IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196 and AM2014/197

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Common issue – Casual and Part-time employment

FINAL WRITTEN SUBMISSIONS FOR THE ACTU

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A. Introduction

1. By this application the Commission is invited to examine and respond to the phenomenon of the "*permanent casual*". "*Permanent casuals*" are a class of worker engaged in regular work from whom basic safety net entitlements and basic employment security are withheld. The consequences of casual employment status for employees include reduced income, lack of access to leave and other basic entitlements, diminished security in employment, minimal training, workplace development and associated effects on welfare at work. The deprivations of casual employment weigh particularly heavily upon working women and exacerbate gender related disadvantage.

2. The spread of casual employment has disadvantages for the economy and the community generally. Although the evidence of a relationship between casual employment and productivity is scant, there is some basis for a conclusion that casualisation diminishes functional flexibility and labour mobility and thereby detracts from the productive and efficient performance of work.

3. The spike in casual work and in "*permanent casual*" work is not a recent phenomenon. It is a matter which has previously been agitated in respect of the manufacturing industry at a federal level, clerical occupations in South Australia, and

more broadly in NSW. This application represents the first opportunity for the Federal tribunal to grapple with the issues globally and ensure that the safety net is not avoided by the expedient of mislabelling regular work as "*casual*".

4. The ACTU does not contend that casual employment is illegitimate *per se*. It is accepted that there is a legitimate need for casual workers available to deal with short term, irregular and unpredictable spikes in work. It is also accepted that casual work is preferred by some workers. In respect of a significant portion of the workforce, however, the casual label is deployed with the objective and effect of depriving workers of basic safety net conditions. This application is addressed to the circumstances of those workers.

B. The concept of casual employment

5. It is a common refrain that casual employment is difficult to define with precision. That is true in the sense that it is difficult to produce a linguistic formula the application of which will categorically determine casual or permanent status in a particular case. That is not to say, however, that there is any real difficulty in identifying the features of casual employment. Courts and tribunals have for many years identified that casual employment is employment which is characterised by intermittency or irregularity and by the absence of obligation to offer or accept work. The authorities adopting that view are numerous: see by way of example only *Doyle v Sydney Steel Co Ltd* [1936] HCA 66; (1936) 56 CLR 545; *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420; *Hamzy v Tricon International Restaurants* [2001] FCA 1589; (2001) 115 FCR 78; *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321; *Cetin v Ripon Pty Ltd* [2003] AIRC 1195 (PR938639); and *Re Metal, Engineering and Associated Industries Award* (2000) 110 IR 247 (**Metal Industries Award Case**) and *Secure Employment Test Case* [2006] NSWIRComm 38; (2006) 150 IR 1 (**Secure Employment Test Case**).

6. In the *Secure Employment Test Case* a Full Bench of the NSW IRC, having reviewed the authorities, summarised the position as follows:

> 231 The concept of a "casual" which has emerged through historical employment practice and industrial jurisprudence and which has now long been defined and regulated in awards in this State is essentially one in which: the employee has a short

> term engagement; shifts are irregular and unpredictable; the employee is not obliged to accept an offer to work a particular shift; the employee's employment technically commences at the beginning of a particular shift and ceases at the end of that shift; the employee is paid a loading as compensation for, amongst other things, annual leave and other benefits "accrued" during each shift worked; and the employee has no expectation of being rostered for another shift.

7. It is against that conception of casual employment that the safety net has evolved. That is to say, the existing framework of award regulation of casual employment has developed on the basis of an understanding that casual employment is employment which is irregular and unpredictable and which involves no obligation by employer or employee to offer or accept work.

8. Importantly, casual employment has been treated as a non-standard form of employment properly subject to limits designed to discourage its use as a means of avoiding safety net conditions. In the *Metal Industries Award Case* a Full Bench explained:

> [9] Types of employment provided for in an award are foundational to the award's regime, and therefore to the award safety net. The expressions "categories of employment" and "types of employment" in industrial jargon refer to types of contract of employment. A type of employment specified in an award is the subject to which the terms and conditions for that type of employment are awarded. Usually an award applies to one or more main or primary types of employment; each other type, in concept at least, is exempt from some or all of the conditions awarded to apply to the primary category or categories. For purposes of the Award, weekly hire, in effect a form of continuing employment for standard hours, has long been the primary category provided for under the Award's predecessors. Each other type of employment may be seen as a response to operational, employment market, or perhaps special case needs. Those needs have been met by making provision as the need arose for the extra type of employment contract to which specific exemptions or peculiar conditions were then awarded. The reasons for having a category of employment should be distinguished from the reasons for awarding exemptions or differential conditions to apply to the supplementary category. Aspects of the use later made of a category in the industry can also be distinguished from each of those reasons. Those distinctions appear not always to have been kept in mind in some of the cases or analysis dealing with particular types of employment.

9. In the *Secure Employment Test Case* the Full Bench similarly recognised that:

> [229] …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.

10. In the *Metal Industries Award Case* the Full Bench concluded:

> [103] … As a general proposition, it is desirable that use of nonstandard forms of employment be justified. To ensure that, it may be necessary to set limits or to impose incidents that discourage uses designed to avoid observance of the conditions that attach to standard forms of employment…

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

12. That development has been noted in a series of decisions including, for example, *Ryde Eastwood Leagues Club v Taylor* (1994) 56 IR 385 and *Clerks (SA) Award* [2000] SAIRComm 41, the *Metal Industries Award Case* and the *Secure Employment Test Case*. As the Full Bench explained in the latter decision, the fact that tribunals have acknowledged the existence of the phenomenon did not amount to an acceptance of that development:

> 233 We do not consider that *Ryde Eastwood Leagues Club v Taylor* represents an acceptance (as opposed to a recognition) by the Commission of the notion of the "permanent casual" as a form of employment. The question whether an employee is engaged on a casual basis for the purpose of determining jurisdiction (such as in an unfair dismissal matter) does not disturb the well established jurisprudence surrounding the true nature of casual employment, nor does it represent a review by the Commission of the casual employment model against statutory standards of fairness or reasonableness.

13. Neither the Commission nor any other industrial tribunal has endorsed "*permanent casual*" work as a legitimate category of employment. The development has typically been noted with disapproval by industrial tribunals with the notion of casual employment for fixed days trenchantly described as "*illogical and oxymoronic*".[1] Tribunals have also observed that the use of long term casual employment has the serious consequence of undermining the safety net. In *Metal Industries Award Case* the Full Bench explained:

[1] *Notification under section 130 by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Liquor and Hospitality Division, New South Wales Branch of a dispute with Parramatta Leagues Club Ltd re reduction of hours* [2002] NSWIRComm 208 at [100] (Sams DP).

> [103]… As a general proposition, it is desirable that use of nonstandard forms of employment be justified. To ensure that, it may be necessary to set limits or to impose incidents that discourage uses designed to avoid observance of the conditions that attach to standard forms of employment…
>
> [106] … The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.

14. The proposition that false casual employment undermines the safety net is, with respect, manifestly correct. Employment as a false casual involves nothing more than an election by an employer (and in some cases an employee) to replace the safety net of award terms and conditions with a casual loading.

15. That being the case, the emergence of the "*false casual*" is to be deprecated as a development which fundamentally undermines the fairness and relevance of the safety net. It is a development which should be resisted, including by the propagation of casual conversion provisions in all modern awards. The alternative to allow the safety net to be "cashed out" by payment of a loading. Nothing could be more fundamental to the establishment of a fair and relevant safety net than provisions which ensure that the observance of the safety net is compulsory.

16. Contentions to the effect that "*permanent casual*" employment is a form of employment legitimately employed in the modern workforce are to be rejected. They have no support in any decision of the this or any other industrial tribunal, nor are they compatible with a fair and relevant safety net.

Award definitions of casual work

17. The development of the "*permanent casual*" has resulted in part from award formulations which define casual employees as those "*engaged as such*"—that is, as those employees who are labelled as casual on engagement. There is some, albeit limited, authority for the proposition that the effect of such award definitions is that the label is conclusive of employment status, including *Telum Civil (Qld) Pty Limited v CFMEU* [2013] FWCFB 2434.[2]

[2] It is doubtful whether *Telum Civil* in fact stands for any general proposition. It was a decision made in a private arbitration under an enterprise agreement. The Commission was concerned with an assessment of rights under the agreement, which in turn involved the construction of the language of that particular agreement. It was

18. Such an approach is objectionable both because it is logically insupportable and because it undermines the safety net. It confuses the nature of casual work and the incidents of casual work. The *nature* of casual work is that it is irregular; an *incident* of casual employment is that important aspects of the award safety net do not apply. It is also entirely inconsistent with the approach otherwise prevalent, where the courts have invariably emphasised that neither the parties' description of their employment relationship or their subjective perceptions of it are determinative of its true character.[3]

19. The ACTU application does not, however, call for wholesale re-assessment of the definitional provisions of modern awards. It is brought in the knowledge that in the majority of cases the true legal position has only limited relevance to the terms and conditions actually extended to employees and that typically an employer's chosen label will—as a matter of fact, regardless of the position at law—determine the conditions extended to an employee.

20. Award casual conversion provisions assume as a necessary premise that work of a non-casual nature is in practice carried out by employees labelled and paid as casuals. The ACTU application similarly accepts that as the reality of work today. Casual conversion clauses are a practical device designed to confront that reality by providing a practical means by which employees may "convert" to permanent status and thereby obtain basic safety net entitlements otherwise withheld.

C. The implications of casual employment for employees

21. The incidents of casual work from the perspective of employees have been considered in a series of decisions. The NSW IRC in the *Secure Employment Test Case* recognised the "*significant adverse consequences for a substantial number of employees, who have relied on and prefer permanent employment, but who have*

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no part of the task properly before the Commission to propagate a general test for the determination of employment status. To the extent it purported to do so, it did so in obiter. Presumably for that reason the Commission did not acknowledge or address a number of authorities relevant to the larger question including *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420, *Cetin v Ripon Pty Ltd* [2003] AIRC 1195 and the *Secure Employment Test Case*.

[3] *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321; 201 IR 123 at [38]; *Cetin v Ripon Pty Ltd* [2003] AIRC 1195 (PR938639) at [61]–[62]; *Personnel Contracting Pty Ltd t/as Tricord Personnel v CFMEU* [2004] WASCA 312; (2004) 141 IR 31 at [24]–[25]; *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3; 209 FCR 146; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52; 184 FCR 44.

experienced a reconstruction of their terms of employment by a forced shift from permanent employment to long term casual employment." The *Metal Industries Award Case* similarly recognised that casuals are disadvantaged in various ways.[4]

22. The evidence in this case requires findings consistent with, but more extensive than, the earlier findings. The evidence demonstrates that casual work, from the perspective of an employee, involves limited potential advantages and myriad potential disadvantages which may be summarised as follows.

The advantages to employees of casual employment

23. The theoretical or potential advantage to employees in engaging in casual work is the capacity to accept or reject work as it is offered. That potential advantage is qualified in three ways.

24. **First**, the advantage is, for the majority of casual employees, a marginal one. The category of employees who actually wish to work on a truly *ad hoc* basis is limited. The ACTU Survey demonstrates that a minority of casuals choose that form of employment because it is more convenient or flexible for them.[5] The more common reason given for casual work is that it is the only work available.[6]

25. Further, the primary attraction of casual employment for employees is the opportunity to perform less than full-time hours of work rather than the inherent variability of casual work. As Markey *et al* note in their report dated 19 October 2015 (**the Markey Report**)[7]:

> …any benefits to employees with regard to flexibility and managing work-life balance appear to be largely dependent on total hours of work, rather than on the weekly variance often inherent in casual work. Many casuals desire to work part-time hours; but would prefer to avoid the unpredictability of both working time and income (over which, as indicated above, they exert little control), which comes with casual status… Variability and lack of control over hours can actually contribute to

[4] Including for example in respect of training ([19]), superannuation ([195]) and progression through classification structures ([195]).
[5] 44 per cent of casual employees listed the reason for working as a casual employee as "*I freely choose to work casual because it is more flexible/convenient for me*". Professor R.Markey and Dr J.McIvor, Report on Casual and Part-Time Employment in Australia, dated 23 September 2015, attachment 'RM-2' to the Statement of Professor Raymond Markey dated 19 October 2015 (Exhibit 110) ('Markey Report') ('Markey Report'), p20.
[6] 49% of respondents to the ACTU Survey indicated that they were employed casually because "*It was the only work available, I had no choice*": Ibid n 5.
[7] Markey Report, p22.

> higher work-life conflict… Work-life interference is particularly prevalent where workers work "unsocial" hours, including at nights and weekends…; and casuals are among the most likely to work at these times… Time lost with loved ones during work on, for instance, weekends, is frequently unable to be made up at other times during the week due to scheduling conflicts…
>
> The available evidence suggests that casual employment offers no advantage for work-family conflict when total hours are accounted for… Analysis of the HILDA data also reveals that part-time casuals reported no greater average satisfaction with the balance of work and non-work commitments than permanent part-time workers, while full-time casuals reported less satisfaction with this balance. While genuine negotiation over hours can mitigate negative perception effects, this tends to be exceptional and dependent on the practices of particular employers… This suggests that permanent part-time work would better facilitate flexibility and work-life management for those employees for whom this is a primary concern.[8]

26. It is further likely that certainty of hours and income is more attractive than "flexibility" for a significant portion of casual employees. The ACTU survey showed that 27.5 per cent of casual employees who have worked for their employer for more than 6 months wish to become permanent.[9] Markey *et al* explained (emphasis added):

> An ABS survey of casuals conducted in 2007 found that around half (52 per cent) of Australians employed as casuals would prefer to be in permanent work with leave benefits (ABS, 2010). **Casuals were explicitly warned in this survey that they would lose the additional income from casual loading if employed permanently, but many casuals apparently valued the stability of income associated with stable work.** The 2015 ACTU survey, which was almost exclusively of part-time casuals, showed that around a third (33 per cent) of respondents responded positively to a sub-question asking about the opportunity to convert to permanent employment, while this was true of around 40 per cent of the labour hire sample.[10]

27. **Second**, the theoretical advantage is subject to the realpolitik of the employment relationship and the relative power of employers and employees. The evidence demonstrates that many casuals do not have the actual (as opposed to notional) entitlement to decline work which is offered. The Markey Report relevantly notes (citations omitted):

> …Much of the evidence concludes that casual work is often controlled by employers – with hours largely dictated to employees… Figure 4.2, based on the ACTU survey,

[8] Markey Report page 22.
[9] See Professor R.Markey. Dr J.McIvor and Dr. M.O'Brien, Supplementary Report: Casual and Part-Time Employment in Australia, dated 15 October 2015, attachment 'RM-3' to the Statement of Professor Raymond Markey dated 19 October 2015 (Exhibit 110) Ray Markey et al, 'Supplementary Expert Report', at paragraph 41.
[10] Markey Report at section 7.2.

> shows that 40 per cent of casuals indicate having very little say over their working hours, while only 26 per cent indicate having a lot of say. Analysis of HILDA data also shows that casual employees had lower average satisfaction with hours worked than permanent employees.[11]

28. And further that:

> In reality, many casuals feel on call and at the mercy of employers; fearing to turn down work due to fear of reprisal and the precariousness of their employment position (LaMontagne et al, 2012; McGann, Moss and White, 2012; Pocock, Prosser and Bridge 2004).[12]

29. The lay evidence of the lived experience of casual employees is consistent with the expert analysis. Ms Linda Rackstraw, for example, gave evidence about the consequences for her of refusing shifts as a casual employee at a McDonalds store. She felt an expectation from her supervisors to be fully available and flexible and that she would receive less shifts the next roster if she refused work. She also observed other casual employees receiving less work if they refused shifts.

30. Indeed the evidence shows that many casuals are subject to express requirements to give notice of their intention to take leave. Ms Tracey Kemp gave evidence about working as a casual Disability Support Worker explaining that her employer:

> … expects that casual workers will notify them when they intend to take personal leave, annual leave or remain unavailable for shifts for an extended period of time. Once, I applied for and took annual leave and only to receive the "approval" from FSG half way through the leave period… I have noticed a culture in my workplace where casual workers are reluctant to take too much time off, because they are concerned that they might not get put back onto the roster when they return... Another factor to consider as a casual worker is that if you take a shift, you may preclude yourself from undertaking a longer shift if one comes up because of the required free of duty period between shifts.[13]

31. **Third**, and importantly, the advantage of capacity to choose or reject work is not threatened in any way by the proposed establishment of a general option to convert. The minority of employees who prefer casual work will be unaffected by the introduction of a conversion option.

Casual loading: a benefit for employees?

[11] Markey Report, p21.
[12] Ibid,
[13] Witness Statement of Tracey Kemp dated 9 October 2015 at paragraphs 10-12, 18.

32. It is likely that some employees express a preference for casual work on the basis of their perception that casual work is better paid because of the existence of the casual loading. Both arithmetical analysis and empirical evidence demonstrate that the perception is wrong.

33. The casual loading is calculated by reference to the financial entitlements foregone by casual employees and approximates the value of the leave and notice entitlements foregone: see *Metal Industries Award Case* at [196] and following; *Re Pastoral Industry Award* [2003] AIRC 452; 123 IR 184 at [109]–[111]. That is to say, even on the basis of a superficial comparison between rates of pay as they appear on the face of awards, there is no financial advantage to casual employment.

34. Perhaps more importantly, and as Markey *et al* explain, the casual loading appearing on the face of the award is a construct which does not in fact translate into higher per-hour wages for casual employees.[14] To the contrary, the data shows that:

    (a) there is a very large gap in take home earnings of casual and permanent workers;

    (b) there is a large gap in per hour earnings of casuals compared to permanents, despite the (notional) casual loading;

    (c) the gap in per-hour earnings persists even once differences in age, gender, industry, full-time/part-time status and so on are controlled.

35. The matter is explored more fully at paragraphs 37 and following below. The short point is, however, that there is in practice no *quid pro quo* by which security of income and safety net entitlements are exchanged for higher earnings. Rather, the true position is that casual employees in aggregate are worse off than permanent employees both in terms of financial and non-financial aspects of work.

Disadvantages to employees of casual work

36. The disadvantages to employees of casual work are numerous. For ease of discussion they may be classified into distinct categories, but the categories are overlapping and interrelated. For example, the reduced commitment to training contributes to reduced income and the unavailability of safety net leave entitlements contributes to

[14] Markey Report section 5.1.

insecurity. Subject to that caveat, the disadvantages may be placed in the following six categories.

37. **First**, lower income than permanent employees. Professor Markey's analysis of ABS and AWRS data demonstrates that casual employees are paid less per week than both permanent part-time and permanent-fulltime employees and this difference is not wholly explained by the proliferation of casual employees in certain industries.[15] Professor Markey found that permanent workers earn 1.9 times as much per week as casual employees according to HILDA data. The ABS data suggests permanent employees earn 2.1 times as much.[16] The disparity is greater for female casual employees.[17]

38. That evidence was disputed only at the margins. Withers *et al* disputed the Markey analysis to the extent they suggested that (a) the appropriate comparison was per-hour rather than per week take home pay and (b) it is necessary to control for various factors including industry and age. It is difficult to see why hourly rather than weekly wages are the appropriate comparator; from an employee's point of view, it is weekly/take home pay which is significant. In any case, as the Withers Report[18] itself confirms, the earnings gap remains even when income is compared per hour. Data reproduced in the Withers Report demonstrates that per-hour hourly earnings for casuals are lower for virtually all industries and all age groups—*despite* the existence of the casual loading. The data is most clearly illustrated at Figures 27, 28 and 29 of the Withers Report.[19]

39. **Second**, the unavailability of important features of the safety net including:

    (a) paid annual, personal and compassionate leave and paid public holidays;

    (b) guaranteed minimum hours;

    (c) notice of termination;

    (d) redundancy pay;

[15] See Supplementary Expert Report, section 3.2.1-3.2.2 and Expert Report at section 5.1.
[16] See Markey, Expert Report, para 27.
[17] See Markey, Expert Report, para 26 and Figure 3.1 showing that female casual employees earn less than both permanent full-time and part-time employees and less than male casual employees.
[18] Report dated 22 February 2016, Exhibit 136.
[19] Withers Report pages 67–69; see also Tables 9–10 at pages 64–65.

(e) an effective entitlement to redeployment, where reasonably available, in case of redundancy of position; and

(f) in the case of genuine casuals, parental leave, unfair dismissal protection, and the right to request flexible working arrangements.

40. Each of those entitlements has a financial value and unavailability of those benefits exacerbates the earnings gap described above. Lack of access to these safety net entitlements is not, however, simply a matter of dollars and cents. To take the most obvious example, the value of annual holidays is not reducible to the monetary value of paid leave (hence the statute's restrictions on cashing out of annual leave). The value of these entitlements includes the utility of time away from work, the financial security provided by personal leave, guaranteed hours and redundancy pay, and the employment security of permanent employment.

41. Leave entitlements, notice of termination, and the variety of other benefits withheld from casual employees are basic features of a fair and relevant safety net. If they are to be withheld, they should be withheld exceptionally.

42. **Third**, insecurity of income and employment. Casual employees experience:

(a) double the risk of unemployment compared to permanent employees;[20]

(b) reduced and/or variable income due to variable hours from roster to roster and the risk of cancelled shifts;

(c) in many cases, inability to move from casual employment to more secure work;[21] and

(d) lower wealth accumulation over time due to underemployment, greater likelihood of transition to underemployment and difficulty meeting financial obligations and securing finance.[22]

43. **Fourth**, non-financial detriment to mental and physical well-being. Casual employment is linked to a range of mental and physical impacts on health and wellbeing and is closely linked to stress, anxiety and frustration in the workplace.[23]

[20] Supplementary Expert Report, paragraph 31.
[21] Markey Report section 5.2.
[22] Markey Report, section 5.3.
[23] Markey Report, section 5.4

Stress and anxiety is associated with a lack of control over hours and over working conditions more generally.[24]

44. **Fifth**, reduced investment and commitment by employers including reduced investment in training and a reduced willingness to put casual employees in responsible positions. Casual employees are less likely to receive training and more likely to pay for such training themselves.[25] They also tend to lack access to promotion and suffer marginalisation by management.[26] As Markey *et al* explain, the effect of the lack of training includes lower mobility for casual workers and a reduced capacity to transition from casual to permanent work.[27]

45. Employers' greater commitment to their permanent workforce provides a higher degree of psychological security for employees that has value in itself and translates into other benefits such as greater workplace participation and inclusion and preferential treatment in rostering and more secure employment in times of downturn. Several ACTU witnesses sought permanent employment for these reasons. For example, Linda Rackstraw gave evidence that as a causal employee she wasn't important or "part of the system". Relevantly, she said in her witness statement that she "*always felt like [she] was there but never really there*"[28]. In oral evidence she elaborated by saying:

> It's a bit hard to explain but you're not really an important part of the system if you are just a casual. Like, you're disposable. I just felt like I wasn't important and that's why I made that statement.[29]

46. **Sixth**, the exacerbation of gender-related disadvantage in the workplace including:[30]

    (a) exacerbation of the gender pay gap and entrenchment of gender segregation between and within industries. Casual employment, being lower paid than permanent employment and providing the above further disadvantages, disproportionately effects women, who are over-represented amongst both

[24] Markey Report, section 5.4
[25] Markey Report section 3.2, especially page 18.
[26] Markey Report section 5.2, especially page 29.
[27] Markey Report section 3.2 especially pages 17–19.
[28] See Witness Statement of Linda Rackstraw, paragraph 28.
[29] PN 1383.
[30] See Markey Report, section 6 and ACTU Submissions filed 19 October 2015, paragraphs 78-93.

casual employees and long-term casual employees and in certain industries such as health care and community services;

(b) denial of the security women require to adequately balance caring and family responsibilities, of which they still bear the lion's share, and preventing women's greater workforce participation. Mothers who desire part-time work for flexibility purposes generally prefer permanent part-time work more than casual employment and the insecurity of casual employment contributes to the "motherhood gap";

(c) increased risk of sexual harassment. Female casual employees experience ten times the chance of unwanted sexual advances in the workplace compared to women employed on a permanent basis.

D. The implications of casual employment: the community

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

48. The effects of casualisation in terms of training and workplace development, productivity, unemployment and participation are discussed below.

Training

49. Markey *et al* point out that casual employment is associated with reduced levels of training, reduced levels of innovation, and as a result, reduced functional flexibility, noting that (omitting references):

> Casual employment may also impact negatively on productivity and firm performance through reduced opportunity for on-the-job training and workforce development. A substantial international literature in labour economics and human resource management suggests that productivity, innovation and competitive advantage of organisations are impacted by the level of on-the-job training undertaken by employees, through development of "human capital"… The links between productivity and training are also central to the concept of High Performance

> Work Systems… These connections are explicitly acknowledged by the Australian Industry Group, which states that "training and development can be a pathway to a more competitive and productive workforce" (Ai Group 2015).
>
> The notion that high levels of casualisation undermine investment in training is supported by Figure 3.1, based on HILDA data. It shows much lower access to training among casuals compared to permanent workers: only 22 per cent of casuals had completed work-related training in the past year, compared to 40 per cent of permanent workers. This is not explained by differences in part-time or full-time status: part-time permanent workers had rates of training comparable to their full-time counterparts, while rates of casual training remain low regardless of whether full-time or part-time. The lack of access to training by casual workers has been attributed to a combination of factors, including not only irregular schedules making attending training difficult, but marginalisation of casuals and lack of investment in training them… This lack of investment in workforce development for casual employees has important implications in terms of limiting productivity growth by limiting functional flexibility.[31]

50. They further explain the effect of casual status on workplace development and promotion (citations omitted):

> Casual employees also frequently lack access to promotion. This may be partly explained by a lack of integration into the workplace, with not only access to training but also invitations to meetings and other events often restricted with regards to casuals, but they also may be actively marginalised by management and other permanent employees… The lack of training highlighted in section 3 is also likely to contribute to this.[32]

51. The contentions of the Markey Report were disputed only as to degree in the Withers Report. In short, Withers *et al* accept that casuals receive lower levels of training than permanent employees but speculate that the reduced training may be a function of concentration of casuals in jobs which "*do not require a large amount of training*". On that basis, it is suggested, that lower training participation is arguably unrelated to casual status and is unlikely to have serious consequences for productivity.[33]

52. It is sufficient answer to this speculation to point out that the data produced in the Withers Report itself demonstrates that the training gap is specially prominent in those occupations and industries where training is critical including the occupations of professionals (18% differential in respect of part-time employees and 16% in respect of full-time employees), managers (20% and 15%) and technicians and trades workers

[31] Markey Report section 3.2 especially pages 17–19.
[32] Markey Report section 5.2 especially page 29.
[33] Withers Report [179].

(28% and 14%) and the industries of professional, scientific and technical services (37% and 14%) and public administration and safety (24% and 21%).[34]

53. The lay employer evidence offered a number of firm-level examples of the phenomenon recorded in the statistical data. Ms Kaye Neill, for example, is the operator of a nursing agency which provides various services including drug and alcohol testing and vaccinations. Ms Neill indicated that a nurse competent in drug and alcohol testing would not, at the end of an assignment, be retrained in vaccination; rather, the firm would simply employ a different nurse already skilled in that area. Similarly Ms Kylie-Ann Brannelly, a representative of the early childhood sector, made clear her view that casuals were unlikely to be well placed to take positions of responsibility.[35] A variety of the enterprise agreements referred to in the evidence prevent casuals from accessing higher classification levels.

54. The phenomenon of reduced training and reduced access to advancement in the workplace was remarked upon by the Full Bench in the *Metal Industries Award Case*:

> [18] …we accept AiG's submission to the effect that, as a matter of form, the Award's classification, training, and overtime provisions apply to casual employees. In practice, the systematic application of the classification process to work performed by a casual employee appears likely to be exceptional. Labour hire employers are remote from the work performed. Casuals generally are not well positioned to query the application of standard criteria to their job or jobs. The evidence included several instances of employees whose base level classification remained unchanged after some years of service as a casual. Conversely, it is clear that casual employment will often be a "launching pad" or a recruiting aid leading to placement in the employer's full-time weekly paid workforce…
>
> [19] Casual employees may be accorded some training. The broad training obligation placed on the employer by the Award, (subclause 5.2), does not exclude casual employees. Again, in practice, casual employees are at real disadvantage in securing access to whatever formal training opportunities are made available to employees in most of the work places covered by the Award.

55. As Markey *et al* explain, the effect of the lack of training includes lower mobility for casual workers. The corollary of lower mobility is reduced allocative efficiency.

56. In short, the evidence would comfortably lead to the conclusions that:

[34] Withers Report, Table 11, page 75.
[35] PN 1058–PN 1059.

(a) casual employment is characterised by lower investment in training relative to permanent employment; and

(b) in that respect, the increased prevalence of casual employment tends to undermine multi-skilling, functional flexibility and labour mobility.

Productivity and flexibility

57. Markey *et al* address the employer arguments regarding the relationship between casual employment and productivity (omitting references):

> In their calls for "flexibility", business groups have placed particular emphasis on the ability to deploy workers in a contingent manner as facilitated by casual employment, as well as aspects such as flexibility in wage adjustments… Indeed, their very notions of flexibility seems to be wholly tied to being able to deploy labour in a contingent fashion (and to unilaterally restrict access to employment protections and benefits). The kind of flexibility advocated by business groups and facilitated by casual employment can broadly be called "numerical flexibility"; as distinct from "functional flexibility" which is "the ability of firms to reallocate labo(u)r in their internal labo(u)r markets, relying on training that allows personnel to carry out a wider range of tasks"… On the issue of functional flexibility, employers have much less to say, with training in particular warranting barely a mention in submissions to the Productivity Commission. Employers contend that such numerical flexibility is necessary to "deliver productivity gains that can underpin high remuneration" (BCA, 2015: 24), because it "means that factors of production are able to respond to market developments"…
>
> However, evidence that numerical flexibility necessarily delivers gains in productivity is scant, and indeed much of the evidence runs in the opposite direction. Links between job insecurity, sickness absence and mental health consequences reduce productivity over the long term … Saville, Hearn-McKinnon and Vieci's (2009) study of human resource managers found no increase in productivity associated with increased labour market flexibility. Storm and Naastepad's (2009) study of 20 OECD countries between 1984-2004 found that countries with more stringent labour market regulation had stronger productivity growth than those with less regulated/ more flexible labour markets. They concluded that "further deregulation and flexibilisation of OECD labor markets may lead to deteriorated productivity performance, because it fails to effectuate the contribution that workers can make to the process of organizational and technological innovation which raises productivity" (ibid: 649).
>
> Innovation has been a theme in recent studies, which have found that while functional forms of flexibility do offer gains for innovation, numerical forms may actually have a negative impact… Indeed, because functional flexibility will be facilitated by investment in employees (including training), there is likely to be a trade-off between this and numerical forms - the disposability of employees associated with numerical flexibility reducing the tendency for such investment … Similar results were found in

> a study from Norway, which found that both productivity and wages were negatively affected by numerical flexibility, while positive effects were observed with functional flexibility… All of this runs in direct contradiction of employer claims, implying that Australia's relatively flexible labour markets may need more, not less regulation if productivity and wages (rather than merely the enhancement of managerial prerogative) are indeed the goal.[36]

58. Although the employer material contended on very many occasions that the wide availability of casual employees was necessary to ensure efficiency and productivity, the material on this point rarely rose above the level of assertion. The Withers Report dealt with the matter only at the level of theory with their argument captured in two short paragraphs:

> [126] … Casuals and part-time employment often better suits the profit (and employment and output maximising) strategies of many firms…
>
> [127] The ability of firms to operate efficiently (hence keeping costs lower and prices competitive) and create jobs is thus enhanced by flexible work arrangements. Reduction in flexibility of working arrangements would be expected to reduce firms' efficiency, output and employment.

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

60. Ms Toth was prepared to go further than Professors Withers and Lewis, asserting that "*There is a 'productivity' benefit to the wider economy that arises from improved 'numerical flexibility' in the labour market. This benefit is mainly achieved through improving the allocative efficiency of labour across the economy.*"[37] She did not trouble to explain the basis for that view or refer to any academic or other support for the proposition.

[36] Markey Report at section 3.2.
[37] Julie Toth statement at [40].

61. Ms Toth further disputed Professor's Markey's suggestion that "*evidence that numerical flexibility necessarily delivers gains in productivity is scant*". Although she accepted that such evidence at the firm level might be scant, there are, she said, concrete economy-wide benefits from labour flexibility improvements. She did not identify any evidence in support of that contention. Ms Toth's view about the existence of empirical evidence in this respect may be contrasted with the view of the Productivity Commission, which doubts whether the entire workplace relations system has a measurable impact on productivity on the economy-wide level.[38]

62. Ms Toth's views on this topic are nothing more than bare assertions which find no support in the expert evidence or in academic literature. They are entitled to no weight.

63. In short, the evidence indicates that:

(a) there is no evidence which would support the conclusion that increased numerical flexibility generally or increased casualisation specifically delivers productivity gains;

(b) the evidence suggests that increased numerical flexibility may be associated with reduced functional flexibility, training, innovation and commitment and that it may therefore be associated with reduced productivity.

Employment

64. There was no empirical evidence of any relationship between increased casual employment and reduction in unemployment. The data in the Withers Report suggests that over the period 1982–2011 the population share of casually employed persons increased by 7.2% and the population share of unemployed persons decreased by 0.7%. As Withers accepted in cross-examination, the data suggested that increased casualisation had little bearing on unemployment.[39]

65. Nor was there any persuasive theoretical argument for a relationship between casual employment and demand for labour. In this respect the Withers Report opined that:

[38] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, at p9.
[39] PN 10939.

> [108] Businesses determine the demand for labour. The demand for labour is generally thought to depend on the wage rate, or more correctly the costs of employing labour which typically includes many other costs apart from the wage… A firm's decisions about how much output to produce and how much labour to hire are made concurrently. Firms hire extra labour when the value of the extra output produced (known as the marginal revenue product) is greater than the wage. Firms will only increase output if activities which were not previously profitable are made profitable. Therefore, demand for labour falls as wage costs rise.
>
> [109] The value of extra output produced is partly determined by the prices charged to consumers for the firm's output. The value of work also depends on the physical output produced by an extra worker or an extra hour of labour – the productivity of labour. Most firms can do little to affect the prices consumers are willing to pay and the wage which must be paid to attract extra workers or induce workers to work more hours. Therefore, much of a firm's profit maximising employment decision is based on its ability to organise production (including scheduling of labour) to increase output per worker. Labour flexibility enhances firms' ability to organise production efficiently and lower the costs of employing labour. Increasing efficiency increases the value of the marginal product of labour, increases output and increases employment. Where that flexibility encourages increased labour force participation and reduced unemployment, then increased overall demand (including thereby for workers) is enhanced from the incomes received.

66. In short, reduced labour flexibility increases wage costs and labour demand falls as wages costs increase. As Markey *et al* put it, that analysis is a "*simplified overview of the neoclassical theory of employment and wages*" and involves a "*gross oversimplification of the determination of employment demand*". Their description of the analysis as "*oversimplified*" may reflect a degree of professional courtesy; more pointed adjectives might have been used. In any case, the Withers analysis is manifestly inadequate to ground any finding of a relationship between the prevalence of casual employment and demand for labour.

67. Ms Toth, once again, was prepared to advance a more strident view than Professors Withers and Lewis. She said of the relationship between numerical flexibility and employment asserting that "*the IMF found that 'numerical flexibility' across the economy (in the form of fewer restrictions on entry and exit from employment) contributes to lower unemployment rates including lower youth unemployment rates*".[40]

[40] Julie Toth statement [39].

68. As became clear in cross-examination, the proposition imputed to the IMF is in fact contained in a "*staff paper*" which described research in progress, was published to elicit comments and specifically warned that its contents should not be attributed to the IMF. The "*staff paper*" examined labour market data for 97 economies and concluded in aggregate that increased flexibility of labour markets was associated with reduced unemployment and that "*hiring and firing regulations and hiring costs*" were the factor with the strongest effect.

69. The highest that Ms Toth could legitimately put the position is to say that an IMF staff paper, having reviewed aggregate data for almost 100 diverse economies, suggested that a factor described compendiously "*hiring and firing regulations and hiring costs*" affected unemployment. That conclusion, taken at its highest, says nothing about the merits of the present claim for conversion of regular casual employees.

70. Neither the empirical data nor the theoretical analysis supply the basis for any conclusion that the ACTU claim will negatively affect levels of unemployment.

Participation

71. On the basis of the data set out graphically at Figure 12 of the Withers Report, Withers *et al* suggested that there was a correlation between increased casual employment and increased participation. The basis for this assertion was nothing more than that the population share of casual employees increased by 7.2% over the period 1982–2011 and the share of person not in the labour force reduced by 4.8% over the same period.

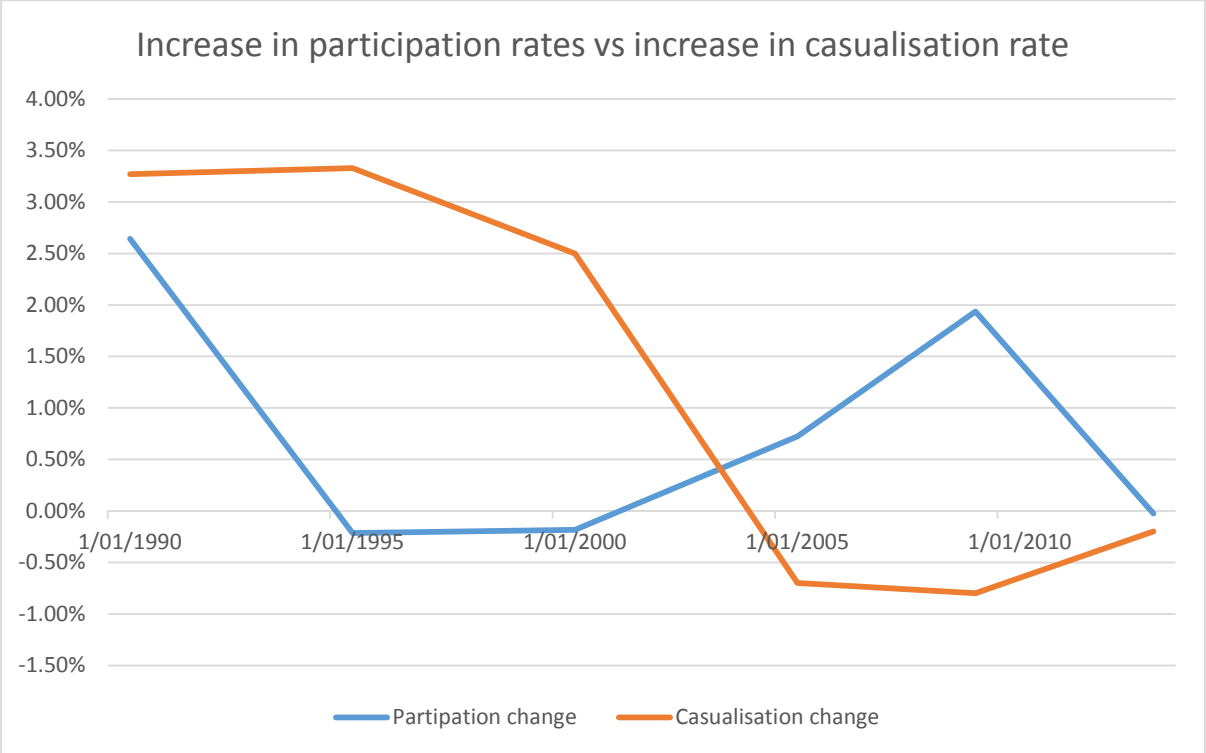
72. Professor Withers accepted that the data presented offered nothing more than "*a suggestive basis*" for such a conclusion. That is probably an overstatement. The most basic interrogation of the data would suggest that there is, if anything, an inverse relationship between casualisation and participation. ABS data suggests that:

(a) over the period 1984–2000, casualisation increased by just under 10% (15.8% to 25.2%) and participation increased by 2.73%;

(b) between January 1990 and January 2000 casualization increased by 5.8% (from 19.4% to 25.2%) and participation dropped marginally, from 63.13% to 62.73%;

(c) between January 2000 and January 2010 participation increased by 2.68% (from 62.73% to 65.41%) while casualisation dropped by 0.9% (from 25.2% to 24.3%).

(d) the major increase in casual jobs has been among men while the major improvements in workforce participation has been among women.



73. In other words, there is no basis for a conclusion that increased casualization improves workforce participation. The data suggests the contrary, namely, that improvements in participation are made when levels of casual employment are stable.

Conclusions

74. The appropriate conclusions as to the implications of increased casual employment are as follows:

(a) Casual employment is associated with reduced levels of workplace training and workplace development, especially in occupations and industries where training is likely to be important.

(b) Reduced levels of training, innovation and commitment may detract from functional flexibility and labour mobility, thereby negatively impacting

productivity. There is otherwise no clearly identifiable relationship between levels of casual employment and productivity.

(c) There is no identifiable relationship between increased casual employment and unemployment.

(d) Increased casual employment does not improve participation. To the contrary empirical data suggests increases in casual employment stymie improvements in participation.

E. Implications of the ACTU claim: the employer lay evidence

75. Employer interests lead a large amount of evidence from a variety of industries and industry sectors. The witness statements, almost without exception, stridently asserted that the grant of the ACTU claim would increase costs and prejudice operations.

76. Despite the variety of sources of the evidence, the employer evidence had a number of common features, each of which detracted from its force.

77. **First**, virtually every employer statement asserted that the ACTU claim would drastically increase the costs of business; and virtually every employer statement declined to provide the detail necessary to permit the Commission to assess the level of cost, if any. In particular the statements:

(a) with few exceptions,[41] declined to provide specific information regarding workforce composition, including the number of casual employees engaged, the length of tenure of casual employees and the range of shift lengths currently worked;

(b) declined to identify the number of casual employees who might become eligible to convert as a result of the grant of the claim; and

(c) offered no analysis of changes in work organisation and workforce planning which might ameliorate the impact of the claim.

78. Each of those matters is a matter solely within the knowledge of the employer. It was open to each employer witness to supply that information and thereby allow the Commission to properly interrogate claims of increased costs and assess the level of

[41] The exceptions include the evidence of the horticulture industry employers and McDonalds.

cost increases, if any. The fact that almost all employer witnesses elected not to do so gives rise to a strong inference that the evidence, is lead, would not have assisted the employer groups' case.

79. This matter is explored in further detail by reference to the evidence relative to the university sector at paragraphs 83 and following below.

80. **Second**, in all cases where the employer claims were capable of being tested through cross-examination, it became clear that the claims of catastrophic cost increases and disruption were overstated. This matter is explored in further detail by reference to the evidence relative to the meat and car repair sectors at paragraphs 91 and following below.

81. **Third**, the employer evidence without exception ignored not only the existence of the enterprise bargaining framework of the FW Act but, in a large number of cases, ignored the existence of an enterprise agreement which renders the entire proceeding moot insofar as the particular employer is concerned. This matter is explored in further detail at paragraphs 95 and following below.

82. **Fourth**, very many of the employer statements contained a large internal contradiction insofar as they claimed that they were affected by irregular work demands and, at the same time, that they would be seriously impacted by the casual conversion claim. This matter is explored in further detail at paragraphs 101 and following below.

Failure to provide relevant detail

83. Notwithstanding that all the members of the Group of Eight universities (**Go8**) are parties to enterprise agreements, the organisation was an active participant in the proceedings. It filed and relied upon four statements. Each of the statements was lengthy, each made sweeping assertions about the effect of the ACTU claim on their operations, and each omitted entirely the information which would allow the Commission to properly assess those assertions.

84. The Go8 relied *inter alia* on the evidence of Mr Steven Smith, Manager Workplace Relations at Monash University. Mr Smith's statement contained a large number of

broad conclusory assertions. He was prepared to assert, for example, that proposed deeming provisions would result in "*many casual professional staff being deemed permanent in circumstances where there is no ongoing need for the work they are performing*" leading to "*a substantial cost impact of universities*".[42] He was similarly prepared to assert that a four hour minimum engagement period would "*not only make it difficult for the University to meet its operational needs… it will have a negative impact on student employment*".[43] In a similar vein, he said that a significant amount of work performed by casual professional staff could not be reorganised to provide a four-hour minimum engagement.[44]

85. During cross-examination, however, it quickly became clear that those sweeping statements were not based on any proper inquiry. Indeed it became apparent Mr Smith did not possess even the most basic factual information required to make good his assertions. He did not know how many casual employees the university employed.[45] He did not know how many casual employees fell into the various categories of casual work he described.[46] His assertion regarding the impossibility of reorganisation of work into four hour blocks was advanced without any relevant analysis.[47] He did not know what proportion of current casuals would be deemed permanent if the ACTU claim were granted.[48] His statistics regarding the average time to process applications for conversion were demonstrably wrong.[49] His understanding of the relevant award provisions was doubtful.[50]

86. Ms Shields, another witness called by the Go8, was even more categorical as to the effect of the proposed deeming provision. Her statement asserted that the effect of the provision would include "*a chilling effect on employment*", that it would "*significantly eat into the facult[ies] budget[s]*" and "*driv[e] down the quality and efficiency of work*" and that "*the faculties would essentially grind to a halt*".[51]

[42] Smith statement at [56] and [58].
[43] Smith statement at [62].
[44] Smith statement at [59].
[45] PN 4132 and following.
[46] PN 4155.
[47] PN 4160 and following.
[48] PN 4167 and following.
[49] PN 4216 and following.
[50] PN 4178–PN 4180.
[51] Shields statement [32]–[35].

87. Propositions of such apocalyptic quality might be expected to be advanced by a person with significant knowledge of human resources who had conducted a significant analysis of the issues. In fact Ms Shields does not have any experience at all in the areas industrial relations or human resources[52] and had a limited knowledge of relevant award provisions.[53] She offered no analysis of the extent to which work carried out by casuals could be bundled into longer engagements or the workforce planning options might exist to ameliorate the catastrophic results described in her statement. She had not considered the extent to which the various idiosyncratic categories of work she described might be accommodated by existing award provisions for fixed term, replacement and other forms of employment. Similarly to Mr Smith, Ms Shields did not take even the most basic step of identifying the number of casual employees engaged by Monash or the average tenure of a casual employee at Monash.

88. Mr Smith indicated that he understood the nature of the proceedings and that he understood that the Commission was required to balance the needs of employers and employees.[54] He understood that the Commission could not do so unless it had some clear understanding of the cost to employers of the proposed variations.[55] No doubt Ms Shields and the other Go8 witnesses, who are advised by a top tier law firm, had a similar understanding. They chose not to provide the information that would allow the Commission to make that assessment. In the absence of any explanation for that failure, it must be inferred that the information was withheld because it would not support the employers' position.

89. The force of that inference is buttressed by a comparison of the Go8 evidence with the evidence of the universities represented by the Australian Higher Education Industrial Association (**AHEIA**). AHEIA, perhaps naively, lead evidence which actually included a level of detailed factual information in support of the conclusions asserted by its witnesses. That evidence made clear that the category of casual employees required for less than four hours was very small and limited to students carrying out orientation, disability note taking and other minor tasks.[56] The effect of that evidence

[52] PN 4490.
[53] PN 4502.
[54] PN 4136–4137.
[55] PN 4138.
[56] See Gladigau statement at [3] and following; Greedy statement at [4] and following.

was to give the Commission a proper insight into the effects of the ACTU claim. That level of proper insight demonstrates that the claim would have effectively no effect beyond student employment and a limited effect within student employment.

90. The case of the higher education sector is but one of a variety of examples of cases where broad claims of increased cost and operational difficulty are not supported by factual detail which makes good the broad assertions. The absence of that necessary factual detail should lead to the rejection of the general claims.

Manifest overstatement of the difficulties resulting from the ACTU claim

91. An obvious example of gross overstatement of the issues thrown up by the application is the evidence of the Australian Meat Industry Council (**AMIC**) regarding the meat industry. The AMIC statements and submissions suggested that the ACTU claim would be destructive in that industry. Pointing to the "*particular and long-recognised circumstances and distinctiveness of the meat industry*" the AMIC witnesses suggested that a restriction on the use of casuals would cause "*fundamental problems*" for the industry.[57] They were categorical in this respect.

92. However, cross-examination demonstrated that the true position was entirely different. The AMIC witness Mr Johnston accepted in short order that there were in effect no flexibilities associated with casuals which were not available through use of daily hire,[58] and that the use of large numbers of casuals in some establishments was a function of a local managerial decision rather than the nature of the industry.[59] The latter concession was perhaps inevitable given that the employer's own evidence demonstrated that the majority of meat industry establishments operated with very few or no casuals.

93. The true position, contrary to the statement (as opposed to oral) evidence of AMIC is that the ACTU claim would have no real impact on the operation of meat processing establishments.

94. Various other examples may be identified. The statement of Ms Maria Meliak suggested that the businesses in the car repair sector would be crippled by the

[57] Cottrill statement [32].
[58] PN 8065.
[59] PN 8070.

imposition of a four hour minimum shift. In cross-examination it became apparent that the crippling cost the claim was, at its highest, $50 per week.[60]

The relevance of enterprise bargaining

95. It would be noted that a large proportion of the employer evidence in these proceedings came from employers who were party to enterprise agreements. For those employers, the grant or otherwise of the claim could have only marginal importance. Claims of increased costs and disruption must, in the circumstances, be viewed sceptically.

96. It is unlikely that the preponderance of evidence by representatives of employers who are party to enterprise agreements is a coincidence. It is likely to reflect the fact that employers who require a level of rostering flexibility above the ordinary enter into enterprise agreements which provide that flexibility. The employer evidence should be assessed having regard to the fact that employers with exceptional needs for rostering flexibility are over-represented.

97. The evidence from employers party to agreements is relevant in another respect, of which Bridge Climb is perhaps the best example. The representative of Bridge Climb, Ms Lauren Logue, explained that it is a business particularly exposed to fluctuations in demand caused by a variety of factors including most obviously the weather and the seasons.[61] The business is also confronted by the difficulty that the work, for the most part, is not scalable but arises in fixed blocks equivalent to the length of the various walking tours.[62] Despite those challenges, Bridge Climb is a very profitable business.[63] Part of its success is likely to be attributable to its entry into an enterprise agreement designed to address its particular circumstances. The enterprise agreement established a regime of part-time employment which is to all appearance well adapted to the needs of the enterprise and the employees.[64]

98. The Bridge Climb evidence was lead in opposition to the claim for variation to the award. Its effect is, however to the contrary. The scenario Ms Logue describes

[60] PN 7377 and following.
[61] PN 1117.
[62] PN 1122.
[63] PN 1127.
[64] PN 1157.

illustrates that the statutory regime permits the circumstances of atypical businesses to be accommodated by way of enterprise bargaining.

99. It is inevitable that there will be a certain proportion of businesses which are affected by idiosyncratic circumstances and which require enterprise-specific rostering or other conditions. Enterprise bargaining is available to address those cases.

100. The content of modern awards should not be set on the basis that it is required to accommodate the circumstances of every enterprise in the economy. To attempt to do so would in fact be contrary to the FW Act's objective of encouraging enterprise bargaining. Modern awards rates of pay are set sufficiently low that they do not discourage employees from bargaining for higher wages; by the same logic, award flexibilities should not be so extensive as to discourage employers from bargaining for increased flexibilities.

Internal contradiction; failure to demonstrate serious impact

101. There was a large logical contradiction contained within the employer evidence. On the one hand, the statements with few exceptions emphasised the variability of the work. On the other hand, the statements emphasised that the ACTU claim would impact severely on their operations. There is, of course a tension between the contention that an employer's work is variable and the contention that a claim for conversion of *regular* casuals will impact the employer significantly. Some examples may demonstrate the point.

102. Ms Kerry Allday explained that her business, Data Response Pty Ltd, provided "*third party contact centre and logistics services*". She described "*the volatile and changing nature of the services we provide to meeting changing and unplanned customer needs*" and that "*demand and supply issues peak and slump to the extreme*" and that "*our hours are unpredictable*". She said that the work was somewhat seasonal and that the business would engage a bare minimum of employees during the 8 week Christmas holiday period.[65]

103. Given the "*extreme*" volatility of the workload of Ms Allday's business, it might be expected that Ms Allday would be uninterested in a claim which had no impact on

[65] See Witness Statement of Ms Kerry Allday, particularly paragraphs 4, 14, 23 and 28.

employees working on an irregular or occasional or non-systematic basis. To the contrary, however, Ms Allday claimed that a right to convert would render her business unviable and that its survival would require conversion of all staff to contractors or offshoring. Apart from making non-specific claims about "*fixed costs associated with casual employment*", there was no explanation as to how the claim could affect her workforce.

104. Similarly Mr Benjamin Norman described the operations of his employer, Viterra. He said that those operations were "*inherently unpredictable and seasonal*", that "*the number of employees required on any given day varies significantly*", that "*there may be days or weeks at a time during which there is no work for Viterra's casual employees to perform*" and that the business has a "*highly variable and unpredictable workflow*". He explained that Viterra terminates the employment of the majority of its casual workforce at the end of each harvest. He mentioned, albeit only in passing, that Viterra is covered by an enterprise award and party to a number of enterprise agreements.[66]

105. Despite these matters, which suggests that the business would literally be unaffected by the grant of the claim, Mr Norman asserted that "*the ACTU's casual conversion clause would have a serious impact on Viterra*".[67]

106. Other examples could be offered. This internal logical contradiction was common to virtually all the employer evidence. Its effect is to critically undermine the force of the employer contentions as to the effect of the ACTU claim.

107. In order to demonstrate that the ACTU claim would have serious impact, it was necessary for an employer to show that there is a substantial category of casual employees who work regularly and systematically for six months, but for whom there is no ongoing work. With the possible exception of one employer in the agricultural industry, no employer demonstrated the existence of such a category.

108. The absence of that evidence precludes any finding that the ACTU claim would have a serious impact on employers.

[66] See Witness Statement of Benjamin Norman.
[67] Ibid at paragraph 48.

The true reasons for the employment of casuals

109. The evidence demonstrates that there are two factors which lead employer to engage casuals. The first is actual or perceived cost saving. The second is ease of management.

110. The first factor may be described in different ways all to the same effect:

(a) a desire for improved flexibility in the form of flexibility to increase or decrease hours;

(b) a desire to avoid having to pay employees for periods during which they are unable to be productively employed (a period which may be a particular shift, a season, or any other period);

(c) a desire to avoid the obligation to redeploy on redundancy of a position;

(d) a desire to avoid termination costs (notice and redundancy pay).

111. Whether the engagement of casuals actually achieves those objectives is a different question. A superficial consideration would suggest that in many, perhaps most, cases the engagement of casuals results in a lower per hour wage cost. The evidence demonstrates that casuals, even controlling for classification and so on, are paid less than permanent employees. It is in any case self-evident that the risk transfer involved in engagement of a casual has financial value.

112. However, the extent to which that saving offsets the disadvantages—of higher turnover, for example, or reduced engagement, training, functional flexibility—is a more difficult question and will vary from case to case. The actual cost saving is in many cases likely to be lower than the perceived saving. The net result for employers and employees is therefore negative: employees are paid less; but the cost saving to employers is eroded by loss of functional flexibility and commitment.

113. The second factor is greater ease of management or, put differently, a reduced need for sophisticated workforce management and planning. In many cases the engagement of casuals is, at least in the short term, the easier option in managerial terms. As Professor Markey explains, that is not a matter of intellectual laziness necessarily but

a matter of a culture which assumes that casual employment is the best way of delivering labour market flexibilities.[68]

114. Neither the first goal of cost reduction or the second goal of simplifying management are objectives which the Commission should necessarily be concerned to vindicate. Employers are, generally speaking, entitled to pursue cost reductions and to manage businesses as they wish; it does follow that the safety net must pursue the same objectives. It is not an objective of the Commission or the award system to reduce labour costs to the minimum level but rather the objective is fundamentally to balance the needs of employers, employees and the community at large.

115. That being the case, the Commission is not assisted by assertions that the effect of the ACTU claim is to increase costs. A more sophisticated analysis is required. The question is one of the quantum of costs and the extent to which any cost increase is justifiable having regard to the interests of employees and the community at large.

Conclusions

116. The ACTU indicated during opening that it admitted the proposition that:

> Granting the ACTU claim may result in an increase in the labour costs for some employers, assuming the employer takes no steps to adapt to the changed award obligations.

117. Having regard to the critical deficiencies in the employer evidence discussed above, that is the only finding available on the evidence: that the grant of the claim may increase costs in some cases, assuming the grant of the claim does not precipitate any change in workforce planning or organisation.

118. There is no basis for any finding that:

(a) the cost of the grant of the claim will be substantial;

(b) any costs caused by the introduction of the conversion clause are unable to be avoided by adjustments in workforce planning or organisation;

(c) the viability of any employer is jeopardised by the grant of the claim.

119. In the *Secure Employment Test Case* the Full Bench said cogently:

[68] PN 9052 and following.

> 246 Further, we note with some concern that employers are increasingly using casual employment for reasons other than to meet short term operational needs. Unions NSW presented evidence, discussed earlier, of employers using casual employment either as an entry level stepping stone from which progression to a permanent position may be achieved, and/or as an ongoing probationary period. Casual employment is not a panacea for inadequate human resource management.
>
> 247 We do not consider that the actual or perceived flexibilities associated with casual employment should be protected at all costs. In our view, the disadvantages of long term casual employment for employees far outweigh the advantages to be gained by employers who wish to persist in using casual employment as a vehicle for virtual permanent employment, whatever their reason for doing so may be. Further, we have seen little coherent evidence that those same advantages cannot be obtained through other forms of employment.

120. An identical conclusion should be reached in the present case.

F. Implications of the ACTU claim: the employer's expert and quasi-expert evidence

121. There is a tradition in award cases of facile analysis of complex economic issues. The evidence of Ms Toth and Mr Goodsell was, in that sense, entirely conventional. Neither Mr Goodsell nor Ms Toth made any serious attempt to present a balanced account of the economic environment or the impacts of the ACTU claim from the perspective of an economist.

122. Mr Goodsell advanced a sophomoric analysis of the state of manufacturing, consisting substantially of a dot-point list of factors said to present serious challenges to the sector. He did not make any serious attempt to identify the various countervailing factors which assisted Australian manufacturer. For example, he ignored the effect of currency movements, oil price reductions and fair trade agreements, each of which was a significant net positive for Australian manufacturing.[69] The statement of Ms Toth similarly consisted of a series of large assertions largely unsupported by reasoning, academic material or empirical evidence. For the reasons discussed in Part C above, her evidence should be wholly rejected.

[69] See Professor R.Markey, Dr J.McIvor and Dr M.O'Brien, *Second Supplementary Report: Casual and Part-Time Employment in Australia*, of 15 February 2016, attachment 'RM-4' to the Further Statement of Professor Raymond Markey dated 9 March 2016 (Exhibit 111) for a discussion of these missing countervailing factors and a further critique of the employer groups' contentions regarding the economy and the impact of the ACTU's claim.

123. The Withers Report in many instances adopted the same approach of advancing broad and controversial propositions with a minimum of analysis in support. Unlike Mr Goodsell and Mr Toth, however, Professor Withers accepted the limitations of his report. He readily acknowledged that the purpose of his report was to critique the Markey Report and in some cases propose *possible* alternative viewpoints without seriously prosecuting an alternative case:

> You see, my concern is that I'm going to start asking you about some of the opinions recorded in your report and that you will no doubt in an articulate and erudite way explain the foundation for the opinions, but not by pointing me to some aspect of the report but by reference to your own knowledge and experience in this field. Do you think that's likely or are you unable to say?---I - well, it's certainly always like - possible as opposed to likely. I wouldn't have thought it was likely partly - well, because what we sought to do here was simply interrogate the ACTU logic and evidence.
>
> Yes?---With an attempt to put it in context and other examination of further evidence. I must say I don't have a particular view as to what the outcome of this should be. It's a careful balancing exercise. So there's no - despite some implications of - and some statements in the ACTU's submission that are occasionally tendentious, there's no cause that's been trying to be prosecuted here. It really is an interrogation of evidence from the middle, as I see it.
>
> Yes?---Rather than trying to prove something that's - that one stands by.[70]

124. Importantly, Professor Withers accepted the limitations of the Report's treatment of the relationship between casualisation and productivity. In particular, he accepted that the analysis relied substantially on an assumption about the rationality and knowledge of employers which, as members of the Bench pointed out, was not established by the employer evidence:

> But the key integer is wage costs?---Costs.
>
> Yes?---And the costs here are relative to productivity, that is, it's cost per unit of revenue, not only unit of output, unit of revenue. And we're not arguing the wage component of that here.
>
> Without investigating the productivity implications of different policy settings we can't actually know what the result of different casual or permanent part-time or permanent full-time?---No, other than the old assumption that's often made though, and I'm willing to qualify it myself, which is business people know best for themselves and they'll do those things that are most profitable for them, therefore if they want to employ casual, it must be better for them through productivity if the

[70] PN 10810 and following.

wages are the same, so that's – now, I think there's a lot of problems with that myself. But it can be a core proposition just the same even though it's not universally and, you know, an iron clad notion.

VICE PRESIDENT HATCHER: And one of the things we've seen, I think Members of the Commission are seeing clearly in this case is that you have businesses of similar size operating in the same sector apparently making rational decisions - - -?---Yes.

- - -who decide to compose their workforce in completely different ways?---Yes.

Yes. Which suggests that there's not necessarily an optimal solution in terms of the composition of wage force for any particular business in any particular industry?---Well, not necessarily a single solution.

Yes?---It can mean that they are really different even though they look the same, that is, you just don't know enough about their detail and how they operate, particularly from, you know, aggregate statistics and observations.

Sure. But I mean using the example - - -?---The other is though that some of them are getting it wrong and they're going to fail.

Yes. I mean, using the example that the Commissioner referred to, someone, say for example, Coles and Woolworths, which to all intents and appearances appear to be similar businesses operating in a similar market of similar size but they do things which are, in some ways, quite different?---Yes. Yes. And usually common in this argument is that that will, you know, sort itself out in the long run as to which one does better, but so much else changes in the long run that it's not necessarily a good experiment to see. Another, of course, is for people like Coles and Woolies, that they're monopolistic who have an ability to indulge themselves in managerial vice; that they can do things that suit managers without the firm coming, collapsing and busting for a while.

SENIOR DEPUTY PRESIDENT HAMBERGER: One of the difficulties in this area is, I mean, your explanation, there's an assumption that the employers know exactly what they're doing?---Yes.

And they have all the information available to them?---Absolutely.

And that unfortunately something that's abundantly clear from, with all due respect to them, some of the witnesses is their knowledge actually of, particularly, the institution or how the rules actually work are often not very good?---Yes. I was fully admitting that when I said it's a proposition that I personally would qualify as well. But what's the alternative? Does this Commission or a bureaucrat or somebody else know any better? It's the old story of your Commission and its predecessors, and it is Sir Richard Kirby an indigenous variable. Are you somehow trying to replicate the market, and come at the same decisions the market would make, and just adding

> transactions costs to the deal. And if you get it wrong you ruin the deal. If you got it right you've just cost the tax payer a bunch of money.[71]

125. Having regard to the limitations of the employer evidence discussed above and in Part C, the Commission should proceed on the basis that the economic evidence of Markey *et al* is unchallenged save for marginal qualifications and comments advanced in the Withers Report.

G. Deeming provision

126. The ACTU seeks a deeming or "opt out" variant of the proposed conversion clause in the following awards:

(a) Food, Beverage and Tobacco Manufacturing Award 2010;

(b) Graphic Arts, Printing and Publishing Award 2010;

(c) Manufacturing and Associated Industries and Occupations Award 2010;

(d) Vehicle Manufacturing, Repair, Services and Retail Award 2010;

(e) Higher Education Industry-General Staff-Award 2010; and

(f) Timber Industry Award 2010.

127. A deeming provision facilitates conversion by:

(a) avoiding the fear of reprisal the evidence demonstrates many casual employees feel in asserting their rights or requesting conversion;

(b) placing a greater practical onus on employers to notify employees of their right to convert or opt out of conversion;

128. A deeming clause is necessary in industries:

(a) where casual workers already predominately work on a regular basis; and

(b) which have a high incidence of vulnerable casual employees who are less likely to be aware of their rights or more likely to fear exercising them; and

129. The justification for adopting a deeming clause in the first four awards listed above is dealt with in the submissions of the AMWU. In relation to the Higher Education

[71] PN 11057.

Industry–General Staff Award, the evidence of Linda Gale supports a finding that casual conversion is being frustrated in the higher education sector by circumstances that are unlikely to be adequately addressed by an 'opt in' or election variant of the conversion clause. For example, Ms Gale's evidence shows higher education employers are strongly resistant to conversion and are often deferring and delaying, sometimes indefinitely, the processing of converting applicants or using other means of 'shifting the goal posts' to reject applications on spurious grounds. Some casual employees are also reluctant to access their right to request conversion due to the insecurity of their employment. As a result, the number of employees successfully converting in this industry is low.[72] These practices may not be adequately addressed by an amended "opt in" clause.

130. The evidence of Mr Smith and Ms Shields demonstrated that the attitude of employers in the industry to casual employment is seriously deficient. Mr Allan was employed on a series of contracts which purported to be casual employment contracts for fixed terms of 15 or 16 weeks for longer than three years.[73] His application for conversion was made in November 2015 and as of the date of the hearing had not been answered. Ms Shields was only mildly surprised that such an arrangement existed.[74] Mr Smith indicated that the fact that Mr Allan had been engaged continually for three years did not necessarily demonstrate an ongoing need for his position.[75] The fact that both witnesses viewed Mr Allan's position as unremarkable demonstrates that need for normative change in the treatment of casual employees in that sector.

131. The evidence of Mr Smith also helpfully demonstrated one of the ways in which higher education industry employers defeated the operation of the casual conversion provision. Mr Smith indicated that Monash would not convert a casual unless the university had budgeted for a permanent position.[76] By implementing that pre-condition the university ensured that it had an effectively unconstrained capacity to determine whether an employee would convert—in effect, the right to convert was thereby transformed to a right to request conversion. The fact that employers would

[72] See Witness Statement of Linda Gale at paragraphs [21]—[34].
[73] Exhibit 46.
[74] PN 5414.
[75] PN 4244.
[76] PN 4255 and following.

unapologetically take that view of casual conversion provisions demonstrates, again, the need for a different approach in that industry.

132. The lay evidence of Colin Aiton and Michael Fisher, both long-term regular casual employees employed under the Timber Industry Award 2010, illustrates the difficulties in such employees accessing the conversion clause under that award. Both attest to an inability enforce their rights. Despite working effectively as a full-time employee for over seven years, Mr Aiton was not able to exercise his right under the Timber Industry Award 2010 to convert to permanent employment to gain the paid entitlements and greater security he desired. In cross-examination, Mr Aiton confirmed he had attempted to convert to permanent employment but his request was rejected. Mr Aiton said:

> "He [his employer] said to me, he goes, "Well, you're like full-time anyway." I said, "How can that be? We don't get paid sick pay. If I take a day off and I'm sick, I don't get paid. I've got to come to work when I'm sick and then we infect each other. It's crazy."[77]

133. Mr Aiton gave evidence also that there was 'no hope' of such a conversion as the employer had already threatened to take their bonuses away if they talked to the union. Mr Fisher also feared reprisal if he raised issues in the workplace around safety or his entitlements.[78]

134. Deeming provisions are appropriate in industries, such as the timber industry, where employees are discouraged from pursuing rights and/or where applications to convert are unlikely to be accepted regardless of their merits.

H. Minimum engagement periods

135. The case for the minimum engagement period is relatively straightforward:

(a) The most basic tenet of a fair safety net is that employees are paid for their work. That an employee should be paid for work is a proposition which holds true universally and is unaffected by the nature of the work, the employer or the employee.

[77] Transcript at PN2387.
[78] See transcript at PN 2483-2488.

(b) There is cost to every employee in attending work. The costs are most obviously the costs of transport, childcare and the utility of time spent at work.

(c) The net financial benefit of work (value of remuneration earned less the cost of attendance at work) diminishes as the minimum period of engagement decreases, ultimately to nil or into the negative.

(d) That being the case, the sole question is: what minimum period of engagement is necessary to ensure that employees are actually paid for work? Put differently—what is the minimum take home payment to which an employee should be entitled?

(e) The appropriate minimum safety net entitlement is that an employee should, after accounting for travel, childcare and other costs, earn at least one-fifth of the Newstart weekly amount being $56.33 per day.

(f) As the ACTU calculations demonstrate, a minimum four hour engagement is required to ensure that every employee earns at least that amount.[79]

136. In other words, the minimum engagement period is nothing more than a guarantee that an employee who works will actually earn more than they would if they did not work. That guarantee should operate as an absolute floor which exists independently of the circumstances of the employment.

137. The employer evidence in this respect was directed to proof of the proposition that there are cases where work requirements for an employee last less than four hours. It follows, it is said, that a four hour minimum period creates an unacceptable risk that an employee may not be able to be productively employed for the entirety of the period for which he or she is paid.

138. So much may be accepted. It may be accepted that there are cases where the work requirement last for two hours, or one hour. That does not take the matter very far. The possibility that an employee might be unable to be productively engaged for every minute of a shift is not so abhorrent as to overcome the requirement to ensure that employees are compensated for work.

[79] See ACTU Submissions filed 19 October 2016 at paragraph 101.

I. Requirement to offer work to existing employees

139. The statistical evidence demonstrates that a significant proportion of casual and part-time employees are underemployed and would prefer to work more hours. Professor Markey et al's analysis of AWRS data shows that over 42 per cent of casual employees and 29.5 per cent of permanent part-time employees express a preference for more hours per week and both express a higher preference for more hours than their counter-parts.[80]

140. The evidence directed to this point invariably proceeded on a misunderstanding of the nature of the obligation. The AHA witnesses, for example, complained that they could not be expected to offer additional work to employees who were already working at the relevant time.[81] Similarly the evidence of Mr Norman was to the effect that offering work to existing employees might offend fatigue management regulations or require work to be offered to untrained employees.[82]

141. Once it is understood that the ACTU claim does not require that work be offered to any person who is already working or who is unable to perform the work by reason of lack of training, safety regulations or otherwise, the objections invariably fall away.

142. The remaining objection was to the effect that the obligation would impose an administrative burden. That objection is implausible on its face. Every employer communicates with employees by some means or other—whether by email, intranet, text message, notice board or in person. The ACTU claim does not require anything other than communication of the availability of additional work to employees by the usual means.

143. The grant of the ACTU claim would address the needs of underemployed casuals without impacting in any substantial way on employers.

J. Factual findings

144. The appropriate factual conclusions to be drawn from the evidence are as follows.

[80] See Supplementary Expert Report, Table 5.3 (p58) and paragraph 56.
[81] See for example statement of Darren Brown at [14].
[82] Statement of Benjamin Norman at [58] and following.

145. An incident of the labelling of employment as "casual" is the withholding of basic safety net entitlements. It follows that use of casual employment necessarily has the effect of undermining the fairness and relevance of the safety net.

146. Casual employment has significant disadvantages for many, although not all, employees, including:

(a) reduced income;

(b) unavailability of basic safety net entitlements including in respect of leave;

(c) insecurity of employment and income;

(d) reduced levels of workplace training and workplace development;

(e) consequential increases in stress and anxiety and reductions in employee welfare; and

(f) exacerbation of gender-based differences.

147. It has not been demonstrated that the ACTU claim would have prejudicial effects on the efficient and productive performance of work.

148. There is some basis for a finding that a reduction in casual employment will increase the efficient and productive performance of work, principally by improvements in functional flexibility and labour mobility.

149. It has not been demonstrated that the grant of the ACTU claim would result in any serious increase in employment costs or the regulatory burden.

150. There is no evidence that increased casual employment improves participation rates. There is some basis for a finding that increases in casual employment stymie improvements in participation.

K. The modern awards objective

151. The grant of the ACTU claims is necessary to achieve the modern awards objective for at least the following reasons.

Casual conversion and deeming provisions

152. **First**, an incident of casual employment is that major features of the safety net are withheld from such employees. In order to ensure that the safety net is fair and relevant, it is necessary to ensure that casual status is exceptional and enforced only in respect of genuinely irregular, *ad hoc* and unpredictable work.

153. **Second**, the ability of an employer to label regular work as "casual" notwithstanding that it is regular and systematic represents a serious threat to the integrity of the safety net. Specifically, it means that major features of the safety net, including entitlements to leave and notice of termination, are in effect optional. If the safety net is to be relevant, it must be mandatory not optional.

154. **Third**, casual conversion provisions are one measure which will have the effect of ensuring that the casual label is applied to work which is genuinely casual, thereby ensuring that the safety net applies to all work except work which is exceptional. Although not a panacea, they will go some way to ensuring the integrity of the safety net.

155. **Fourth**, casual employment has serious disadvantages for many employees. If the safety net is to be fair, it must limit those disadvantages. Casual conversion provisions ensure fairness by ensuring that employees in regular work need not suffer the disadvantages attendant on casual employment, thereby protecting relative living standards and the needs of the low paid.

156. **Fifth**, the disadvantages of casual employment impact particularly on women in the workforce and exacerbate gender inequity at work.

157. **Sixth**, casual conversion provisions will promote rather than inhibit the flexible modern work practices and the efficient and productive performance of work.

158. **Seventh**, casual conversion provisions will have a limited impact on employment costs and the regulatory burden.

159. **Eighth**, casual conversion provisions will have a neutral or positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

160. **Ninth**, in some industries including higher education, the prevalence of false casual employment is so widespread that deeming rather than conversion provisions are required.

Minimum engagement periods

161. An essential feature of the fair and relevant minimum safety net is that employees are better off when they work than if they did not work.

162. A four hour minimum engagement period is necessary to ensure that result.

Requirement to offer work to existing employees

163. One of the difficulties confronting casual and part-time employees is underemployment. A readily available means of addressing that difficulty is a requirement that additional hours be offered to existing employees.

164. An obligation of that kind would have a minimal impact, if any impact, on employment costs and the regulatory burden on employers.

165. A fair and relevant minimum safety is one which minimises, to the extent possible, the challenges faced by employees including underemployment. That being the case, it is appropriate that casual and part-time employees have the opportunity to perform additional hours when available.

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