4 YEARLY REVIEW OF MODERN AWARDS

MATTER NO. AM2014/197 and AM2014/196
CASUAL EMPLOYMENT AND PART-TIME EMPLOYMENT

FINAL SUBMISSIONS ON BEHALF OF RESTAURANT AND CATERING INDUSTRIAL

A. INTRODUCTION

1. We refer to and rely on our submissions dated 22 February 2016.

2. Restaurant and Catering Industrial (**R&CI**) make these final submissions to oppose the claims by the Australian Council of Trade Unions (**ACTU**) and Union Voice, in particular the draft determinations filed by the ACTU on 17 July 2015 in respect of the *Restaurant Industry Award 2010* and the *Hospitality Industry (General) Award 2010*.

3. We also set out in these submissions our response to the Issues Paper issued by the Commission on 11 April 2016.

B. REVIEW PROCESS

1. Section 156(2) of the *Fair Work Act 2010* (**FW Act**) prescribes the steps to be followed by the Commission in conducting a 4 yearly review of modern awards:

> *"(2) In a 4 yearly review of modern awards, the FWC:*
> *(a) must review all modern awards; and*
> *(b) may make:*
> *(i) one or more determinations varying modern awards; and*
> *(ii) one or more modern awards; and*
> *(iii) one or more determinations revoking modern awards.*
> *(c) must not review, or make a determination to vary, a default fund term of a modern award."*

2. We note that the Commission may rely on its procedural powers pursuant to Division 3 of Part 5-1 of the FW Act, in particular s.590 provides that the Commission can *"inform itself in relation to any matter before it in such a manner as it considers appropriate"*.

3. In the Commission's decision of the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues[1] the review process was outlined as follows:

> *[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act.[14] In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.'* [15][2]

4. The above decision was adopted and applied by the Commission in its recent decision in respect of the Annual Leave Case, handed down on 23 May 2016.[3] In citing paragraph 24 of its previous decision, the Commission further noted:

> *"**[14]** The short points to be drawn from the above extract are that in the Review:*

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1 [2014] FWCFB 1788.

2 Ibid [24].

3 [2016] FWCFB 3177.

> *(i) the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made; and*
>
> *(ii) variations to modern awards should be founded on merit based arguments that address the relevant legislative provisions, accompanied by probative evidence directed to what are said to be the facts in support of a particular claim. The extent of the argument and material required will depend on the circumstances.*
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> ***[15]** It is also important to appreciate the context in which the observations set out at paragraphs [13] and [14] above were made. The Full Bench was there dealing with submissions about what a party seeking to vary a modern award in the Review should be required to demonstrate. It should not be inferred from the quoted passage that in conducting the Review the Commission is confined to only dealing with variation applications made by interested parties. The FW Act charges the Commission with the responsibility of acting on its own motion to review all modern awards; it is not dependent upon the applications of interested parties in performing that statutory function."*[4]

5. Section 134 of the FW Act requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net taking into account, *inter alia: the need to promote social inclusion through increased workforce participation* (s.134(1)(c)); and *likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden* (s.134(1)(f)); and *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards* (s.134(1)(g)).

6. R&CI submits that the Commission is at risk of not meeting the obligations imposed upon it under the "modern awards objectives" (in particular the matters outlined above), if it grants the application sought by the unions. The abovementioned were discussed in the matter of *Shop, Distributive and Allied*

[4] Ibid [14].

Employees Association v National Retail Association the Commission, whereby Tracy, J stated at paragraph 7 of the decision:

> *"The "modern awards objective" is framed as an obligation, imposed on FWA by s 134(1) of the Act, to "ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions", taking into account a range of considerations, which include "relative living standards and the needs of the low paid", "**the need to promote social inclusion through increased workforce participation**", "**the need to promote flexible modern work practices and the efficient and productive performance of work**" and "**the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden**.""*[5]

(Emphasis added).

7. R&CI further submits that the unions have not advanced a merit argument or properly demonstrated a plausible case, capable of persuading the Commission to make a decision to bring about the changes sought in their application. Sub-paragraph 60(3) of the Preliminary Jurisdictional Issues decision states:

> *"…The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, **where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation**..."*[6]

(Emphasis added).

C. ISSUES PAPER

Casual and part-time employment - general

1. What, apart from the difference in the mode of remuneration, is the conceptual

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5 [2012] FCA 480 [2].

6 [2014] FWCFB 1788.

difference between casual and part-time employment?

1.1 The difference between a casual employment and permanent part-time employment is, casual employment is commonly known to be undertaken as a temporary work engagement, with no promise of continuing work, generally has no set hours, does not provide for leave entitlements, such as sick leave and annual leave, afforded to permanent part-time and full time employees. Casual employees receive casual loading in addition to their hourly rate, as compensation for the lack of such entitlements.

1.2 Casual employees, unlike permanent employees, do not have an ongoing contract of employment with the employer. The employer can elect to offer employment on a particular day or days and when offered, the employee can accept the offer of work. Each engagement is, in the eyes of the law, separate, and neither party is bound at any point after the conclusion of one contract to enter into a further arrangement.

1.3 From the perspective of employers, casual employment is commonly characterised as spontaneous, flexible and irregular, compared to part-time permanent employment, which is less flexible and requires careful pre-planning of work hours. Casual workers may be defined as 'on-call' workers, employed specifically to undertake work on an irregular basis to supplement a fixed number of employees. There is no expectation, certainty or guarantee of ongoing work, fixed shifts or hours for casual employees.

1.4 It is this degree of informality, flexibility, uncertainty and irregularity of the engagement that gives it the characteristic of being casual. Every other form of work are properly regarded as permanent work. Employees who are guaranteed less than 38 hours a week are permanent part-time.

1.5 The OECD groups casual employment together with other non-standard form of employment:

> *"Temporary jobs for the purpose of this analysis are defined as dependent employment of limited duration, including temporary work agency, casual,*

seasonal or on-call work. Definitions across countries outside the European Union are not harmonised and are based on different approaches… In the case of Australia, a broad definition of temporary work includes jobs of fixed-term duration, those employed through a labour hire or a temporary work agency as well as casual workers. Casual workers may lack entitlements to key fringe benefits such as paid vacation or sick leave or may not be protected by legislation against unfair dismissal, but might otherwise have continuous and stable employment, and are therefore one form of atypical or Non Standard Worker (NSW). In this respect, this definition follows the work undertaken by the Australia Productivity Commission (2006) in classifying casual work as one form (and the most sizeable one) of non-standard work."[7]

Part-time Employment

1.6 There are varying definitions of part-time employment in terms of hours worked. A broad definition of part-time employment in industrial terms identifies part-time employment as being in the same category as permanent full-time employees, with the difference being the number of hours of work are generally less than 38 hours. Part-time employees receive statutory leave entitlements, and are more or less treated the same as permanent full-time employees, although as they are engaged to work a set number of hours, with pre-agreed start and finish times there is a strong argument they have superior conditions to full time employees who do not have a Contracted Roster. The *Restaurant Industry Award 2010*, defines part-time as:

12. Part-time employment

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

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

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

(b) has reasonably predictable hours of work; and

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

[7] In It Together: Why Less Inequality Benefits All , p. 138

12.3 *At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.* (Note: referred to herein as a "**Contracted Roster**".)

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

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

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

1.7 The OECD report identifies part-time employment as:

> *"Part-time employees are defined based on their weekly working hours, namely working less than 30 hours per week. This may differ from national definitions which use different hours thresholds. Part-time work is also further disaggregated into part-time temporary and part-time permanent jobs when the data is available."*[8]

1.8 The ABS Labour Force Survey (LFS) defines part-time employees as:

> *"those who **usually** work less than 35 hours per week, **and actually** worked less than 35 hours in the survey reference week **in all of their jobs**."*[9]

1.9 Parties can also agree on the number of hours part-time workers are engaged in under an employment agreement. As noted by an employer witness at a hearing in March, at her place of employment, part-time workers are guaranteed 35 hours of work per fortnight, and such hours are agreed according to the worker's availability.

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

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[8] Ibid 139.

[9] Australian Bureau of Statistics (2016), *Labour Force Data*, cat. no. 6202.0, ABS, Canberra, June, 40.

3.1 Currently under the award system in Australia, the work hours of a part-time employee are usually fixed and regular, with little change from week to week. This "Contracted Roster" award provision is not identified by the OECD as a part of part-time employment (refer para 1.7 herein) nor is there a requirement to provide full time employees a "Contracted Roster.

3.2 R&CI submits that if the part-time provision removed the "Contracted Roster" requirement in the award, employers would be less likely to rely on casual employment.

3.3 Permanent part-time employees are regarded as having the same entitlements as permanent full-time employees, such as such as notice and leave, but on a pro-rata basis. The only difference between a full time and part-time employee is, part-time employees work less than 38 hours per week. The work hours of a part-time employee are usually fixed and regular, with little change from week to week.

3.4 Casual employment is commonly known as an irregular form of employment, with no promise of ongoing employment at the end of an engagement. Casual employment is an important form of employment for business who require flexibility in an ever-changing and uncertain market.

3.5 Casual employees do not receive the same work entitlements as permanent full time and part-time employees, however, this is compensated for by receiving a 25% casual loading, in addition to their normal hourly rate.

3. What factors lead employers to engage casuals?

Structural Economic Change

3.1 A study conducted by the Australian Bureau of Statistics (**ABS**) identified a major structural change in the Australian economy involving a move away from agriculture and manufacturing to the services sector. The report cites a twenty

percent increase in move to the services sector between 1975 and 2015.

3.2 The study further cited that a large proportion of casual employees are employed in accommodation and food services workforce, and a significant number of those employees (70%) are in the younger age group (aged 15 to 19).[10] A further correlation was identified, relating to an increase in the younger age group's (mainly students in their final year of secondary school and tertiary students) participation in the workforce and the increased demand for part time work:

> *"PN9020*
> *Would you also accept then this proposition that the increase in student numbers, that is persons completing year 12, persons entering university and TAFE courses, that that in part has driven the demand for what the ABS call part time work? That is, an increase, it has driven a demand for the increase in work of under 35 hours a week where students juggle full time education with some earning capability?---To some extent we have got the supply/demand issue there and also students are a minority even in accommodation and food services in restaurants and retail anyway. So they are significant, but they are a minority.*
>
> *PN9021 … I just wanted to understand that as we have seen this increase as we have gone through before in what the ABS call part time employment, we have seen this increase in what the ABS call casual employment. We have also seen correlation about a dramatic increase in year 12 retention and a fairly dramatic increase in attendance at universities and TAFE. And I am putting to you that those two have a relationship?---Yes, but it is a matter of which drives which.*
> ***I think a lot of the expansion in the services sector has been in accommodation and food services in retail where labour demand is part time. So students have been one group who have been there to take that up.****"*[11]
>
> (Emphasis added).

3.3 As noted by the Productivity Commission in its final report into Australia's workplace relations framework, the labour market is influenced by the economy, the workplace relations framework and social norms.

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[10] Reference: ABS Labour Force Data 2009 – ABS Data set 2014 (**Exhibit 113**).

[11] Transcript of 23 March 2016 Hearing.

> *"The labour market has accommodated well to large increases in the labour supply and to major compositional shifts. Many more women, students, more mature age workers and large numbers of skilled migrants have entered the labour market. For example, the current level of skilled migrant intake is almost three times higher than levels of the late 1990s.*
> *Most people who experience unemployment do not do so for long. The shift away from making solid things to services has largely been achieved without growing unemployment."*[12]

3.4 Casual employment is historically viewed as a mutually beneficial form of employment for employers and employees alike. The restaurant and catering industry has had an increased demand in restaurant and catering services, the concentration of the service demand is mainly in the availability of dinner services throughout the week, with a noticeable increase on the weekends.[13]

3.5 The increase in employment share of non–standard forms of employment has declined, and to some extent even reversed. For example, the share of female employees without leave entitlements — the most commonly used description of a casual worker — scarcely grew between 1992 and 2000, and has since dropped significantly (as identified in figure 2.8 below). While male casual rates grew strongly from 1992 to 2000, they have since stabilised. The share of casuals working part-time has also stabilised (see figure 2.9 below). There is little evidence that the proportion of workers operating as independent contractors — a form of work also often, but dubiously, cited as insecure — has increased in recent years. [14]

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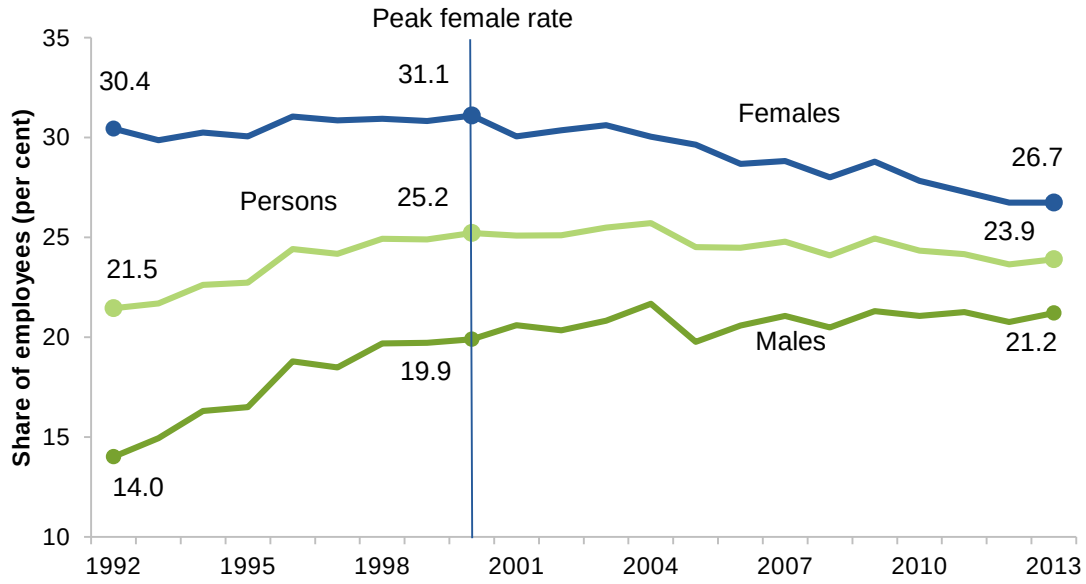
[12] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, vol 1, 8-9.
[13] Ibid, pp108-118.
[14] Ibid, 109.

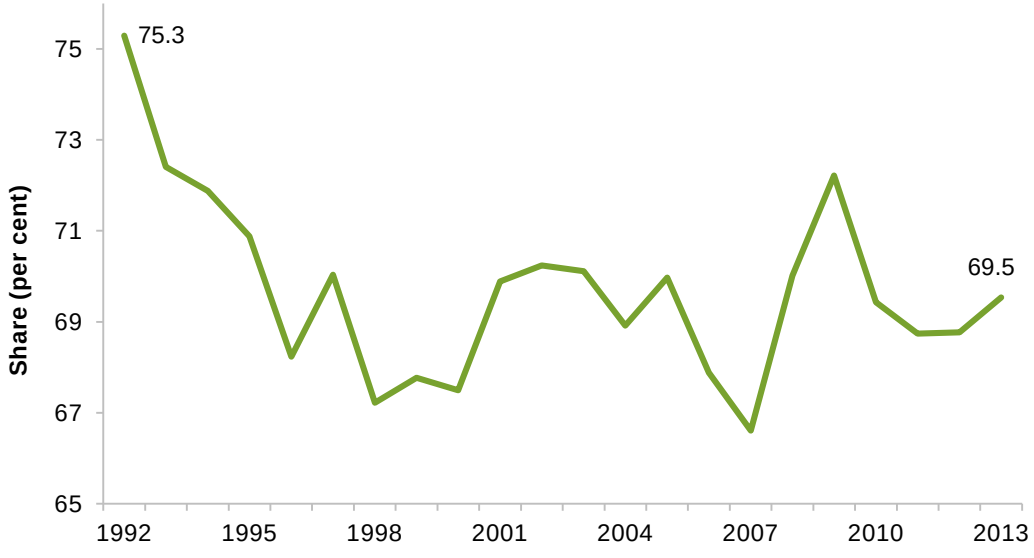
Figure 2.8 **The casual job share has been falling in recent years**

Share of employees, 1992–2013[a]



[a] Casual job status is identified as a person without paid leave entitlements. This is a commonly accepted definition, but there are others, including the existence of a leave loading or self-perceptions (Shomos, Turner and Will (2013). The shares are based on August data from 1992 to 2007, and on November data from 2008 to 2013. Note that the difference between the casual share in this chart and in table 2.3 reflect that the former relates to the share of all employees and the former to the share of all employed.

Figure 2.9 Share of casuals working part time
1992 to 2013



Source: ABS 2014, Australian Labour Market Statistics, Cat. No. 6105.0, released 8 July.

3.6 ABS studies suggests that the rising casual rates among young people are due to these individuals combining employment with education. In particular, employment rates for 15-19 year olds who are in full-time education have increased markedly since the mid-1980s, though after the global financial crisis, they have fallen back to the levels apparent in the late 1990s. In contrast, employment rates for young people who are not in full-time education have not changed appreciably since the mid-1980s (though this outcome is strongly influenced by economic cycles).[15]

3.7 For employees in the younger age bracket, who are likely to still be living at home or living in shared accommodation for the first time, it would not be unreasonable to assume that their primary concern is not to convert from casual employment to permanent employment, but to have a job that gives them the flexibility to simultaneously pursue their education. The security of receiving leave and other entitlements would not likely be at the forefront of the minds of these employees. Receiving casual loading is an even bigger incentive for these employees to maintain their status as casuals.

Operational Requirements

3.8 Employers are driven by various motivations when hiring casual employees. As with the majority of decisions a business makes, such as budgets, purchase of goods and supplies, inventory maintenance, negotiating commercial lease terms, and other operational necessities of the business, careful consideration is similarly given to staffing requirements. It would be reasonable to assume that in making such assessments, businesses rely upon their own experience, the experiences of their competitors, as well as available historical business and financial records.

3.9 It is acknowledged that casual loading has a more immediate impact over the

[15] ABS 2014, Australian Labour Market Statistics, Cat. No. 6105.0, released (8 July 2014).

cashflow of a business, compared to leave and other entitlements payable to full and part time employees, which are accumulated and can easily be budgeted for over the course of the year. One way businesses attempt to mitigate their losses is by only using labour as and when required. In practical terms, the 'flexibility' afforded to employers in this regard is, for example, having the ability to allow casual employees to finish a shift early, following their assessment of the number of patrons and level of activity within the establishment at a particular point in time.

3.10 The high levels of casual employment (identified in ABS studies as *employees without paid leave entitlements*) particularly in the food services industry,[16] evidences a willingness of employers to employ casuals to give them the flexibility, despite the immediate cashflow implications of casual loading.

3.11 As mentioned previously, it is also the case that employing part-time employees under the current award settings is not operationally efficient. R&CI submits that foremost on the minds of employers when considering hiring casuals include, the flexibility that would be afforded to them, having regard to the operational requirements of the business. Determination of staffing requirements would involve careful consideration of the different functions of the business, the number of employees required to carry out these functions key roles, level of skill required to undertake each role, availability of employees, labour costs and other operational costs.

3.12 From an administrative point of view, hiring casual employees is less burdensome, as there is no requirement to ensure that they are allocated a fixed number of hours on any given week/month, as is required for part-time employees. In fact, it is only after full-time and part-time work hours have been allocated that employers need to consider the approximate number of casual employees they require to fill in any gaps, or ensure that they have sufficient cover for any unforeseen circumstances such as, in the event of illness, absenteeism, or leave.

16 ABS 6333.0 – Characteristics of Employment, Australia, August 2014.

3.13 As with other service providers, restaurants, cafes and caterers are very much driven by consumer demand. It is the consumers who influence the hours of operation. Recent studies commissioned by R&CI together with Foodservice Supplies Association of Australia show that in there has been a steady increase in demand for food and beverage services on Friday, Saturday and Sunday.[17] In order to survive, operators need to be nimble and be able to react to such demands. It is for this reason that the industry relies on the flexibility associated with casual employment, as it enables them to call on workers as and when required at short notice.

Regulatory Restrictions

3.14 R&CI submits that it is the inflexibility of the part-time provision in the *Restaurant Industry Award 2010*, and the onerous requirements, in particular the Contracted Roster requirement, relating to the setting of a part-time employee's working hours, that forces employers to look for alternatives to hiring permanent part-time employees. It is due to these strict requirements that employers are consequently driven to hire casuals, to afford them the flexibility that the part-time provision is clearly lacking. This proposition was discussed in these proceedings at a hearing in March:

> *"PN9059 SENIOR DEPUTY PRESIDENT HAMBERGER: Can I just put a proposition to you, Mr Markey, which is that historically – it may or may not be so true anymore, but historically talking about developing a culture and management culture, if you look at the typical awards, there are a lot of rules about employing full time, and that was historic law (indistinct) full time employee that there are all sorts of provisions about, and then there were provisions for casuals that were actual very simple and most of the awards didn't apply to casuals. And therefore in terms of it being easier to employ casuals, this was because the system itself made it easy to employ casuals, whereas it was complicated to employ part timers. Part timers weren't even an option until relatively recently. It was a full timer or a casual and that therefore that is the way it is - the way businesses have developed the way –*

[17] Foodservice Supplies Association of Australia: Food Industry Foresight-Success Based On Sound Sight: Dining Out Data, May 2015, p. 15.

they need that flexibility, they have gone to using casuals because the rest of the provisions have been complicated and potentially difficult. This is a long term culture. It takes years and years to change?---Yes.[18]

PN9072 I just leave the clause there. I don't say that that is a uniform part-time employment clause, but I put to you that it has many similar features to a lot of modern awards. Can I just ask you to think about this: I put to you a moment ago that an employer will rationally try and determine how best to roster people; they will rationally try and determine what's their best labour mix. When you have a look at this award you see a casual employment provision which has effectively very little fetters on it in terms of rostering and working. Would you agree with me that by comparison, the part-time employment provisions in this award have very substantial fetters?---Yes, reasonably, yes.

PN9073 So isn't one of the rational considerations a manager in Australia has to take, in the context of the modern award, when they're looking at their labour profile, they have to actually understand not just the flexibility of the casual, but the inflexibility of the part-time employee?---Yes.

PN9074 Yes. And can I put to you that in many cases that might actually tip them towards using a casual rather than some philosophical or cultural bent to using casual employees?---In some cases, but there are a lot of other explanations too.

PN9075 I understand that. But in some cases you would accept that?---Yes. ABS studies show that a very large proportion of workers in the food industry are casuals."[19]

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

4.1 The positive effects of casual employment on employees include, first and foremost the opportunity to be employed, particularly where employment opportunities are scarce, or if there have previously been difficulty in securing a

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18 Transcript of Proceedings, *United Voice and Australian Paramedics Association of Victoria and Ambulance Victoria* (Fair Work Commission, C2015/3378 and C2015/7416, 23 March 2016) PN9059.

19 Ibid, PN072-PN9075.

job, increased rate of pay due to the provision of casual loading, and the flexibility that a casual role provides, in terms of having the ability to accept or refuse work depending on individual needs and circumstances. In some situations, there are no requirements to have particular skills and qualifications to fulfill certain roles, making them more accessible.

4.2 Casual employment can also be seen as an intermediary, allowing individuals to transition from unemployment to permanent employment (Chalmers and Kalb, 2001). This is particularly the case for a large number of tertiary students who work in casual roles while completing their studies, and subsequently start careers in the profession in which they have been educated. Students who take this path, are more likely to be successful in securing their chosen roles, as employers typically prefer candidates already in work over candidates who are unemployed; the so-called stigma effect of unemployment.

4.3 Contrary to claims advanced by unions, evidence provided by employers (including the example given below) show that in fact a large number of long term casual employees prefer to stay as casuals, due to the flexibility afforded to them, to enable them to engage in other pursuits, including pursuing studies:

> *"PN1162 Do employers have a capacity to change their availability and nomination from time to time?---That is correct and that happens quite a lot in our business. We have a lot of students, so around changes in the semesters there's applications and then generally there's not too many significant changes. It might be, say, you know, "From a Thursday, I'm now available until Wednesday", and that is by agreement with their department.*
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> *PN1163 Thank you. Are there any questions arising out of that exchange? No?*
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> *PN1164 DEPUTY PRESIDENT KOVACIC: I just have one. I've noticed you've got some casuals. Is that just basically to fill in for people who might be seek or absent for whatever reason?---A third of the casuals we actually have are actually operating in a kind of a translating capacity for us, so it's very sporadic. The other, kind of, two thirds do work on a semi-regular basis with us and have actually been with the business for many, many years and just prefer to remain on a casual status whilst they're pursuing other work*

opportunities, studies et cetera."[20]

4.4 Additionally, casual employment is seen by individuals aged 45 and over to be a desirable path in a gradual transition from full time employment to retirement. Casual employment can, therefore, only be expected to become more prominent and important to maintain mature aged workers in the workforce.[21] It should be noted that the in pursuing their claims, the unions have not provided any evidence from casual employees. This is important to note given the low number of union membership for casuals[22], and brings into question whether in fact they genuinely represent the interests of casual employees, or at the very least, whether they have in fact made genuine attempts to understand the interests of casual employees.

4.5 Notwithstanding claims by unions that casual workers feel trapped, there has been no evidence provided to support this proposition. When defining a 'trapped worker' as a worker who is dissatisfied but indicates that they have a low probability of voluntarily quitting their job within the next twelve months, Buddelmeyer, Wooden and Ghantous found that non-casual workers are more likely to feel trapped than casual workers. [23]

4.6 Despite any claims to the contrary, surveys conducted at a national level have not revealed any widespread dissatisfaction amongst casual workers, compared to workers in 'standard' employment relationships. Wooden and Warren's 2004 study found that only casual workers who were working full-time hours reported significantly lower levels of overall job satisfaction than other workers, and in fact, such findings of dissatisfaction were primarily limited to males working full

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[20] Transcript of Proceedings, *United Voice and Australian Paramedics Association of Victoria and Ambulance Victoria* (Fair Work Commission, C2015/3378 and C2015/7416, 13 March 2016) PN1162-PN1164.

[21] Abhayaratna, J., Andrews, L., Nuch, H. and Podbury, T. 2008, *Part Time Employment: the Australian Experience*, Staff Working Paper, Productivity Commission, 11.

[22] Australian Bureau of Statistics (2013), *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, ABS, Canberra, August, 29.

[23] Buddelmeyer, H., Ghantous, S. and Wooden, M. (2006), 'Transitions from Casual Employment in Australia - Project 09/05', Melbourne Institute Working Paper no. 7/08. Melbourne Institute of Applied Economic and Social Research, University of Melbourne.

time. Wooden and Warren's study concluded that attempts to *'inhibit the diversity of employment options that are available to employers will often not result in changes in working arrangements that will be unambiguously preferred by employees."*[24]

4.7 A report conducted by the Productivity Commission observed that non–standard work is perceived to be an overly negative one, noting that employees on fixed-term contracts have been found to be more satisfied with their jobs than other workers (Wooden and Warren 2004)… People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and may act as stepping stones for more secure employment (PC 2006). The Productivity Commission also previously noted:

> *"Whether non-traditional work is satisfactory or unsatisfactory, from a worker's point of view, can only be assessed in relation to individual forms of employment and to particular socio demographic groups within them. (PC 2006, p. xxv)."*[25]

4.8 The ACTU claim that casual employment result in *adverse financial, social and economic consequences of insecure work. They represent an attack on basic employment security protections which we submit are already inadequate.*[26] In advancing their arguments, the unions rely on the expert evidence of Professor Markey who argues that *"casual employment creates a precarious work situation for employees, one which is associated with a range of negative consequences for mental, physical and financial wellbeing."*[27]

4.9 Some negative impacts associated with casual work as advanced by the unions, include the lack of security experienced by casual workers, as they are engaged on an hourly basis and may be dismissed with an hour's notice. In addition to a

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[24] Wooden, M. and Warren, D. (2003) The Characteristics of Casual and Fixed-Term Employment: Evidence from the HILDA Survey, Melbourne Institute Working Paper no. 15/ 03, 26.

[25] Productivity Commission above n 12, 108-118.

[26] ACTU, Submission to Fair Work Commission, *4 yearly review of modern awards,* 22 February 2016, [5].

[27] Exhibit 110.

lack of receiving notice, casuals also do not receive a severance pay.[28]

4.10 Casual employees on average have shorter periods of elapsed job tenure in their current jobs, suggesting that they are more exposed to employment insecurity in practice as well as in principle.

4.11 Due to the irregularity of work engagements and the lack of guarantee of minimum weekly hours, casuals can experience substantial variations in their take home pay. For casuals, periods of work can be accompanied by long gaps or short hours of work, which results in difficulty in predicting their income, budget, or ability to secure personal or housing loans. The level of income and hours worked is also considerably lower for casual than for permanent employees, reflecting the correlation between casual employment and part-time work.[29] As a result, casual employees have substantially greater difficulty paying for the basic costs of life than permanent employees.[30] This indicates that casual work is likely to impact negatively on employees' financial well-being.[31]

4.12 As noted above, representation of casual workers by unions are significantly low, compared to union representation of permanent workers. Where unions have made progress in recruiting casual members there remains substantial tensions between the interests of majority permanent staff (some of whom will be directly responsible for employing and supervising casual staff) and the interests of minority casual staff. Competition among casual staff over hours can also undermine collegial behaviour and impede the development of workplace solidarities.

4.13 A recent study by Richard Curtain, which was commissioned by the labour hire industry noted pay received by casual workers to be below a pro-rata full-time equivalent. This reveals that for all occupations, other than professionals,

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28 Campbell, I. '*Casual Work and Casualisation: How Does Australia Compare?*' (Paper presented at 'Work Interrupted: Casual and Insecure Employment in Australia', University of Melbourne, August 2004, 85-111.

29 Buchler, S. '*Casual Employment in Australia: The Influence of Employment Contract on Financial Wellbeing and Job Satisfaction' (*Honours Thesis, University of Queensland, 2007), 34.

30 Ibid.

31 Watts, R (2001) The ACTU's Response to the Grown in Long-term Casual Employment in Australia. Australia Bulletin of Labour. 27(2): 137-149.

casuals earn less, not more, than permanent counterparts.[32] Some researchers point out that the casual loading does not fully compensate for all foregone benefits (Smith and Ewer, 1999). Others indicate this is because part-time employee may be on a different award or agreement, on a higher classification level, or has access to additional payments such as bonuses and penalty payments (Campbell, 2004, 92-93).

4.14 It is also claimed that in comparison to other employees, casual workers, whether employed on a short or long term basis, receive lower levels of non-monetary employment benefits, such as training. It is further claimed that casual workers also experience poor career opportunities and adverse occupational health and safety outcomes.[33] It is also noted in the statement of Professor Markey that:

> *"Casual employment has been linked with feelings of anxiety, stress and powerlessness. The uncertainty and lack of control experienced by casuals is also exacerbated by a lack of paid sick leave, which leads some workers to come to work when sick. Casual employment may be linked to long term negative health effects over time."*[34]

4.15 In respect of long term casual employment, there are claims that there is a likely negative effect on casual workers, in terms of lack of opportunities to up-skill and receive promotions.

4.16 We set out below our response, together with some evidence filed in these proceedings, to counter the unions' misconceived claims regarding the apparent negative issues associated with casual employment.

4.17 In response to claims relating to perceived adverse health consequences experienced by casual workers, R&CI submits that no plausible evidence has been provided to support this proposition. On the contrary, Dr Underhill, a union

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32 HILDA Survey Wave 1, 2001 as cited in Richard Curtain, 'A critical review of 'Securing Quality Employment: Policy Options for Casual and Part-time Workers in Australia' prepared for the Recruitment and Consulting Services Associations of Australia, [July] 2004.

33 Watson, I. 2004, Contented Casuals in Inferior Jobs? Reassessing Casual Employment in Australia, Working paper no. 94, Australian Centre of Industrial Relations Research and Training, Sydney.

34 Exhibit 110, 6.

witness who provided evidence pertaining to the health and safety outcomes connected with casual employment, affirmed that employees who choose casual employment as a lifestyle choice, have better health outcomes. The same is true for individuals who opt for casual work as a transitional phase in their career:

> *"PN7893 COMMISSIONER ROE: Dr Underhill, can I just get a bit more clarity on the issue that Mr Ferguson asked you about concerning the issue of those who choose casual employment. In paragraph 10, you talk about those who choose it for lifestyle reasons. You talk about those where employment is secondary to other activities such as educational studies. You also talk about young people who choose it* ***. Does that mean you believe, or the research suggests, that anyone who chooses casual employment is likely to have better health outcomes? ---The strongest evidence is around those who choose casual employment for lifestyle reasons****. In effect, the employment is secondary to the other issues around the lifestyle that they've chosen and it supports them in that lifestyle choice, and they do have better health outcomes.* ***Others who are doing casual employment as part of supporting their educational studies are more likely to be transitioning through casual employment and are less likely to be employed casually for a longer period. As result, you wouldn't expect the adverse health outcomes to be as bold****."*[35]

4.18 A further claim by the unions is that casual employees are prevented from, or are not given adequate opportunity to undergo on-the-job training and development and are less likely to receive promotions, compared to permanent employees. In making this claim, they rely on the evidence of Professor Markey.[36] An expert witness commissioned by ACCI, Professor Withers, noted in response to this claim that the lack of training experienced by casual employees is due to the nature of the jobs that they hold and not the fact that they are casuals:

> *"…casual employees as a group appear to participate less in work-related training than permanent employees, but* ***much of the difference is likely to be explained by the different nature of jobs they hold****, and overall the evidence suggests that lower training participation has little impact on the future employment prospects or job satisfaction of casuals. If many of the jobs that lend themselves to casual employment simply do not require a large amount of*

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35 Transcript of 22 March Hearing, PN7893.

36 Exhibit 110, 6.

training, ***lower training participation is arguably not due to casual status per se****, and nor is it likely to have any serious consequences for productivity."*[37]

(Emphasis added).

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

5.1 Between 1984 and 1998, the level of casual employment grew dramatically (by 70 percent). However, ABS data indicate that casual employees as a portion of the total workforce has been stable at around 24% of employees and 19-20% of all employed persons (including employees, employers and self-employed workers) since 1998. According to the most recent estimates, for November 2015, there are 2,396,500 employees without paid entitlements. Given a total pool of 11,919,100, that implies a casual employment share of 20.1%.[38] Indeed based on the ABS data, the level of casual employment has not increased in Australia for the past 18 years.

5.2 In his report, Professor Markey identified casual employees to make up the majority of labour hire workers:

"Labour hire or temporary agency work is also a small subset of casual employment. Based on the HILDA data, such workers make up around 2 per cent of the total workforce. Labour hire workers are much more likely to be casual - around 76 per cent indicated not having any leave benefits."[39]

B. Casual conversion

General concepts

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

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37 Exhibit 136, p. 10.

38 Australian Bureau of Statistics (2016), Labour Force Data, cat. no. 6202.0, ABS, Canberra, May.

39 Exhibit 110 p.14.

6.1 R&CI does not consider it appropriate to impose a model casual conversion clause across all modern awards. As outlined in our submissions of 22 February 2016, casual conversion should be negotiated via an enterprise by enterprise basis, as the variants are large between what is appropriate for each business model at the enterprise level.

6.2 One way of looking at such differences is by consideration of the term *'irregular casual employee'* as that term is defined in paragraph 2 (proposed clause 13.4(b)) of the ACTU's draft determination.[40] R&CI submits that this very definition would have a different interpretation in the context of the trading and operational hours of the restaurant and catering industry. For example, what is deemed *'occasional or non-systematic or irregular basis'* in one award (such as the *Clerks-Private Sector Award 2010)* in terms of hours worked, would not equate to the same meaning in the *Restaurant Industry Award 2010* or the *Hospitality (General) Industry Award.* The reason for this is there is less predictability in terms of hours of operation, and hours of work in the latter two awards. We submit that such hours of operation and hours of work are in fact dictated not by employers, but by consumers. In effect, the hours of operation, and the hours of work in the restaurant and catering industry would fit within the true meaning of the definition of *'occasional or non-systematic or irregular basis'*. This is the basis upon which we submit that the casual conversion provision has no application in the *Restaurant Industry Award 2010* or the *Hospitality (General) Industry Award.*

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

R&CI would firstly agree that it would be appropriate to apply for an exemption of the application of any model clause to the *Restaurant Industry Award 2010* and the *Hospitality (General) Industry Award.* In the alternative, it may be appropriate to apply for a variation of a provision based on circumstances peculiar to the aforementioned

[40] ACTU, Draft Determination to Fair Work Commission, 17 July 2015.

awards, for the reasons outlined in question 6 above.

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

8.1 R&CI rejects any proposal that employers should facilitate a move of an employee into a different role, upon conversion. Such a move would likely require the employer to significantly disrupt and redistribute the existing labour mix. Employers go to great lengths to balance the needs of employees against the needs of the business in arranging each employee's work hours. A casual conversion clause should be limited to facilitating a change in payment and leave entitlements of an existing job.

8.2 In terms of rostering, unless the hours worked can be maintained upon conversion, finding new or additional hours would cause difficulties, and would not only create an insurmountable administrative and financial burden on employers, it would also have the potential of putting existing permanent employees in an unfair position. Under cross examination, AI Group's witness noted the difficulties that might arise in this regard:

> "*PN7266 Is there any reason why McDonald's wouldn't have a position if I'm competent and I've been working for the business for a reasonable period of time that I should be given an opportunity to convert also?---**As I said before, it needs to be - they might not have hours to commit to a particular person; they might have already committed them elsewhere. That person's availabilities might not be - we might not be able to guarantee that they can be rostered enough hours during that time**.*
>
> *PN7267 If I'm regularly working more than 10 hours a week as - I think I suggested before that there were questions about the figures - roughly half the workforce might be on a regular or semi-regular work basis working more than 10 hours per week - that would meet the requirements of the enterprise agreement, wouldn't it?---They could if they were working more than 10 hours a week, which is the minimum for a part-time employee, so they could, **but whether or not a restaurant could necessarily commit to***

rostering, that is different."[41]

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

R&CI submits that this proposal should be avoided as it would subject employers to insurmountable administrative and financial burden. Additionally, it would likely also interfere with other employees' work arrangements. See answer in 8 above.

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

10.1 It cannot lightly be assumed that the engagement of employees on a part-time basis would be a workable substitute for the engagement of part- time casual employees.

10.2 Many awards contain highly restrictive part-time provisions. Such provisions have either evolved or at least operated against a backdrop of a largely unfettered employer capacity to engage casual employees.

10.3 For example, the *Restaurant Industry Award 2010* and *Hospitality (General) Industry Award 2010* contain clauses that require part-time employees to work set ordinary hours, including specifying the number of hours to be worked and the days and times at which ordinary hours will be performed. In these awards, hours worked outside of these arrangements are overtime and paid at overtime rates.

10.4 Given the relatively high level of regulation of the engagement of part-time employees in the hospitality awards, the Commission should be cautious about

[41] Transcript of 21 March 2016 Hearing.

limiting access to the engagement of casuals, or adopting a 'one size fits all approach' to converting casual employment. As mentioned in the Minister for Employment and Workplace Relations' of 28 May 2009 consolidated request:

> *"27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and in [sic] the industry's core trading times.*"

10.5 The effects will also differ depending upon the extent to which particular industries (or employers) rely on casual employees to overcome the inflexibilities associated with employing part-time employees, particularly the onerous requirements of Contracted Rosters under the provisions of the relevant award. Employers in the hospitality sector typically engage casuals because they operate in an uncertain environment, with intense competitive pressures. Engagement of casuals on a *regular and systematic basis* for six or twelve months does not diminish concerns of uncertainty of the viability of business operations from an employer's perspective.

10.6 There is a myriad of award-specific and industry-specific considerations that need to be taken into account in considering the interaction of the proposed conversion provisions and the existing regulation of part-time employment. This is a product of the industry-specific nature of award provisions regulating different types of employment.

10.7 If such a provision, absent the existing right to engage casual employees, does not meet the needs of participants in the industry, the Commission cannot be satisfied that the award would constitute a fair and relevant minimum safety net.

10.8 As mentioned throughout these submissions, we reject the claims by the

unions. However, in the event that these claims are granted, we consider that an alternative position should be facilitated to ease the restrictions in the part-time provisions in the hospitality awards, to provide more flexibility for business operators in the hospitality industry. To not do so would create an unjust and unsustainable situation, and expunge any hope of a sustainable environment for the hospitality industry.

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

11.1 As mentioned previously, the unique characteristics of the restaurant and catering industry, requires a great deal of flexibility in terms of determining and planning the labour mix within the business. The reason that employers predominantly engage casual workers, is due to the inflexibility and rigour of the part-time provisions.

11.2 If the unions' are successful in their application and employees receive an absolute right to convert after a period of 6 to 12 months of employment, employers would need to consider whether they have the capability, from an administrative and financial perspective to maintain their current casual workforce. This may result in a mass restructure and redundancies of casual employees prior to prior to any casual conversion provision taking effect. Employers may also consider the possibilities of hiring future employees strictly on an 'irregular' basis, to avoid being captured under the conversion provision. Another alternative would be to consider employing casual workers only through labour hire agencies.

11.3 R&CI has grave concerns that an already overburdened and overregulated industry, may be subjected to further significant administrative burden and financial hardship, which may result in their decision to significantly decrease or completely eliminate casual employment. Certainly, from employees' point of view, the risk of losing their jobs would be a far greater concern than being converted from a casual to a permanent employee.

11.4 Evidence given on behalf of Ai Group suggest that the process of identifying when a casual employee qualifies for casual conversion is a very technical, complicated and time-consuming process, requiring significant resources. The evidence provided gave an example of a payroll system of McDonalds, a very large multi-national organisation, which illustrated the difficulty in identifying (using their complex payroll system), those employees who qualified for casual conversion. The evidence given is an unambiguous illustration of the significant administrative burden that will be imposed should the Commission grant the application sought by the unions:

> *"PN7317 ...you were asked about whether the payroll system would have the capacity to notify McDonald's, if you will, when their employees reach their anniversary date, and also 12 months' service.* ***Would the payroll system have the ability to identify whether an employee has been working on a regular, systematic basis and notify you in an automated way?*** *---* ***No. The payroll system - you'd have to look at each employee and go through and look at that employee's hours over that period of time to see if they work on a regular basis.***
>
> **** KRISTA THERESE LIMBREY RXN MR FERGUSON*
>
> *PN7318 So what would that entail specifically?---So you'd have to look at that employee's history for the last - someone would have to go in and look at that employee and that employee's hours of work for the last year I suppose, because if you were to look at an average it wouldn't be reflective of what they regularly did, because particularly with our employees they might be not available for a whole period of five - you know, four, five, six weeks, for exams or holidays or whatever, so if you looked at an average it's probably not reflective, so you'd have to go in and look at that person and each week.*
>
> *PN7319 Would that be a difficult or an easy task?---I'm not in payroll but I'd say it would probably be not necessarily difficult but time-consuming, yes."*[42]

> *"*** KRISTA THERESE LIMBREY XXN MR BLISS*
>
> *PN7281 There's arrangements in place where at a particular anniversary date you have the technology for McOpCo to automatically trigger an event within the payroll system, is that correct?---It would automatically trigger a change in their pay.*

[42] Transcript of 21 March Hearing.

> *PN7282 So it would be, I propose, relatively simple to use the same technology to notify automatically through the metime system a notification to a casual employee with more than 12 months' service they have the opportunity to elect to become permanent part-time?---I suppose I'm not totally across those systems and how the technology would work, but our payroll system doesn't currently communicate to our employees.* ***Our metime system is different to our payroll system, so that might trigger something in the payroll system but that doesn't actually communicate to an employee.***
>
> *PN7283 VICE PRESIDENT HATCHER: But would the franchises use the same pay system as you?---No, they don't, so our franchisees are able to elect one of a number of payroll systems that we've allowed them to select, and they manage that themselves.*[43]

11.5 It is important to note that R&CI's members largely consist of small business operators, who utilise payroll systems that are nowhere near as sophisticated as an employer such as McDonald's. Hence, the changes sought by the unions would amount to a massive imposition on these employers, and the implementation/application of the changes proposed would be beyond the capabilities of their payroll system, and would exhaust, if not exceed, all of their available resources.

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

In the event that the unions are successful in their claim, R&CI submit that the casual conversion clause should provide greater certainty to ascertain when an employer is, or is not required to convert a casual employee to avoid any disputes and to lessen any administrative burden on employers, which may arise.

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[43] Ibid.

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

13.1 Notwithstanding R&CI does not think that a casual conversion provision should be implemented in the Restaurant Award, R&CI, does acknowledge that the inflexibility of the part-time provision in the award, and the flexibility that it offers has been the main reason employers have opted to employ casuals over permanent part-time employees. Evidence provided by an employer witness highlight the onerous requirements involving arranging work hours of part-time employees:

> **** KRISTA THERESE LIMBREY XXN MR BLISS*
> *PN7269 Part-time employment requires a significantly greater amount of administration.*
> *PN7270 In terms of rostering, you'd agree with the proposition that essentially the same rostering process is adopted by your restaurant managers for the part-time and the casual employees?---When allocating shifts, yes, but then they would need to go through a process of making sure that a full-time employee had exactly the right number of hours scheduled. For a part-time employee they'd need to do the same thing and make sure that that was the case. They'd also need to manage any leave requests differently.*
> *PN7271 I'll come to the leave. Do you consider making sure the minimum hours under the part-time contract or the full-time contract is a significantly greater amount of administration, would you?---If you were to - with the numbers that we're talking about, the numbers of employees per restaurant, if you were to take that number of employees and have to go through that process for that number of employees, I would say that it could be."*

13.2 R&CI accordingly agree that if casual conversion was to be adopted, an alternative position, , would be to make the current part-time provision less restrictive.

13.3 R&CI submit that the changes to the provision in the *Restaurant Industry Award 2010,* previously sought by R&CI as contained in a draft determination filed in these proceedings on 17 July 2015 would be appropriate. The proposed changes are:

a) *By deleting sub clause 12.3 and inserting the following:*
At the time of engagement the employer and part-time employee will agree on the employee's availability of hours and specifying in writing at least the hours of availability for each day of the week.

b) *By deleting sub clause 12.4 and replacing it as follows:*
Any agreed variation of the hours of availability will be recorded in writing.

13.4 R&CI further submit that no further restriction should be imposed on employers regarding management and rostering of hours, once availability of hours are agreed upon between the employer and employee, upon commencement of the role.

13.5 It is entirely reasonable to put in place safeguards for employers who may face difficulty in filling shifts if doing so is contingent on employees having the ability to change their hours of availability without prior agreement. Any exercise of conversion from casual to permanent part-time employment should be subject to an agreement in writing between the employer and employee relating to the availability of hours to be worked, and any variations sought should be done in accordance with 13.1(b) above.

13.6 An example of when the above form of arrangement has been seen to be workable was provided by a witness in these proceedings:

"PN1157 VICE PRESIDENT HATCHER: Ms Logue, can I just ask you a couple of questions about part-time employment under your agreement? So do I understand that ***part-timers get guaranteed 35 hours per fortnight****, is that right?---That's correct.* ***Yes, if they provide a specific requirement of availability, yes.***
PN1158 Well that's what I was going to ask you about. So within that minimum the company has the right to roster shifts as required, but in accordance with a - - - ?---Agreed availability, yes.

PN1159 So how does that agreed availability system operate in practice?--- Basically ***it's actually agreed upon the commencement in the role****. We would generally go to market and recruit, requesting X-number of days coverage and then when people start with us, that forms part of their employment contract. So* ***for a team member to be - a part-time team member to be eligible for that minimum availability or guaranteed minimum entitlement, they need to provide at least four full days of availability, including one weekend day.***
PN1160 So if, for example, you nominate Monday, Tuesday, Wednesday and Saturday, any rosters you allocate to that person will be within that scope of availability?---That's correct, yes.
PN1161 Obviously we don't have set opening and closing times, so a full day means no set restrictions.
**** LAUREN LOGUE XXN MR FAGIR*
PN1162 ***Do employers have a capacity to change their availability and nomination from time to time****?---****That is correct and that happens quite a lot in our business****. We have a lot of students, so around changes in the semesters there's applications and then generally there's not too many significant changes. It might be, say, you know, "From a Thursday, I'm now available until Wednesday", and that is by agreement with their department. "*[44]

Definition of irregular casual

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

14.1 The term 'irregular casual employee' lacks clarity and precision, and is open to subjective interpretation. This ambiguity could expose employers who fail to correctly identify irregular casual employees to inadvertent breaches of awards, with significant financial penalties.

14.2 No party has proposed a clearer definition of 'irregular casual employee' to date, and any alternative definition should be subject to careful consideration by industry and the Commission.

14.3 The Commission should be careful adopting a 'one size fits all approach'.

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[44] Hearing – 15 March 2016.

The acceptance of the term 'irregular casual employee' in a minority of awards does not mean that the term will be workable in the context of others. If this is the union's claim, they must demonstrate it forms a workable basis with reference to the relevant award provisions and evidence of actual employee's patterns of work in each industry. This is especially important for industries, such as the hospitality sector, that rely heavily on flexible rostering arrangements.[45]

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

15.1 The definition of 'irregular casual employee' under the ACTU and AMWU proposals is as follows:

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

15.2 It is entirely feasible that an employee may be engaged on a systematic or regular basis but not in a pattern of work that will conform to the definition of either full-time or part-time work under the particular awards or with patterns of work in the industry, occupation or enterprise covered by the award.

15.3 Restaurant & Catering proposes similar affirmative definition as is in the *Registered and Licensed Clubs Award 2010*, namely:

*"This clause only applies to a **regular casual employee**. A **regular casual employee** means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months."*

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[45] Australian Industry Group, Reply Submissions to Fair Work Commission, 4 yearly review of modern awards, 26 February 2016, para. 126 – 129; Australian Industry Group, Submissions to Fair Work Commission, 13 March 2016, para. 393 – 402.

15.4 While, the concept of "regular and systematic basis" has no certain meaning, it has been interpreted widely by courts and authorities.[46] A determination of whether a casual employee is employed by an employer on a regular and systematic basis must ordinarily be made on the particular circumstances of each individual case. This would require an analysis of the facts of each case.

15.5 This would of course potentially represent a very significant change to the award system and one that should only be made following the careful consideration by industry and the Commission.

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

16.1 *Yaraka Holdings Pty Ltd v Giljevic* [2006] ACTCA 6 is an appropriate conceptual basis for an understanding of 'regular and systematic engagement'. The decision states that it is the employment that must be on a regular and systematic basis, not the hours worked.[47] However, a clear pattern or roster of

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[46] *Ponce v DJT Staff Management Services Pty Ltd T/A Daly' s Traffic; Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339

[47] *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 399 [65];

hours is strong evidence of regular and systematic employment.[48] The term 'regular' implies a repetitive pattern and does not mean frequent, often, uniform or constant.[49] The term 'systematic' requires that the engagement be 'something that could fairly be called a system, method or plan'.[50]

16.2 R&CI agrees that you need to 'give a strict and literal meaning to 'regular and systematic basis' because it is intended … to pick up very limited circumstances where there is a *de facto* incorporation into the organisation of the employer. Some such notion must indeed be the justification for burdening an employer of an independent contractor with the same obligations that the Act casts upon employers towards their employees'.[51]

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

Employer Notification

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

18.1 R&CI submit that removing the requirement for employers to notify employees of their rights to casual conversion would not render a casual conversion clause pointless, provided all relevant information about an individual's employment is given to them at the commencement of their employment, including information regarding their right to casual conversion. Further, in the digital age, where information is easily accessible, it is likely to be the case that

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48 Ibid.
49 *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 399 [68]
50 Ibid, [91].
51 Ibid, [93].

employees are more well-informed about their workplace rights.

18.2 The information on a casual employee's right to conversion is already made available through similar administrative obligations placed on employers, including the need to display or make available copies of relevant modern awards and provide a copy of the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.[52]

18.3 RC&I agree that these resources are seen as sufficient in relation to other employee rights and entitlements, such as an employee's right to request flexible working arrangements or for casuals employed on a 'regular and systematic' basis. In terms of the latter, there is no separate obligation to notify the casual that they may be entitled to certain new employment conditions, such as a right to request flexibility working arrangements, parental leave, and access to unfair dismissal.[53]

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

19.1 If the unions are ultimately successful in their claims, R&CI agrees that the process of notification should be made administratively simpler by providing information to the employee upon commencement of their employment, as mentioned in paragraph 18 above, at an employer's election.[54]

19.2 RC&I agree that employers should not be required to notify employees of casual conversion rights more than once, and this obligation should not extend to irregular casuals.[55]

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52 Australian Industry Group, Submissions to Fair Work Commission, 13 March 2016, para. 117-122.

53 Australian Industry Group, Submissions to Fair Work Commission,14 October 2015, para. 31-91.

54 Australian Industry Group, above n 54, para. 131.

55 Ibid, para. 123-132.

19.3 It may also be useful to confirm whether the employee's role comes within the definition of "irregular casual employee", which would naturally require for this concept to be pre-determined prior to implementation.

Period prior to conversion right

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

No. The hospitality industry can be heavily affected by seasonal factors, amongst other things, which makes it difficult to ascertain any established working patterns by casual employees in a period over less than 12 months.

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

The latter. R&CI submits that access to jurisdiction of conversion provisions should be analogous to that of unfair dismissal provisions.[56] Access to unfair dismissal is predicated on a number of conditions being met, which relevantly, for present purposes, includes a requirement that the employee has "… completed a period of employment … of at least the minimum employment period".

Section 384 of the Fair Work Act 2009 (the Act) deals with the "period of employment" and provides that (emphasis added):

*"**384 Period of employment***

*(1) An employee's **period of employment** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.*

(2) However:

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[56] *Fair Work Act* 2009 (Cth), pt. 3-2.

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

*(*i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) … (not relevant)"

[6] *The correct application of this section was considered by a Full Bench of Fair Work Australia in Shortland v The Smiths Snackfood Co Ltd (Shortland) 5. In the first instance, the period of continuous service is identified as required by s.384(1) and in accordance with the definition in s.22 of the Act. Any periods of service which do not meet the requirements of s.384(2)(a) of the Act do not count toward continuous service and must be deducted. If the resultant amount is less than the minimum employment period, then the jurisdictional prerequisite has not been met and the application must be dismissed.*

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

22.1 The opportunity will continue for so long as the employment remains regular and systematic. Once qualifying, if an employee passes up an offer from an employer to convert, their entitlement will dissipate. The same will occur if an employees' employment later reverts to true casual employment.

22.2 If regular and systematic casual employees have a continuing opportunity to convert their employment, this will indubitably lead to uncertainty as to the employment status of the employee. Certainty in the planning and structure of a workforce is an essential component of the successful organisation of work.

Employer capacity to refuse

23. Should any casual conversion clause permit employers to refuse to convert

employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?

23.1 An employer should have the right to refuse on reasonable grounds based on the needs of the business. In doing so, a guideline should be implemented which should include show that due process was followed by the employer in considering whether or not conversion is appropriate for the business in the circumstances. However, some concerns which may arise out of this may be, in proving that the refusal was indeed justifiable, certain confidential or commercially sensitive business information may have to be disclosed.

23.2 There are many justifiable reasons as to why employers may choose to refuse an employee to be converted from casual to permanent employment. An important reason would be that a business simply does not have enough work, or cannot guarantee that the business will have ongoing work for the employee who is seeking to convert. If casual conversion is made mandatory with no right of 'reasonable' refusal on the part of the employer, this would fly in the face of the principle of fairness prescribed under s134 which apply to employees and employers alike.

23.3 Further, the matters outlined in s.134 of the FW Act which the Commission must take into account, include the need to promote social inclusion through increased workforce participation and the likely impact of any exercise of modern award powers on businesses, including on productivity, employment costs and the regulatory burden.

23.4 The employer may consent to, or refuse the election, but only on reasonable grounds. Clause 13.4(f) of the *Hospitality Industry (General) Award 2010* provides:

*"**(f)** Where a casual employee seeks to convert to full-time or part-time employment, the employer may consent to or refuse the election, but only on reasonable grounds. In considering a request, the employer may have regard to any of the following factors:*

- *the size and needs of the workplace or enterprise;*
- *the nature of the work the employee has been doing;*
- *the qualifications, skills, and training of the employee;*

- *the trading patterns of the workplace or enterprise (including cyclical and seasonal trading demand factors);*
- *the employee's personal circumstances, including any family responsibilities; and*
- *any other relevant matter."*

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

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

Reasonable for the reasons explained in respect of question 20 above.

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

Unreasonable, subject to the caveat that no other reasonable business grounds exist to refuse the request.

Employers in the hospitality sector typically engage casuals because they operate in an uncertain environment, with intense competitive pressures. It is impossible to foresee all the combinations or permutations of external factors which could affect the employer's ability to accommodate the employee's desire to convert. As the Full Bench of the SAIRC stated in SA Clerks Case, there may be cases where it is simply unreasonable to require an employer to afford an employee permanent status no matter how long the employee has been performing work for the employer.[57]

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

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[57] [2001] SAIRComm 7, [103].

normal or likely fluctuation in work demand?

Reasonable.

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

Unreasonable, subject to the caveat in 24.2.

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

Reasonable. R&CI submits that inherent logic which underpins the employers' right of reasonable refusal in casual conversion clauses is similar to the logic that underpins the right of an employer to refuse an employee's request for flexible work arrangements on 'reasonable business grounds' under s.65(5) of the FW Act. The FW Act was amended, through the Fair Work Amendment Bill 2013, to add the following s.65(5A) to clarify the meaning of 'reasonable business grounds' (emphasis added):

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service."

R&CI submits that this request would be reasonable if premised on the above grounds. It is unclear how a business could continue if employers were unable to refuse a request that could not be accommodated for reasonable business grounds.

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

25.1 R&CI submit that employees should not have an unfettered right to convert to permanent employment. To remove a right to refuse casual conversion on reasonable grounds would render the casual conversion provision 'unjust', as held by the Full Bench of the SAIRC in the SA Clerks Case.[58] We submit that an unjust casual conversion clause could not constitute a 'fair safety net' as required by s.134(1) of the *Fair Work Act.*

25.2 To employers, the injustice would include increased employment costs, loss of flexibility, loss of efficiency and diminished productivity. For employees, this would entail the loss of thousands of casual jobs and a decrease in casual workforce engagement.[59]

25.3 There may also be cases where it is not viable for an employer to accommodate an employee's desire to convert, irrespective of the length of the employee's service.[60] Employers who engage casuals are often operating in uncertain environments, with fluctuating demand and intense competitive pressures, where it would be unreasonable to remove a right to refuse.

25.4 Similar to the right of an employer to refuse an employee's request for flexible work arrangements, the employer's right of reasonable refusal promotes discussion between employers and employees about the issues of conversion and an understanding of any mutual problems that may exist in accommodating an election. [61]

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[58] *Clerks* [2001] SAIRComm 7.

[59] Australian Industry Group, Submissions to Fair Work Commission, 26 February 2016, para. 321-345;

[60] *Clerks* [2001] SAIRComm 7.

[61] Australian Industry Group, above n 61 [376]-[392].

26. If employers retain the capacity to refuse to convert employees to non-casual work subject on reasonable grounds, should the employer be required to engage in a discussion with the employee about the issue before making a decision about conversion?

Yes, R&CI believe that such a process will promote understanding between employers and employees about the issue of casual conversion and any mutual problems that may exist in accommodating an election.

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

Since casual conversion provisions were inserted into numerous awards, there have been virtually no disputes about the refusal of employee requests to convert. [62] Given the lack of disputation, and the evidence as to the diminutive rate of conversion,[63] this requirement would impose a disproportionate and unnecessary regulatory burden upon employers.[64] RC&I submit this regulatory burden is not warranted, or 'necessary' under s.138 of the Fair Work Act. Given the multitude of administrative obligations employers are already faced with, they can ill-afford to apply to the Commission to seek an exemption every time they are unable to accommodate an employee's request on reasonable business grounds. This process would be especially onerous for small and medium-sized businesses with limited resources.[65]

Small business

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

28.1 As mentioned throughout these submissions, R&CI support the move to exclude small business employers from a casual conversion clause. According

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62 Ibid [340];

63 Recruitment and Consulting Services Association, Submissions to Fair Work Commission, 12 October 2015, [4].

64 Australian Industry Group, above n 61, para. 340;

65 Recruitment and Consulting Services Association, above n 65, para. 35-40.

to recent ABS data, *"as of June 2015, small business accounted for almost two-thirds of businesses in Accommodation and foods services. Small and medium businesses comprised a higher proportion of business in Accommodation and food services than across all industries"*.

28.2 In a report prepared by the Commission for the Penalty Rates case[66], a small business is defined as a business that employs less than 20 persons. A report commissioned by the Fair Work Commission on small businesses' experiences in using awards,[67] found that their focus was to maintain business profitability and their information needs were focused on certainty, efficiency, ease and support.

28.3 The requirement that an employer assess the regularity of an individual casual employee's engagement to determine eligibility for conversion is inherently burdensome. This is exacerbated by ambiguity or uncertainty surrounding the definition of "irregular casual employee'.

28.4 For the members of the small business community, certainty is often identified as the overarching need when it comes to dealing with documents such as the modern awards. [68] This need for certainty is underpinned by a desire amongst participants to minimise risk. The report commissioned by the Fair Work Commission found that small business operators felt very strongly that they could not afford to make a mistake on something as important as wages and entitlements. [69]

28.5 The current modern awards are already a source of frustration for the small business operator, who does not have the resources or personnel to dedicate significant amounts of time to reviewing the regulation of casual employee. While many participants in the report commissioned by the Fair Work Commission identified that wanted to do the 'right thing' by the law and by

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66 Fair Work Commission: Industry profile- Accommodation and food services, Workplace and Economic Research Section, Tribunal Services Branch, March 2016, p. 8.

67 Bond, M. and Hodges, J. 'Citizen Co-Design with Small Business Owners' (Research report repared for the Fair Work Commission, 13 August 2014) 5.

68 Ibid,13

69 Ibid.

their employees, many had little confidence in their ability to interpret the information provided in the current modern awards correctly. Similarly, the potential costs of making an error, e.g. the financial implications of having to rectify incorrect pay rates over a period of years, or the costs of an employee dispute, could have a very large impact on the business.

28.6 This regulatory burden extends the notification requirement on employers. This burden, including the associated costs and time, is significant, as addressed in the witness statements of Ms Adele Last, Mr Stephen Noble, Ms Wendy Mead and Ms Kathryn McMillian of Ai Group's Application. This it is unjustifiably burdensome in circumstances where, either as a consequence of the employer's labour force needs or the preference of the employee, there may be no reasonable prospects of the employee converting to permanent employment.

28.7 Small businesses are unique in their structure and operation. This is confirmed by the separate arrangements that exist in relation to redundancy entitlements and a longer than standard period of employment before 'regular and systematic' casuals gain access to unfair dismissal provisions. Small businesses have less ability to bear the costs of notification requirements for conversion and resources to assess the regularity of an individual casual employee's engagement.

28.8 Similarly, small businesses are vulnerable to changes in labour standards such as this. They do not enjoy the same economies of scale as larger businesses which have more scope to alter work arrangements and work flow to adapt to changes as they occur. This need for certainty was underpinned by a desire amongst participants to minimise risk. The small business operators felt very strongly that they could not afford to make a mistake on something as important as wages and entitlements.

28.9 Imposing a casual conversion clause on small businesses will impose significant additional costs on employers in terms of the time spent in administration and compliance, affecting productivity, and employment costs. R&CI submit that this is inconsistent with the modern award objectives as per section 134 of the *Fair Work Act 2009 (FW Act)*.

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

While R&CI presses for small businesses to be completely exempted from any proposed conversion clause, should this be rejected by the Commission, R&CI submits that small businesses should indeed be entitled to relief by way of a longer conversion period, for the reasons explained in respect of question 28 above.

Labour hire

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

R&CI is not aware of any evidence that this has been the case.

C. Allocation of additional work

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

31.1 R&CI opposes the claim of ACTU. R&CI submits that the distribution of available work is essentially a matter of management discretion and an employer should retain the right to select the appropriate employees to perform available work, reinforced by Concor C in *Markowski v Catalina Country Club*.[70]

31.2 R&CI refers to and adopts the submissions of the Clubs Australia Industrial dated 18 February 2016, in particular paragraphs 50 to 61.

32. Is there anything in the modern awards objective in s.134(1) of the *Fair Work*

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[70] [2000] NSWIRComm 1034

Act **which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?**

No. We set out below the applicability of relevant subsections of the Modern Awards in the context of the unions' claims:

134 (1)(a) Relative living standards and the needs of the low paid

Mandating that employers must offer additional hours to existing employees and thus limiting the number of employment opportunities available will do little to ease cost of living pressures.

134 (1)(b) The need to encourage collective bargaining

R&CI submits that the existing award provisions do not impede the participation of casual or part-time employees in collective bargaining.

134 (1)(c) The need to promote social inclusion through increased workforce participation

Restricting the offer of new casual employment to those outside of the existing workforce will only serve to limit social inclusion by decreasing workforce participation rather than promote it.

Before an individual can participate in the workplace, they must first be given an opportunity to participate in the workforce, which we say will reduce if the variations proposed by the unions proceed.

The definition of social inclusion refers to having the resources, opportunities and capabilities to: work (e.g. participate in employment, unpaid or voluntary work including family and carer responsibilities). As such, there is merit in recognising that existing casual employees (including long term casual employees) who have other commitments, desire to be included in the workforce on a casual basis.

134 (1)(d) The need to promote flexible modern work practices and the efficient and effective performance of work

Introducing provisions which restrict an employer from offering casual employment do not promote flexible modern work practices. They do not promote flexibility and are certainly not modern.

The ACTU evidence demonstrates a small, but vocal proportion of the casual workforce who are disgruntled with their work arrangements, yet pursue a claim on the presumption that the majority of employees in casual or part-time work are seeking more hours, and casual employees seeking to be converted to permanent status, at the cost of the immediate financial benefit of casual loading, and loss of flexibility. We note however that the ABS figures paint a different picture and show that the number of workers who would prefer less hours (21%) exceeds the number who would prefer more hours (14%).[71]

134 (1)(da) The need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours; weekends or public holidays or shifts

Not applicable.

134 (1)(da) The need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours; weekends or public holidays or shifts

Not applicable.

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71 Australian Bureau of Statistics March 2011, *Australian Social Trends, Overemployment*, cat. no. 4102.0, ABS, Canberra.

134 (1)(f) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

Imposing restrictive, provisions which will mandate a right of first refusal on additional hours to existing casual and part time employees will impose significant additional costs on employers in terms of the time spent in administration and compliance.[72] This is a disproportionate response which incorrectly pre-supposes a preference for all working casual or part-time for full-time hours.

134 (1)(g) The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

There is significant variation within the provisions sought across all modern awards. This will require significant practices to be adopted by employers to ensure compliance.

The requirement to offer existing casual and part-time employees additional hours before any new employees can be hired is outdated and unsustainable in a truly modern award system.

Rather than simplifying the modern award system, all that will be achieved by the proposed variations sought by the ACTU and AMWU is additional complexity and potential compliance risks for employers.

136(1)(h) The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

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72 Shepherd Statement [15], [21]; MacMillan Statement [32]; Mead Statement [31]–[34]; Wolverson Statement [30]-[33].

A one size fits all approach ignores the realities of the modern labour market such that different industries have different employment requirements. We submit that the approach advocated by the ACTU and AMWU will lead to employers, particularly in retail, hospitality, food services and agriculture, whose industries are subject to peak periods and cycles, and have high concentrations of casual employment for those very reasons, being reluctant to hire new casual employees.

This would result in employers needing to spread the additional work load in those peak periods across the existing workforce thereby increasing the likelihood of overtime and additional costs for employers.

Any provisions which operate to undermine the flexibility available to employers through casual employment are a disincentive to employment growth, and may as a consequence be detrimental to the efficiency of the national labour market.

D. Casual minimum engagement

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

We submit that this is a rhetorical question – the differing reasons for engaging casuals across different industries and the factors influencing the duration of casuals' employment with an employer, or in the sector itself, means that no standard engagement period can be justly established. There may be some matters that can be harmonised, however R&CI submits that the minimum engagement period is not among them.

R&CI submits that an appropriate alternative is for the employee and employer to agree to a minimum engagement period, as discussed in more detail below.

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

R&CI agrees that parties should be able to come to an agreement to shorten minimum engagement if what is reflected in the award does not suit them. It is proposed that such a process may be initiated either by the employee or employer. Any agreement should be

Without such facilitative provisions, there does not appear to be any means under modern hospitality awards to circumvent the operation of a minimum engagement provision. This is irrespective of whether it is sought to meet the genuine needs of the employer and the individual employee.[73]

Employers have indicated that a three-hour minimum engagement often poses unnecessary employment costs as they are engaging employees for longer periods than required or justified. Shorter minimum engagement periods would allow employers to better structure employee working arrangements around their peak operational periods. To maintain business profitability in the absence of such provisions, employers are requiring rostered employees to perform additional tasks, which they do not always possess the requisite skills or experience for, where the work required would take less than three hours. In turn, this can adversely affect customer experience and workplace productivity. [74]

RC&I agree that the minimum engagement provision would allow employers to tailor the working hours of their employees to the work that needs to be performed. It would also better accommodate the personal circumstances of employees. These provisions would create a simpler, more flexible and more sustainable award system, in accordance with s. 134 of the FW Act.[75]

35. Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?

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73 Australian Industry Group, above n 61, para. 639-646.

74 Australian Industry Group, above n 54, para. 219-255.

75 Ibid.

35.1 Given the limitations of school student's hours, it is not always viable for employers to offer the minimum period of engagement. This is particularly true for fast food restaurants operating in shopping centres, or cafés which close late afternoon, and have school students with availability from 4pm.

35.2 Stipulating minimum hours for casual employees without the ability to agree to a shorter period of engagement, does not provide a safety net that is relevant to industries characterised by fixed operating hours, fluctuating demand and high levels of junior employment, such as the hospitality sector. Enabling an employer and employee to agree to vary the casual minimum engagement period would increase workforce participation by school aged employees and benefit students who are trying to develop transferrable workplace skills whilst simultaneously pursuing their education.[76]

36. Should a casual minimum engagement period be introduced in awards which do not currently have one (such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*[1]) of where the current minimum period is only nominal (such as for home care employees under the *Social, Community, Home Care and Disability Services Industry Award 2010*[2])? If so, what should the length of the minimum period be?

The question is not applicable to R&CI.

CONCLUSION

R&CI rejects the claims sought by the and their reasoning that their proposed changes will bring about a greater sense of security in workplace for casual employees and enhance their career prospects. Such claims ignores the important role that this type of employment has played in the Australian workforce, particularly in the hospitality industry, including the opportunities provided to people seeking to enter the workforce, and those who see casual work to supplement their income whilst they pursue other interests.

It should not be ignored that if the changes sought by the unions are made, this will

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76 Ibid.

undoubtedly impose further significant strain, particularly for small business operators, who will ultimately need to decide the long term viability and sustainability of their business. As previously mentioned, the unions have failed to provide any evidence to demonstrate that in pursuing their claims, they do so with the genuine interest of casual employees in mind. This brings into question whether they are in fact making these claims to ultimately pursue their own interests.

For the reasons given above, and as outlined in these submissions, we submit that the Commission should reject the union's application and maintain the status quo on the basis that to not do so would create an unbalanced situation and would subject employers to an even greater regulatory and financial burden. However, if the Commission is minded to introduce a conversion clause, R&CI submits that it should do so conditional upon providing employers a reasonable right of refusal; ensuring the minimum conversion period is twelve months particularly for the restaurant and catering industry; and amending the part-time provision in the Restaurant Industry Award to be more flexible by removing the Contracted Roster requirement. We make this request on the basis that the inherent operation of 'casual' employment particularly in the restaurant and catering industry is part of the lifeblood of the industry.

R&CI

[1] MA000089

[2] MA000100