treated as regular casuals.	
	Liam Waite (Witness Statement)	**(witness statement)**	**Graffiti Removal Specialist**		**19**	"19 - I report to the General Inspection Manager who is in charge of general inspections. We have three people fill that role as they are on a rotating shift. **Every day it can be a different manager.**"	
					46	"46 - I feel like I'm living with constant stress because I never know what's happening from week to week"	
					47	"47 - We did see people raise issues about safety on the project before regarding fumes and the person was **told not to come back on Monday**. We have concerns where there are OH & S issues, **but we worry about repercussions as has been the case when previous contractors - when they raise issues, they are let go"**	
	Deborah Vallance	**(witness statement)**	**Occupational Health and Safety Co-Ordinator**		**13**	"Recent Australian research showed a significant association between casual full time employment and poor physical health"	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
					16	"Insecure work is associated with increased risk of injury, more severe injuries and experience greater difficulties in returning to work post injury"	This evidence is supported by the facts of *Lynch v Prices Removals and Storage Pty Ltd* [2014] FWC 8115 referred to in the catalogue of disadvantage. The case involved a regular and systematic casual worker who was dismissed after requesting to take leave without pay due to an injury. The applicant sent a text message to the respondent stating "If I knew was going to lose my job over this I would have stopped taking the pain killers and been there in a flash" at [8].
					20	"effective internal inspection is difficult if the presence of the affected workers is transitory or not there when the inspector visits or the temporary agency workers lack of familiarity with work place hazards."	
					23	"insecurely employed injured workers often have a more difficult time returning to work and during the workers compensation process…labour hire workers are not provided with light or suitable duties for their return to work"	
					29	"The *Work Related Injuries in Australia 2005-06, Factors Affecting Application for Workers Compensation* report rates that those without leave entitlements are **less likely to make workers compensation claims**". "Injured workers without paid leave entitlements were three times as likely to think they were not eligible for workers compensation as employees with paid leave entitlements"	
	Simon Peter Hynes	**(witness statement)**	**Screen Printers Assistant**		**12**	After a workplace injury - "the company (Christie Tea) detached me in 2014. They claimed financial hardship so WorkCover took over my weekly payments. Although when I was detached they had an agency worker who cost about $40 an hour still working in the same role that I was working in".	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
					15	"Being casual is stressful because the company could potentially ring up and say don't come in today at any time"	
					17	"Even when I was sick I went into work. It is was really bad I would stay home but I used to go to work sick because if I didn't go to work, I didn't get paid"	
	David Kubli	**(witness statement)**	**Crane Driver**		**18**	"We are required by the company to pay for our overalls. **They take $45 out of our pay**. If we want overalls, we approach the supervisor and then they take it out of our pay. We have to sign a piece of paper so they can take it out of our pay."	This appears to be a blatant violation of WHS principles. In NSW, s 273 of the Work Health and Safety Act 2011 state that "A person conducting a business or undertaking **must not impose a levy or charge on a worker, or permit a levy or charge to be imposed on a worker, for anything done, or provided, in relation to work health and safety**". Overalls are clearly for the purposes of safety and therefore should not be charged to the workers.
					30	"I would prefer to be permanent 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**".	
	Heidi Kaushal	**(witness statement)**	**AMWU Organiser - Food Division**		**15**	"It was bought to my attention by a member onsite that a worker named Pat Carpenter who had been working at Agrana for about 5 months straight had stopped working. I am told that Pat was employed by 'labour power', a labour hire company. I am also told that Pat (and our member)attending a workgroup meeting onsite regarding Health and Safety Representatives (HSR). The message conveyed to the workers by the company was 'if you become a HSR you will have to do whatever the company requests otherwise you can get the sack'. Pat spoke up and said 'that is not true and I know it is not true because I was a HSR at my last place of employment'. He never worked at Agrana after the day of this meeting."	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
Efficacy of Conversion	Clinton Lewin	Alessandra Moussa	NSW Organiser	16-Mar-16	PN30331	"Do you remember being told by a particular casual employee about what happened to other casual employees how had asked to convert to permanent employment? --- I don't recall a specific person raising that concern. I know that once I explained to the casuals about the provisions that prevail for them under the Patricks' agreement and for also the award, that I said that "You have opportunity here to approach the employer and ask for a permanent basis - permanent employment" and it was then that the casuals said "We've seen in the past when casuals have done that they either haven't been asked back for the next shift" which normally they would because these casuals are basically doing 38 hours a week and in excess of that and that's when I was made aware that some casuals weren't prepared to put their hand up and ask the employer"	
					PN3095 - PN3098	"With respect to that provision - I won't labour the point but - would you agree with me that it had limited application to casuals in the past? --- No, I wouldn't agree with that. All right. I put it to you that it's an unusual circumstance for a casual to work full-time hours for six weeks in a row. Would you agree with that? --- It's not unusual, no. Well, so you think it applied a lot or you have no recollection of it? --- The sites that I generally visit where there's a high level of casuals, those casuals work consistently in excess of 38 hours a week for periods long than six weeks. But you're talking about those larger businesses, again, in your experience? --- Yes.	
					PN3170 - PN3174	"Success in relation to casual conversion? --- Yes, there has been some success there, yes. So do you believe that that means that the region is starting to work; that the casual conversion clause is starting to have some effect? --- No, I don't believe it's working. Well, you say there that you had success at Prix Car? All right? --- It's only one - until I intervened that it worked. Paragraph 19 you mention - you're aware that there are instances where companies do make casuals permanent, is that right? --- Yes. Have you got examples of those? -- Well, Prix Car is one. Yes, any other examples? --- No, not really."	
					PN3175	"Do you think that relates to the new casual conversion clause, that there are more casuals being made permanent or part-time? --- Well, as I said, the only time I've seen casuals be converted to permanent is when I myself have intervened and made the businesses aware of their obligations"	
					PN3184	"My apologies to you there. I'm quoting from the line in paragraph 19 where it says: 'There are instances that I'm aware of where the companies do make casuals permanent and it isn't necessarily because I have raised a grievance with them on behalf of members'? --- Well, yes, in that circumstance I know that some casuals have approached the employer, particularly Prix Car and Patricks, and those casuals that were directly employed by Prix Car and Patricks, where they have sought permanent on occasions the company has given them either permanent or part-time. But a majority of the time it isn't until I intervene. That's my experience".	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
	Liam Waite	**(witness statement)**	**Graffiti Removal Specialist**		**30**	"30 - After the first 6 months I was wondering what was going to happen and I raised my conversion to permanent with management. Time went by, **and it is now almost 2 years later, and I am still employed with the labour hire company and not permanent with Sydney Trains**".	
					34	"34 - I have not received any response from Sydney Trains to my request to be made permanent"	
	Vinh This Yuen	**(witness statement)**	**Organiser - AMWU**		**8 - 10**	"8 - A different female employee then asked, 'What do we do if we want to be made permanent?' 9 - I then responded by saying, 'You got to approach your employer, and let them know that you want to be made permanent.' 10 - Another woman then said, **'Oh talk to the employer? That is another way out of the door.'"**	
					14	"14 - There are about 80 workers there with only two that are permanent and the rest are casual. **The casuals have been there for over 6 years and some up to seven years**".	
	Aaron Malone	**(witness statement)**	**Organiser - AMWU**		**35**	"One worker in particular detailed to me on my first visit to the site that she had worked there for seven years. She said words to the effect of "I've worked here every day for seven years". I asked if she would prefer a permanent position. She said "of course" I asked her if she had spoken to management about it. She said "Yes, and sometimes you get promises or assurances, but nothing changes." She went on to effectively say that "the company prefers things the way they are". (this was specifically in relation to a labour hire firm)	
					41	"the consensus was amongst the supervisors that their job would be made much easier **if they could have a permanent workforce, as it would increase productivity and give stability to the workforce.** The supervisors talk of frustration in having to **explain, train and retain different people when they do come in**".	
	David Kubli	**(witness statement)**	**Crane driver, forklift driver, oxy operator and hanger operator**		**5**	The manager "Rob" told the workers upon being made direct casual employees that "down the road in six months time we'll make you all permanent"	
					21	"I had asked Rob about becoming permanent and he said 'Next year sometime. **You have been here long enough.**'	
					26	"Three workers told me that they had asked to become permanent. They told me they received no answer to their request".	
	Heidi Kaushal	**(witness statement)**	**Organiser - AMWU**		**6**	"There were plenty of labour hire workers who worked at Cerebos. Some worked continuously for years".	
					9	"Peter (workplace delegate) believes (based on his discussions with the casuals who Fred - the production manager - claims to have offered permanent employment) that the casuals actually do want a permanent position and it wasn't clear that they were being offered a permanent job."	
					18	"No casuals were offered either a part time permanent position or a full time permanent position and all the written responses from Simplot were exactly the same, except for the personal details for the employees"	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
	Simon Peter Hynes	**(witness statement)**	**Screen Printer's Assistant**		**7**	"I put a letter in writing to the Manager Mr David Keelan. The response that the company couldn't make us permanent because the contracts that the company have were reviewed every twelve months and it wouldn't be fair on the other people working there that didn't apply if we were made permanent"	
	James Fornah	**(witness statement)**	**Pasteuriser/Sealer**		**16**	"When I started working with the company, I wasn't given anything in writing about my casual rights. I was told at the interview that I'd be made permanent after 6 months, but they didn't keep their promise."	
					19	"I did eventually approach my manager and asked to be converted to permanent, but I was told to just wait, wait, wait."	
Requirement to Give Notice of Rights to Convert	**Heidi Kaushal**	**Brent Ferguson - AiG**	**NSW Organiser**	**16-Mar-16**	**PN3394 - PN3403**	"Are you aware that this agreement does not require Patrick's Autocare to notify employees of any rights to convert to permanent employment? --- Not specifically. So you agree that it doesn't require that? Is that your understanding? --- I'll have a look. You might want to go to clause 16.3 Mr Lewin, you haven't raised any dispute with Patrick in relation to casual conversion that got to the Commission, have you? --- No. VICE PRESIDENT HATCHER: I'm not sure how (f) sits with (c). MR FERGUSON: It's undoubtedly a matter we can make some submissions about, your Honour. But there's certainly no obligation to notify. COMMISSIONER ROE: Is that right, because it says: Initiate a process for transfer in accordance with the award. And the award does require notice to be given. It then says: For clarification the company can supply those notice to an employee tyo advise him whether the qualification period has elapsed. Doesn't that appear to be a reference to the requirement in the award? MR FERGUSON: Not, and I'm sure I can make submission to this at a later point, but, I think, just what the reading of it is, that on the completion of six months either party can initiate the conversion process but that conversion process, made in accordance with he award, and I don't with to criticise the drafting of an agreement, and perhaps it needs a little to be desired, but it certainly doesn't require, as I read it, a notification"	
Difficulties associated with casual status	**Jill Biddington**	**Brent Ferguson - AiG**	**ACTU**	**14-Mar-16**	**PN687 - PN689**	Not all of the casual employees you heard from were actually opposed to casual employment, where they? --- No. In fact, the casual employees that we heard from were actually more often cranky with the labour hire agencies than their own employers. In fact, casual employees who were directly employed were very often less stressed than those who were processed through a labour hire agency and it would be true to say that they seemed to have less frustration in terms of communications. The vast majority of people did appear to come from labour. But just to be clear, not all of the casuals that participated were actually opposed to continuing the casual employment, were they? --- The people we heard from were chiefly concerned that they could be employed and pay their bills. That was their priority. They were not opposed to having a job to pay those bills, but they were frustrated, because they felt very much like they weren't getting ahead or that somehow socially they were a lower form of worker, but the fact they had not permanency.	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
					PN823 - PN824	"What was the evidence that the presented to the hearing? --- When they appeared? Yes? --- The message to the Commission was quite a universal one. So whether someone was employed as a regular casual or an infrequent employed casual or any other kind of worker, generally they spoke about the social impacts about the stigma of not having full time work; the stigma of not being seen to be able to pay their own way, many of them, and perhaps more men than women talked about the embarrassment at feeling that they had to go and beg for money to have their bills covered. A lot of frustration mentioned by all about feeling like they very much were some kind of lesser clans, and several referred to relationships at the workplace where full-time or permanent employees did not regard them as equals."	
	Deb Vallance	**Brent Ferguson - AiG**	**AMWU Health and Safety Officer**	**17-Mar-16**	**PN4805**	"Would you accept that long term regularly employed casuals may have less concerns about their job security? --- That would depend on the circumstances. If you look at the evidence, even if people in long term arrangements, they are still nervous about raising issues because sometimes that means that they do jeopardise their relationship with their employer or the labour hire"	The catalogue of disadvantage indicates that regular casual employees often face uncertainties in terms of the timing of their dismissal, and assessing whether they have been dismissed at all. This can be seen through the decisions in *McClelland v International Parking Group Pty Ltd* [2015] FWC 3708, *Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547 and *Fletcher v Little Darlings Early Development Centre* [2016] FWCFB 2810 .
	Dr Elsa Underhill	**Brent Ferguson - AiG**		**22-Mar-16**	**PN7887 - PN78888**	"You would agree that there would be employees in Australia that may choose casual employment because they're approaching retirement and it's an appropriate transitional form of employment? --- There may be. I don't know that there's any data on that, but it's highly likely. It's right, isn't it that I suppose the level of instability in the nature of a - in a particular casual arrangement, will also have an impact on whether there are any adverse health effects? --- Yes. Level of instability, along with other job characteristics."	
					PN7889	"So the more stable an arrangement is, the less likely it is going to be to lead to adverse OHS consequences? --- No. The more stable the arrangements, the less adverse their health outcomes. Not that it's less likely, but the adverse health outcomes will be less".	
	Liam Waite (Witness Statement)	**(witness statement)**	**Graffiti Removal Specialist**		**23**	"23 - As of 1 August 2015 my terms and conditions of employment changed. Concept Engineering began contracting directly to Sydney Trains, whereas before they were contracted to UGL to work at Sydney Trains. As a result of the change in the contract from UGL to Sydney Trains, our terms and conditions changed including the removal of our monthly Rostered day Off. **Now they are saying that the extra two hours a week is for the lunch break, which is no longer paid. They didn't advise us of the change to everyone took an RDO and the company docked our pay subsequently."**	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
					45	"45 - On Christmas Eve last year (2014), we got a text message from management at Concept Engineering out of the blue saying we had to take time off. **We had no say in this**. That came as a real shock to me going in Christmas as **I didn't know if I was sacked and it made me feel very worried about my ongoing employment and if I could pay bills**".	
					46	"46 - I am not sure how many other contractors are working at Sydney Trains, but I think there are about 30 people working on the refurb project. All those people will be leaving and it makes me worry that Sydney trains will sweep the decks. **No one tells us what is going on, and I worry about my long term job prospects and with the new baby it's a worry I don't need**".	
	Steven Murphy	**(witness statement)**	**Assistant State Secretary (NSW) - AMWU**		**6**	"Largely the membership are permanent, and the casuals are not members"	
					11	"One employee said, 'the problem you've got is if we join the union, they probably give us the sack'"	
					21	"I was then asked by a casual worker, 'how do I get a permanent job? If I get a permanent job, I'll join the union straight away and I'll support industrial action"	
					37	An HR manager said to Steve Murphy - "I told them if they wanted to go permanent, they could, but I'd have to cut their wages by 25%...they said they were not [interested in conversion]".	
					41	"The HR manager said in the meeting 'if we've got to convert them to permanent, we might have to review whether or not they are suitable'"	
					48	"I understand from conversations with our two site Delegates that the workers are worried about three things. The first is pissing off the employer. The second is their job security. The third is that joining a union will result in being terminated".	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
	Aaron Malone	**(witness statement)**	**Organiser - AMWU**		**19**	When speaking with Alf Inglese - the director of Provedore - "Whenever I spoke with Alf, he claimed that he was unaware of the right for casual employees to convert to permanent".	
					34	"At this worksite (Preshafruit), no worker has said that they want to keep their casual loading; they much prefer permanent job entitlements".	
					35	"She said words to the effect of 'I've worked here every day for seven years'. I asked if she would prefer a permanent position. She said 'of course', I asked her if she had spoken to management about it. She said 'yes, and sometimes you get promises or assurances, but nothing changes'. She went on to effectively say that 'the company prefers things the way they are'".	
					37	"I did ask employees if they wanted to convert to permanent with the labour hire firm. The employees didn't want to convert to the labour hire firm. They asked words to the effect of "what good would that do me?"	The decision in *Pettifer v MODEC Management Services Pte Ltd* [2016] FWC 3194 demonstrates the ease with which unfair dismissal protections can be bypassed in labour hire employment relationships - even where the employee works on a regular and systematic basis.
	James Fornah	**(witness statement)**	**Pasteuriser/Sealer**		**22**	"At the meeting Aaron raised with my boss about back pay. Alf said words to the effect: 'If I gave you back pay, I might have to fire you'. Aaron then told him that he couldn't say that as it was against the law".	
Understanding of workplace rights as a casual	**Dr Elsa Underhill**	**Michael Nguyen**		**22-Mar-16**	**PN8209**	"Dr Underhill, you were asked a question earlier, before the break about long-term casuals and whether they were more secure from unfair dismissal and you responded "Legally". What is your view about the level of understanding that long-term casuals have about their legal protection from unfair dismissal? --- To answer that I would probably have to go back to research I conducted on labour hire employees who were, in some instances, quite long-term casuals and they had no sense that they would be protected from dismissal or from the failure to re-engage. I mean, legally they do have an entitlement to claim unfair dismissal but actually, effectively, using that entitlement is not straight forward for casual employees.	The catalogue of disadvantage corroborates this sentiment, with *Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547 and *Axmann v Global Players Network Pty Ltd* [2013] FWC 6719 showing various misunderstandings as to the rights and entitlements of casual employees.

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
	John Herbertson	**Alessandra Moussa**	**AMWU - Vehicles Organiser**	**22-Mar-16**	**PN8775 - PN8776**	Do you recall giving an answer to Mr Chesterman's question, which was: do you believe that the existing casual conversion provision provides an equal balance between the right of employer and employee? And you answered no?---I thought that it wasn't. It wasn't an equal balance, yes. Yes. Why don't you think it was an equal balance?---Because some businesses just don't contact the employee when their six months is up to make the request. Whether that's deliberate or not, my experience is that some businesses just don't do it. And what's the effect on employees when that happens?---If they're not aware of it at all - of the clause in the award - then they will go along being a casual employee for a while; whereas some of them do want to be made up to full-time or part-time employment but they're frightened to ask because if they do ask, they may - I wouldn't say be terminated, because they're casual employees - they may not be rang up the next day to be brought in. So I just think that the request should be made automatically at six months.	
Effects of the AMWU/ACTU deeming claim	**Tom Skladzien**	**Brent Ferguson - AiG**	**AMWU Economist**	**24-Mar-16**	**PN11324**	"VICE PRESIDENT HATCHER: Mr Ferguson, one consequence of the grant of the claim might be that employees, whether in manufacturing or elsewhere, rather than directly employing casuals, would obtain their casual workforce from a labour hire agency so that the primary business never has to deal with the question of conversion. Would that be a possible undesirable effect of the claim?---I mean, I think that's possible, but again, I don't think that it would be a very significant response. I mean, it's - you know, you're always going to get all types of responses to changes like this across - when you look across businesses. But as the point was raised earlier, I think if a business is sitting there and thinking about that, given the ease with which businesses can move work from one casual to another or an existing casual to a new casual, then I would have thought that a business seeking to do that type of thing to avoid this obligation - you know, this potential obligation - would just manage to avoid it without going to those lengths by, you know, saying when somebody has been working in a permanent casual position for five months, they would then have no work for them all of a sudden and employ somebody else."	
	Clinton Lewin	**Mr. Baum-Gartner**	**AMWU - Vehicles Organiser**	**146 March 2016**	**PN3105 - PN3106**	"What about smaller businesses? You made any effort to communicate and focus on them about this clause; about casual conversion? --- Well, as I said earlier, small businesses don't generally run casuals so it's really not a clause that would matter for those employees in those small businesses. So you would agree that they tend to employee full-time employees? --- Smaller dealerships, yes.	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
Labour Hire	**Stephen Murphy**	**Brent Ferguson - AiG**	**AMWU - Assistance State Secretary**	**16-Mar-16**	**PN2969 - PN2970**	"Am I right to assume that you never approached the labour hire company you refer to there? Do you see (indistinct)? --- If you read the previous paragraph, the reason behind that was that their wages had been frozen for a lengthy period of time, so they saw no value in (indistinct) employment with a labour hire company that would simply drop their wages with no other outcome." "So they wanted to (indistinct) their employment in the hopes of getting (indistinct)? --- There was two issues at place: one is that those workers did want to have a guarantee of employment on an ongoing basis, the work was there. The second issue was that direct employees with B&D Doors saw that work was there 38 hours a week for over three years and said that that would should be permanent work, not supplementary"	
Leave Entitlements	**Vinh This Yuen**	**(witness statement)**	**Organiser - AMWU**		**15**	"15 - when we went out there, the workers got upset because they had been casual for so long. The workers advised that if they wanted to have a holiday, **they would need to resign and then come back.**"	
	David Kubli	**(witness statement)**	**Crane driver, forklift driver, oxy operator and hanger operator**		**13**	"If I am sick, I am expected to call up the day I am sick and then go to the Doctor and get a doctor's certificate. If I want to take extended sick leave, I have to apply and give three week's notice."	The difficulty casuals experience when applying or taking sick leave are also reflected in *MacDonald v Black Ivory Pty Ltd* [2015] FWC 2098. The applicant was effectively stood down for a period of time to recover from workplace induced stress. Upon his return, he was offered employment with a labour hire company, as opposed to being directly engaged. The decision highlights the importance of adequate personal leave.
					15	"The company has also recently advised us that if we take more than two weeks off, then we have to reapply for our job. This applies to permanent employees too."	
	Simon Peter Hynes	**(witness statement)**	**Screen Printer's Assistant**		**18**	"We were treated like a permanent employee but when it came to shut downs, public holidays, sick leave we weren't paid. They called us "permanent full time casuals".	

Indicia	Witness	Examiner (If relevant)	Position	Date	PN Number / Paragraph (Statements)	Quotation	Comments
	James Fornah	**(witness statement)**	**Pasteuriser/Sealer**		**24**	"I haven't had any paid time off or had a holiday since I started working with the company in 2012. **I am too scared to take time off**".	The decision in *Cheema v Venture DMG Pty Ltd* [2013] FWC 1795 (documented in catalogue of disadvantage) is relevant here. The applicant returned to India to visit his sick mother for one month. Upon his return, he was told to apply for his job through a labour hire company, rather than be directly engaged as was the case before he went on leave. It was noted at [18] that an employee who had "an entitlement to paid annual leave would have been given leave in those circumstances".
					25	"My mother died on 18 June 2013 in Ghana when I was still working as a casual. I asked to have the time off and I wasn't allowed to go home. I was told that they had no one to do the pasturising, and so I had to stay''	
Access to training	**Heidi Kaushal**	**(witness statement)**	**Organiser - AMWU**		**13**	"I am told by Peter Wechsler the delegate in relation to classifications that, 'there are no casuals on level 3 as they can't get past level 2. Only permanent employees can move past level 2".	
	Brian Howe	**(witness statement)**	**Chair - "Lives on Hold" Inquiry**		**31**	"Part of the problem of insecure work is the short-term focus of employers while employees must find ways of growing their knowledge and skills. This is in part an issue of saving for future investment or in anticipation of risks"	
					46	"under employment and temporary employment is so costly if not in the short term certainly in the longer term. **It is a disinvestment strategy, not only that invests, because in modern labour markets skills are so important and becoming more important"**	

ATTACHMENT 'E'

Revised Draft Determinations

1.1 Manufacturing and Associated Industries and Occupations Award 2010

<<FileNo>> <<PrintNo>>
FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Manufacturing and Associated Industries and Occupations Award 2010
(ODN AM2014/196 & AM2014/197) MA000010

Manufacturing and associated industries

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER ROE
COMMISSIONER BULL MELBOURNE, XX YYY 2016

Review of modern awards to be conducted.

[A] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section *156(2)(b)(i) of the Fair Work Act 2009,* that the *Manufacturing and Associated Industries and Occupations Award 2010* be varied as follows.

[1] Delete existing sub-clause 13.2 and insert a new sub-clause 13.2 as follows:

> "A part-time employee must be engaged for a minimum of not less than 4 consecutive hours per day or shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for no less than 3 consecutive hours per day or shift. The agreement reached must be recorded by the employer on the employee's time and wages record."

[2] Add a new sub-clause 13.10 as follows;

"An employer shall not increase the number of part time employees without first allowing an existing casual or part time employee engaged in similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours by agreement. The number of increased hours is to be agreed and recorded by the employer on the employee's time and wages record."

[3] Delete clause 14.2 and replace with the following**:**

14.2 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement of no less than three hours .

[4] At Clause 14.3 Insert "in writing" in between the words "~~casual~~ employee" and "that" in the first line and add the phrase "~~and~~ an employee's right~~s~~ to become full or part-time consistent with Clause 14.4 Casual Conversion" after the word "pay". ~~in the last line~~.

[5] Delete existing sub-clause 14.4 and insert a new sub-clause 14.4:

"**14.4 Casual Conversion**

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

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

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 14.4 if the employer fails to comply with clause 14.4(d).

(e) An employee who would otherwise be deemed a full-time or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under 14.4(d) or after the expiry of the time for giving such notice.

(f) Unless the employee elects to remain a casual employee, the employer

and employee must discuss and document:
(i) whether the employee will become a full-time or part-time employee; and
(ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment.

(g) After the six month period in cl. 14.4(a) has elapsed:

(i) An employee who has elected to remain a casual employee under cl. 14.4(e) retains the entitlement to elect to convert to full-time or part-time employment at any time, provided that the employee remains qualified under cl. 14.4(a). The employer must accept the request and the casual employee will convert in accordance with the requirements under cl. 14.4(c).

(ii) A casual employee who is deemed to be employed on a full-time or part-time basis may only revert to casual employment by written agreement with the employer at any time.

(h) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 14.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 14.4(a).

(i) A casual employee who is deemed to be employed on a full-time or part-time basis shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual employee.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full-time or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause."

[6] Delete existing sub-clause 14.5 and insert a new sub-clause 14.5 as follows:

“14.5

a) An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or the employee's work or position outsourced by the employer, to avoid any obligation under this award.

b) An employer shall not increase the number of casual employees without first allowing existing casual or part-time employees engaged in similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours."

[B] The determination shall operate on and from XX YYY 2016.
VICE PRESIDENT

1.2 Graphic Arts Printing and Publishing Award 2010

<<FileNo>> <<PrintNo>>
FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Graphic Arts, Printing and Publishing Award 2010
(ODN AM2014/196 & AM2014/197) MA000026

Graphic Arts

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER ROE
COMMISSIONER BULL MELBOURNE, XX YYY 2016

***Review of modern awards to be conducted*.**

[A] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Graphic Arts, Printing and Publishing Award 2010 be varied as follows.

[1] Add a new sub-clause 12.3(e) as follows;

"An employer shall not increase the number of part time employees without first allowing an existing casual or part time employee engaged in similar work, whose normal working hours are less than 38 hours per week, an

opportunity to increase their normal working hours by agreement. The number of increased hours is to be agreed and recorded by the employer on the employee's time and wages record."

[2] Delete from sub-clause 12.4(c)all the words following "NES".

[3]Delete existing sub-clause 12.5 and insert a new sub-clause 12.5:

"12.5 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

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

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 12.5 if the employer fails to comply with the clause 12.5(d).

(e) An employee who would otherwise be deemed a full or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under clause 12.5(d) or after the expiry of the time for giving such notice.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss, and document:

(i) whether the employee will become a full time or part-time employee; and

(ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 12.3—Part-time employment.

(g) After the six month period in cl. 14.4(a) has elapsed:

(i) An employee who has elected to remain a casual employee under cl. 14.4(e) retains the entitlement to elect to convert to full-time or part-time employment at any time, provided that the employee remains qualified under cl. 14.4(a). The employer must accept this request and the casual employee will convert in accordance with the requirements under cl. 14.4(c).

(ii) A casual employee who is deemed to be employed on a full or part-time basis may only revert to casual employment by written agreement with the employer at any time.

(h) A casual employee who is deemed to be employed on a full or part-time basis shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

(i) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(j) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause."

[4] Delete existing sub-clause 12.6 and insert a new sub-clause 12.6 as follows:

"12.6

a) An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or the employee's work or position outsourced by the employer, to avoid any obligation under this award.

b) An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours.

c) An employer when engaging a casual must inform the casual in writing that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required per week."

[B] The determination shall operate on and from XX YYY 2016.
VICE PRESIDENT

1.3 Food, Beverage and Tobacco Manufacturing Award 2010

<<FileNo>> <<PrintNo>>
FAIR WORK COMMISSION
DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3, Div. 4 – 4 Yearly reviews of modern awards

Food, Beverage and Tobacco Manufacturing Award 2010
(ODN AM2014/196 & AM2014/197) MA000073

Food, beverages and tobacco manufacturing industry

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER ROE
COMMISSIONER BULL

Review of modern awards to be conducted. MELBOURNE, XX YYY 2016

[A] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Food, Beverage and Tobacco Manufacturing Award 2010 be varied as follows.

[1] Delete sub-clause 12.2 and insert the following in lieu thereof:

> "A part-time employee must be engaged for a minimum of not less than 4 consecutive hours per day or shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for no less than 3 consecutive hours per day or shift. The agreement reached must be recorded by the employer on the employee's time and wages record.

[2] Add a new sub-clause 12.10 as follows;

> "An employer shall not increase the number of part time employees without first allowing an existing casual or part time employee engaged in similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours by agreement. The number of increased hours is to be agreed and recorded by the employer on the employee's time and wages record

[3] Delete clause 13.2 and replace with the following**:**

13.2 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement of no less than three hours .

[4] At Clause 13.3 Insert "in writing" in between the words "employee" and "that" in the first line and add the phrase "an employee's rights to become full or part-time consistent with Clause 13.4 Casual Conversion" after the word "pay."

[5]Delete existing sub-clause 13.4 and insert a new sub-clause 13.4:

"13.4 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

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

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 13.4 if the employer fails to comply with clause 13.4(d).

(e) An employee who would otherwise be deemed a full-time or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under 13.4(d) or after the expiry of the time for giving such notice.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss and document:

(i) whether the employee will become a full-time or part-time employee; and

(ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 12—Part-time employment.

(g) After the six month period in cl. 14.4(a) has elapsed:
(i) an employee who has elected to remain a casual employee under cl. 14.4(e) retains the entitlement to elect to convert to full-time or part-time employment at any time, provided that the employee remains qualified under cl. 14.4(a). The employer must accept this request, and the casual employee will convert in accordance with the requirements under cl. 14.4(c).

(iii) A casual employee who is deemed to be employed on a full-time or part-time basis may only revert to casual employment by written agreement with the employer at any time.

(h) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 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).

(i) A casual employee who is deemed to be employed on a full-time or part-time basis shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, parental leave, right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual employee.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full-time or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause."

~~[4] Delete existing sub-clause 12.2 and insert a new sub-clause 12.2 as follows: "A part-time employee must be engaged for a minimum of four consecutive hours per day or shift."~~

[6] Delete existing sub-clause 13.5 and insert a new sub-clause 13.5 as follows:

“13.5
a) An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or the employee's work or position outsourced by the employer, to avoid any obligation under this award.

b) An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours.

~~c) An employer when engaging a casual must inform the casual in writing that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required per week.”~~

[B] The determination shall operate on and from XX YYY 2016.
VICE PRESIDENT