DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

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

(AM2014/196 and AM2014/197)

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL

SYDNEY, 9 AUGUST 2018

4 yearly review of modern awards - common issues - part time employment and casual employment.

INTRODUCTION

[1] In our decision published on 5 July 2017[1] concerning part-time and casual employment issues which had arisen in the course of the 4 yearly review of all modern awards conducted under s 156 of the *Fair Work Act 2009* (FW Act) (principal decision), we set out (in paragraph [902]) the further steps which were to be taken to give effect to our decision. We published a further decision following from this on 24 November 2017[2] (November decision), which resolved several outstanding issues. A number of the remaining outstanding issues were the subject of a further hearing on 1-2 February 2018. This decision concerns the outstanding issues from the principal decision which have yet to be determined.

MODEL CASUAL CONVERSION CLAUSE

[2] In the principal decision we determined to insert a standard casual conversion clause in 85 identified modern awards,[3] and expressed a provisional view as to the form of that casual conversion clause.[4] The proposed model clause[5] was as follows:

> "**11.6 Right to request casual conversion**

[1] [2017] FWCFB 3541, 269 IR 125

[2] [2017] FWCFB 6181

[3] [2017] FWCFB 3541, 269 IR 125 at [368]

[4] Ibid at [381]

[5] Using clause numbering consistent with the exposure draft for the *Pharmacy Industry Award 2010* published on 20 January 2017.

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A **regular casual employee** is a casual employee who has over a calendar period of at least 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked an average of 38 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee

does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 29. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(i) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.4.

(j) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(k) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(l) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(m) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(n) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o)."

[3] In respect of the proposed model clause, we then directed:

"1. Any further written submissions which any interested party wishes to make concerning the proposed model casual conversion clause, including whether it requires adaptation to meet the circumstances of particular awards, shall be filed on or before **2 August 2017**.

2. Any further written submissions which any interested party wishes to make concerning whether the notification requirement in any existing casual conversion

clause in any modern award should be modified consistent with the notification requirement in the proposed model casual conversion shall be filed on or before **2 August 2017**."[6]

Submissions

[4] A number of submissions were received in response to these directions. Except for three specific modern awards which are dealt with separately later, no party requested the opportunity to adduce further evidence or make further oral submissions in relation to this issue.

Australian Chamber of Commerce and Industry (ACCI)

[5] The ACCI submitted that the model clause should be amended to require existing employees to complete a 12 month eligibility period *following* the introduction of the casual conversion clause into modern awards. The ACCI also proposed that the notification procedure should be changed to give employers 12 months to provide a copy of the clause to all existing casual employees. ACCI also submitted that the word "*significant*" in paragraphs (b) and (g)(i) should be removed, so that any adjustment to hours of work required to effect a casual conversion would be a basis for refusal of conversion. It also proposed that an additional ground for refusal should be added to paragraph (g): "*other reasonable grounds identified by the employer*", in order to clarify that the grounds of refusal are not exhaustive. Regarding procedural requirements, ACCI submitted that paragraph (j) should be amended so that any conversion would commence within one month of agreement.

Australian Business Industrial and the New South Wales Business Chamber (ABI and NSWBC)

[6] ABI & NSWBC supported the submissions of the ACCI.

Australian Industry Group (Ai Group)

[7] The Ai Group submitted that there was a problematic treatment of overtime under the model clause, and it should be amended to clearly articulate that only a pattern of work performed during "*ordinary hours*" would be relevant to determine whether an employee is eligible for conversion. Regarding reasonable grounds for refusal, it submitted that paragraph (g)(i) should be deleted, since it might mislead employers into thinking they were required to provide a response to a conversion request even where an employee is not a "*regular casual employee*" as defined in paragraph (b). The Ai Group also submitted that the model clause needed to provide greater restrictions on when an employee was eligible to convert; that there should be a time limit on when an employee could make a request to convert once they became eligible; and that there should also be capacity for an employer to proactively offer conversion and if that offer was refused, the employee should not be subsequently entitled to convert.

[8] The Ai Group also submitted that the paragraph (o) notification requirement should be amended to allow an employer to determine if it will provide the notification to all casual

[6] [2017] FWCFB 3541, 269 IR 125 at [902]

employees or only those eligible to request conversion, and that paragraph (p) should be deleted as it was unnecessary and would be inconsistent with s 138 of the FW Act. It proposed that there be a transitional arrangement so that the casual conversion clause did not take effect until at least 6 months after the final determinations were issued, and that conversion rights should apply only to casual employees first engaged after the commencement of the new provision.

Australian Public Transport Industrial Association (APTIA)

[9] APTIA proposed four substantive amendments to the model clause. Firstly, it submitted, paragraph (o) should be amended to provide for a 90-day notification period for existing casual employees; secondly paragraph (a) should be amended to provide that the right to convert employment should lapse if not taken up by an employee within 21 days of being eligible to do so; thirdly an additional paragraph (p) should be added to provide that existing casual employees could not convert within 90 days after the commencement of the clause; and fourthly that (at least in respect of the *Passenger Vehicle Transportation Award 2010*) there should be an addition to the paragraph (g)(i) ground for refusal where the casual employee's hours of work are not capable of being worked over 52 weeks of the year and the employer is not able to reasonably offer hours of work for a full year.

Association of Professional Staffing Companies Australia (APSCA)

[10] The APSCA submitted that the model clause had a lack of clarity regarding whether "on-hire" employees were included, and that is should exclude "on-hire" arrangements. It also submitted that the reasons for refusing a request should be expanded to include "*any other reasonable business ground*" and that there should be a transitional period of at least three months.

National Farmers Federation (NFF)

[11] The NFF proposed that paragraph (b) be amended to require a casual employee to have worked a *regular* pattern of hours on an ongoing basis to be eligible. It also submitted that paragraph (g)(iii) should be clarified so that any variation to hours of work, not only a reduction in hours, would not be consistent with eligibility to convert to full time or permanent employment. The NFF also submitted that conversion should be able to be refused due to "*reasonable business grounds*" and that businesses should be protected from complaints or disputes in relation to a refusal. They also proposed that paragraph (o) be amended so that a casual employee would be provided with notification within four weeks prior to the expiry of the 12 month qualifying period.

Ports Australia

[12] Ports Australia submitted that paragraph (d) should be amended to make clear, consistent with paragraph (c), that where a conversion from casual employment to part-time employment results in a different number of hours per week, an agreement is reached between the employer and employee as to those hours.

Restaurant and Catering Industrial (R&CI)

[13] R&CI supported the changes to the model clause proposed by the ACCI and additionally submitted that the inclusion of the word "*significant*" in paragraph (g)(i) would cause uncertainty. It also submitted that paragraph (g) should add an additional ground for refusal, namely "*other reasonable grounds identified by the employer*". R&CI submitted that the notification requirement in paragraph (o) should be confined to regular casual employees only.

Recruitment and Consulting Services Association (RCSA)

[14] The RCSA supported the submission of the ACCI and additionally raised issues of specific relevance to the on-hire industry. First, it submitted that the definition of "*regular casual employee*' in paragraph (b) did not contemplate when a break in any particular engagement was sufficient to break the "*pattern of hours on an ongoing basis*", which was a difficulty for the on-hire industry, and proposed that a four week absence from work, if not authorised, should break continuity. In relation to paragraph (e), they proposed that any request must be provided within four weeks of obtaining the status of a regular employee. In relation to the notice requirements, the RCSA submitted that they were facilitative rather than prescriptive and this should be emphasised in any subsequent decision or order. The RCSA also sought the clarification of paragraph (o) so that the notification requirement would be satisfied by an employer issuing a copy of the casual conversion provision in the award applicable to the employee at that point in time, so that there would be no further notification requirement if an employee's award coverage changed. Additionally, in assessing whether there were reasonable grounds for refusal, the provision in the award applying to the employee as at the date of the request was to apply.

Australian Council of Trade Unions (ACTU)

[15] The ACTU proposed that the expression "*Right to request*" in the model clause title was inapt to describe a provision under which an application could be made to exercise a conditional right which might be accepted or refused by an employer, and proposed that the model clause instead be entitled "*Right to casual conversion*". Regarding the qualification period, the ACTU submitted that paragraph (c) should be amended to refer to "*full-time equivalent hours, having regard to a full-time employee's entitlements under this Award and the NES to access leave and be absent from work*", since a full-time employee would not actually work an average of 38 hours across a year because of leave absences. Likewise the ACTU submitted that paragraph (d) be amended to include in the calculation of average hours all leave and absences accessed under the National Employment Standards (NES), which should be treated as hours worked. The ACTU proposed that the definition of "*reasonable grounds*" of refusal should be revised in two ways: first, the definition should be exhaustive and limited to the matters in paragraph (g) (i)-(iv) and, second, the limitations on what was "*reasonably foreseeable*" in paragraph [380] of the principal decision should be explicitly included in the model term.

[16] The ACTU submitted that it generally supported that notification be "*within the first 12 months*" in paragraph (o), but expressed concerns about the practical impact if the notification requirement was complied with through an "*induction pack*." Anticipating that the Commission may want to avoid a hard "*trigger date*" for notification, it proposed that the

time frame for notification be between 6 to 11 months of the employee's first engagement, and also that notification could be by electronic communication.

Australian Manufacturing Workers Union (AMWU)

[17] The AMWU supported the ACTU's submission regarding reasonable grounds being exhaustive, but also proposed that the definition of "*reasonable grounds*" also include examples of unreasonable grounds. The AMWU also requested the opportunity to make submissions about industry or occupation-specific variations should the need arise after the model clause was finalised.

Textile, Clothing and Footwear Union of Australia (TCFUA)[7]

[18] The TCFUA supported the ACTU's submissions.

Real Estate Salespersons Association (RESA)

[19] The RESA supported the inclusion of the model clause.

Community and Public Sector Union (CPSU)

[20] The CPSU supported the ACTU's submission.

Consideration

[21] We have determined to amend the model casual conversion clause in a number of respects having regard to the submissions summarised above and one other issue which we have identified.

[22] Paragraph (b) will be amended to make clear that the 12 month qualification period to be eligible to make a casual conversion request is a rolling period, so that eligibility remains whenever a casual has in the preceding 12 months worked the requisite pattern of hours. This clarifies that the right to request conversion does not arise as a "one off" event but is a right which is continually exercisable while ever an employee meets the definition of a "*regular casual employee*".

[23] In respect of paragraphs (c) and (d), we accept the submission of the ACTU that the model clause in the principal decision does not take into account that casual employees may be absent from work for leave purposes such that this may affect their annual average of hours. Accordingly, paragraph (b) will be amended to remove the requirement to work an average of 38 hours over the 12 month period, and to replace it with a requirement to have worked "*equivalent full-time hours*" over that period. Paragraph (c) will also be amended consistent with paragraph (b).

[24] We also accept the ACTU's submission that our statement in paragraph [380] of the principal decision that "for a ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable" (as distinct from being merely speculative or

[7] Subsequent to the hearing in this matter, the TCFUA was de-registered as a result of the amalgamation process to form the Construction, Forestry, Mining, Maritime and Energy Union.

based on some general lack of certainty about the relevant employee's future employment) should be incorporated into the model provision. A new paragraph (h) will be added to this effect, and the remaining paragraphs will be re-designated.

[25] We have identified a difficulty with paragraph (i)(ii) (which will become paragraph (j)(ii) as a result of the addition of the new paragraph (h)). It was drafted in the context of the exposure draft for the *Pharmacy Industry Award 2010 (Pharmacy Industry Award)* published on 20 January 2017. Clause 10.4 of that exposure draft is the same as clause 12.2 of the *Pharmacy Industry Award* as it currently stands, which provides in relation to part-time employees:

> **12.2** 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:
>
> **(a)** the hours worked each day;
>
> **(b)** which days of the week the employee will work;
>
> **(c)** the actual starting and finishing times of each day;
>
> **(d)** that any variation will be in writing;
>
> **(e)** that the minimum daily engagement is three hours;
>
> **(f)** all time worked in excess of agreed hours is paid at the overtime rate; and
>
> **(g)** the times of taking and the duration of meal breaks.

[26] Thus the matters required to be discussed and recorded in writing for casual employees covered by the *Pharmacy Industry Award* converting to part-time employment are those specified in the above provision. The part-time provisions in the majority of modern awards contain a similar provision requiring written agreement upon engagement concerning the regular pattern of work of the part-time employee. Some modern awards contain provisions simply requiring the employer to *inform* the part-time employee upon engagement about their pattern of hours (for example, clause 10.2(c) of the *Banking, Finance and Insurance Award 2010*), but we consider that there must still be an underlying contractual agreement about these matters, so clause (j)(ii) of the model clause can still without alteration operate effectively by reference to such provisions. However the following 14 modern awards contain no provision analogous to that in the *Pharmacy Industry Award* at all:

Animal Care and Veterinary Services Award 2010

Architects Award 2010

Broadcasting, Recorded Entertainment and Cinemas Award 2010 (in respect of cinema employees only)

Business Equipment Award 2010

Cemetery Industry Award 2010

Contract Call Centres Award 2010

Educational Services (Teachers) Award 2010

Gas Industry Award 2010
Hydrocarbons Field Geologists Award 2010
Market and Social Research Award 2010
Medical Practitioners Award 2010
Professional Employees Award 2010
Real Estate Industry Award 2010
Telecommunications Services Award 2010

[27] In the case of these awards, paragraph (j) of the model clause will be modified to read as follows:[8]

> **(j)** Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:
>
> > **(i)** the form of employment to which the employee will convert – that is, full-time or part-time employment; and
> >
> > **(ii)** if it is agreed that the employee will become a part-time employee, the days the employee will be required to attend for work and the starting and finishing times for each such day.

[28] The point made in the submissions of the APTIA and the NFF that, in respect of the requirement to provide casual employees with a copy of the award provision, there needs to be a transitional provision concerning existing employees has merit. The model clause will provide that existing casual employees must be given a copy of the provision within 3 months of the provision taking effect.

[29] Finally, the last paragraph of the provision erroneously referred to a "*right to convert*"; this will be corrected to read "*right to request to convert*".

[30] We do not intend to otherwise deal with the submissions advanced by interested parties, except to make the following points:

(1) As stated in paragraph [380] of the principal decision, the grounds for refusal of a conversion request provided for in paragraph (g) are not intended to be exhaustive, since there may be grounds which we cannot currently contemplate which might reasonably justify a refusal, but are intended to constitute generally the grounds for refusal that would be reasonable. We consider that paragraph (g) as currently drafted makes this clear.

(2) The clause is intended to apply to employers in the labour hire sector in the same way as it applies to any other employer.

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[8] Excluding the *Broadcasting, Recorded Entertainment and Cinemas Award 2010*, for which paragraph (j) will be in terms equivalent to paragraph (i)(ii) of the provision at paragraph [42].

(3) The requirement to provide *all* casual employees with a copy of the provision within the first 12 months of employment was intended to relieve employers of the task of determining when particular employees completed the qualifying period and whether they met the eligibility criteria, and thus to ease the regulatory burden of the notification requirement upon employers, as explained in paragraph [379] of the principal decision. Paragraph (o) of the model provision in the principal decision gives the employer considerable flexibility as to compliance with this requirement; they can for example simply provide any new casual employee with a copy of the clause as a matter of course, or they may wait until a later time in the first 12 months so that they only need give it to casuals who have worked in the business for a considerable amount of time. The proposals advanced by both employer groups and unions to change this in various respects would erode this flexibility and are rejected for that reason.

[31] The modified model casual conversion to give effect to these conclusions, apart from the 14 awards identified in paragraph [26] above, is as follows:

XX Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-

time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause X. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause X.

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause XX(p) .

[32] For the 14 awards identified in paragraph [26] above, paragraph (j) will be in the modified form set out in paragraph [27].[9] The model clause will otherwise be the same for these awards.

[33] Except in relation to the *Local Government Industry Award* 2010, which is dealt with separately later in this decision, draft determinations for each of the other 84 awards will be published shortly after this decision is issued to give effect to this part of the decision. Interested parties may make submissions raising any award-specific drafting issues within 7 days after the draft determinations are published. The final variations to the 84 awards will then be made and will take effect from 1 October 2018.

[34] In respect of the 28 awards which already contain a casual conversion clause,[10] the only submission advanced which supported the amendment of such provisions to include the notification provision in the model clause (now paragraph (p)) was the Australian Hospitality Association in respect of clause 13.4 of the *Hospitality Industry (General) Award 2010*. The Ai Group made submissions opposing a general modification of the 28 awards to include the modified notification requirement on the basis that this would be inconsistent with the framework of many of the existing casual conversion clauses, would impose a new and potentially unjustifiable regulatory burden upon some employers and would only provide at best a limited benefit in the context of most awards. It submitted that the prudent course would be to not amend the provisions at this stage and leave it to interested parties to advance an application should they deem it warranted.

[35] Having regard to the general lack of employer interest in any change to the notification requirements in existing casual conversion clauses, particularly amongst those employer groups who previously agitated for change in this area (the Ai Group and the RCSA), we do not propose to vary any existing modern awards already containing a casual conversion provision in this respect.

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[9] Excluding the *Broadcasting, Recorded Entertainment and Cinemas Award 2010*, for which paragraph (j) will be in terms equivalent to paragraph (i)(ii) of the provision at paragraph [42].

[10] [2017] FWCFB 3541, 269 IR 125 at Attachment F

CASUAL CONVERSION - *MEAT INDUSTRY AWARD 2010*

[36] As we noted in the November decision, there was a strong contest amongst interested parties as to whether any form of casual conversion provision should be introduced into the *Meat Industry Award 2010* (*Meat Award*). Senior Deputy President Hamberger conducted a conference of interested parties in relation to the *Meat Award* on 16 November 2017, but the issues in dispute were not resolved and the hearing on 2 February 2018 dealt with this issue.

Submissions and evidence

[37] At this further hearing, the Australasian Meat Industry Employees Union (AMIEU) submitted that the model casual conversion clause, in its entirety, should be inserted into the *Meat Award* for establishments that are not meat processing establishments. It also put forward a modified clause for use in meat processing establishments. At the hearing, it adduced evidence from one of its officials, Mr Graham Smith, in support of its position. Mr Smith gave evidence that in meat processing establishments using daily hire, it was common for a pool of regular and irregular casual workers to be engaged. Regular casual employees, like daily hire employees, did not work an average of 38 hours per week, and so a strict 38 hour average would not be an appropriate conversion criterion.

[38] The Australian Meat Industry Council (AMIC) submitted that a casual conversion clause should not be adopted - even for non-meat processing establishments - as the meat industry "*exhibits particular characteristics different to and distinct from most other industries*." However it did appear to concede that the model conversion clause could apply to non-meat processing establishments. It opposed the adoption of any casual conversion clause for meat processing establishments. In its view "*it is well-nigh impossible to adapt a conversion clause for meat processing establishments whilst retaining the objectives and ratio of the Full bench decision*." It called evidence from Mr Ken McKell, its HR/IR Manager, who summarised the relevant aspects of the *Meat Award*. In respect of meat processing establishments, he gave evidence that many such establishments used daily hire employment, and some only used daily hire and casual employment for meat processing functions. He identified various practical difficulties which he perceived in providing for conversion from casual to daily hire employment. He also described aspects of the operation of manufacturing and retail establishments, including that some of these engaged in slaughtering operations which were affected by seasonal factors. He expressed the opinion that provision for daily hire employment for such operations in manufacturing and retail establishments should be made if a casual conversion clause was adapted to apply to meat processing establishments.

Consideration

[39] The principal decision discussed the existence in the *Meat Award*, in respect of meat processing establishments, of an intermediate type of employment known as "*daily hire*".[11] It noted that where daily hire is permitted to be used, the award allows the employer (in the absence of agreement with the employee) to transfer the employee from full-time employment to daily hire and vice versa on 7 days' notice. Daily hire can be on either a full time basis (shifts of at least 7.6 hours) or a part time basis (shifts of at least four hours). Daily hire

[11] Ibid at [368](3)

employees are basically hired by the day as and when required, but days they are not required to work do not break their service. They receive all NES entitlements (apart from notice) and a 10% loading. They must make themselves available to work on each "*ordinary day*" unless they have been previously notified by the employer that they are not required. Having regard to this mode of employment, we concluded:

> "The concept of casual conversion as it has been considered in previous decisions did not address, and the ACTU claim for a model provision advanced in these proceedings was not adapted to meet, these unique features of the *Meat Industry Award* as it applies to meat processing businesses. It may be that the model clause we propose to develop could apply to employers and employees covered by the award other than in meat processing establishment and/or that the model clause could in some way be adapted to meet the unique features of employment in meat processing establishment, but we have not received submissions about this. We propose, as discussed later, to give interested parties an opportunity to make further submissions in this respect."[12]

[40] Having regard to the submission made by the AMIEU and the AMIC, we see no reason why the model casual conversion clause as earlier set out should not be adopted for non-meat processing establishments covered by the *Meat Award* based on the conclusions concerning casual conversion stated in the principal decision. These establishments include manufacturers, retailers and distributors. They do not have access to daily hire and there is nothing particularly distinctive about them.

[41] We also consider that an appropriately modified casual conversion clause would be suitable for meat processing establishments and would meet the modern awards objective. The concept of a "*regular casual employee*" requires modification to take into account the existence of daily hire. Daily hire still has some of the characteristics of casual work (in that work is not guaranteed and may be quite irregular), but as earlier explained daily hire workers, unlike casual employees, have access to the NES. In practice the adoption of such a casual conversion clause would probably mean that most (if not all) casuals who converted would do so to daily hire rather than to full-time or part-time positions. However that is not a real difficulty, because the lack of access for casual workers to the NES was our key reason for adopting a casual conversion clause in the first place. Conversion from casual to daily hire employment would at least entitle an employee to the benefits of the NES. Further, because daily hire is a highly flexible mode of employment, it will be relatively straightforward for casuals in meat processing establishments to meet the criterion of working a pattern of hours that could equally have been worked under daily hire, so that such casuals may find it easier to qualify for conversion. Such an outcome is consistent with the general approach we have adopted, namely that casual employees who work for 12 months a pattern of hours that could have been worked by a non-casual should, *prima facie*, have access to conversion.

[42] For these reasons we consider that the provision proposed by the AMIEU for meat processing establishments should be adopted, subject to relatively minor amendments. The provision will be as follows:

15.14 Right to request casual conversion in meat processing establishments

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[12] Ibid

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time, part-time, daily hire or part-time daily hire employment.

(b) A **regular casual employee** is a casual employee who has over the preceding 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time, part-time or daily hire employee (including part-time daily hire employee) under the provisions of this award.

(c) A regular casual employee may request to have their casual employment converted to the category of non-casual employment corresponding to the pattern of hours the employee has worked over the period referred to in clause 15.14(b).

(d) Any request under this clause must be in writing and provided to the employer.

(e) Where a regular casual employee seeks to convert to full-time, part-time, daily hire or part-time daily hire employment, the employer may agree to or refuse the request. The request may only be refused on reasonable grounds and after consultation with the employee.

(f) Reasonable grounds for refusal may include:

(i) that it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time, part-time, daily hire or part-time daily hire employee in accordance with the provisions of this award - that is, the casual employee is not a true regular casual employee as defined in clause 15.14(b);

(ii) that it is known, or reasonably foreseeable, that the regular casual employee's position will cease to exist within the next 12 months;

(iii) that it is known, or reasonably foreseeable, that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months, other than where daily hire is in operation and the reduction in hours is due to seasonal factors; or

(iv) that it is known, or reasonably foreseeable, that there will be a significant change in the days and times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(g) For any ground of refusal to be reasonable it must be based on facts that are known or reasonably foreseeable.

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee

does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 10. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(i) Where it is agreed that a casual employee will have their employment converted to full-time, part-time, daily hire or part-time daily hire employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert—that is, full-time, part-time, daily hire or part-time daily hire employment; and

(ii) if it is agreed that that the employee will become a part-time employee, the matters referred to in clause 13.3 where that provision is applicable, or otherwise the days the employee will be required to attend for work and the starting and finishing times for each such day.

(j) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(k) Once a casual employee has converted to full-time, part-time, daily hire or part-time daily hire employment, the employee may only revert to casual employment with the written agreement of the employer.

(l) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(m) Nothing in this clause obliges a regular casual employee to convert to full-time, part-time, daily hire or part-time daily hire employment, nor permits an employer to require a regular casual employee to so convert.

(n) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time, part-time, daily hire or part-time daily hire employment.

(o) An employer must provide a casual employee whether a regular casual employee or not, with a copy of the provisions of this clause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2018.

(p) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause 15.14(o).

[43] A draft determination containing the variations to give effect to our decision will be published, and interested parties will be given seven days to make any submissions as to its form, with the final variation taking effect on 1 October 2018.

CASUAL CONVERSION - *STEVEDORING INDUSTRY AWARD 2010*

[44] In the principal decision we concluded that the model casual conversion clause which we had formulated would not be appropriate for the *Stevedoring Industry Award 2010* (*Stevedoring Award*):

> "The Stevedoring Industry Award 2010 also contains a unique intermediate category of employment, namely "Guaranteed wage employment", which makes the award ill-adapted for a casual conversion clause of the conventional type. We will likewise invite further submissions in relation to this award, as discussed below."[13]

[45] We accordingly invited interested parties to make further submissions concerning whether there was any appropriate form of casual conversion provision which might be placed in the *Stevedoring Award*.[14] Written submissions were made by the Maritime Union of Australia (MUA)[15] and a group of stevedoring employers[16] (Stevedoring Employers).

MUA submissions

[46] The MUA proposed amending the model conversion clause by substitution of the words "*pattern of hours*" and "*part time employment/employee*" with "*number of hours*" and "*guaranteed wage employment/employee*" respectively. The MUA submitted that there was no significant difference in the regularity or irregularity of hours worked by a stevedore, regardless of whether an employee is engaged on a permanent, guaranteed wage or casual basis.

Stevedoring Employers submissions

[47] The Stevedoring Employers did not propose an amended conversion clause for consideration, but submitted that while bespoke casual conversion mechanisms exist for individual enterprises in the stevedoring industry, they would not be workable in the *Stevedoring Award*. In their view, a casual conversion clause could not be adapted based on the principles decided in the principal decision.

Consideration

[48] Clause 10 of the *Stevedoring Award* lists three types of employment:

- Full-time employment;
- Guaranteed wage employment; and

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13 Ibid at [368]

14 Ibid at [382]

15 Since de-registered following the amalgamation to form the Construction, Forestry, Maritime, Mining and Energy Union. For the purpose of this decision, the relevant party will continue to be referred to as the MUA.

16 Qube Ports Pty Ltd, Qube Bulk Pty Ltd; DP World Group of Companies; Patrick Stevedores Holdings Pty Ltd and Victoria International Container Terminal.

- Casual employment.

[49] As part-time employment is not provided for in the *Stevedoring Award*, the right to request conversion from casual to part time would not be relevant.

[50] A "*Guaranteed wage employee*" (GWE) is defined in clause 10.2 of the *Stevedoring Award* as an employee who is guaranteed a *minimum* or *average* number of full shifts each week and, where the guaranteed shifts are not supplied, the employee is provided the equivalent payment. Where the GWE classification is used by employers the guarantee in respect of the minimum or average number of full shifts per week is a matter for each individual employer to determine.

[51] Under the model casual conversion clause a casual stevedore would, having satisfied the listed criteria, have the right to request conversion to a GWE or full time employee. The hours of a full-time employee under the *Stevedoring Award* are stipulated as an average of 35 hours per week, whereas the hours of a GWE are not specified; the only specification is that the employee is guaranteed a minimum or average number of full shifts per week. It appears that what period the average is calculated over is a matter for the parties.

[52] While under the *Stevedoring Award* a GWE has access to all NES entitlements[17], which a casual employee who receives a 25% loading does not, a GWE is also subject to casual type provisions in that they are able to be irregularly rostered on a basis which can change from day to day, provided the guaranteed minimum or average full shifts are provided or paid for in lieu. In this sense moving from a casual classification to a GWE does not bring with it a regular working pattern for an employee, which is one of the employment characteristics the Full Bench identified as being associated with casual employment.[18]

[53] The GWE employment type was originally inserted into the *Stevedoring Industry Award 1999* (the 1999 Award) as a result of a decision[19] made arising from the award simplification process for this award conducted under the *Workplace Relations Act 1996*. There was no equivalent employment type in the predecessor award, the *Stevedoring Industry Award 1991*. During the award simplification process the irregularity of working hours for GWEs was acknowledged. In a witness statement filed by an employer it was stated that GWEs are paid a retainer to guarantee their commitment and availability to meet peak load requirements. The GWE classification was said to be different from regular part time work.[20] In the same award simplification proceedings the MUA representatives described the GWE employment type as having been a feature of the industry for some time, but that they were not regular part time employees, with Mr Giddens for the MUA submitting:

> "They're totally irregularly rostered and there is no particular pattern or expectation as to when they may be used."[21]

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[17] For the purposes of leave accruals under the NES, a guaranteed wage employee's ordinary hours of work are the hours actually worked by the employee over the qualifying period for the leave: clause 10.2(b) of the Stevedoring Award

[18] [2017] FWCFB 3541, 269 IR 125 at [366]

[19] *Stevedoring Industry Award 1991*, Marsh SDP, 3 August 1999, Print R7753 at [6]-[11]

[20] Ibid at [7]

[21] Ibid at [9]

[54] In making the 1999 Award, Marsh SDP concluded that the GWE employment type was not an equivalent to regular part-time work.[22]

[55] The rostering practices in the stevedoring industry were described in a recent Full Bench decision made in the conduct of the 4-yearly review as follows:

> "While employees may be rostered to work on particular days in a roster cycle, the rosters are different to most other rosters that operate in other industries. The rosters do not guarantee work on the rostered days. Rather employees are expected to make themselves available on those days (subject to a limited number of refusals) and will not be rostered work on all of the days when they are effectively required, by virtue of their roster, to make themselves available. Allocation of labour at container terminals is typically performed on a day to day basis and is dependent on shipping schedules, actual shipping movements and the progress of unloading and loading activities."[23]

[56] In the same matter Mr Warren Smith, MUA Assistant National Secretary, gave the following evidence on the rostering practices of stevedores:

> "Workers in the stevedoring industry face a unique set of challenges. It is a 24-hour industry scheduled around the arrival and departure times of multi-million dollar cargo ships. There is a great deal of pressure to load and discharge these ships as quickly as possible in order to maintain their efficiency and utilization. Workers are therefore required to be flexible and their work-time is scheduled around ship arrivals and departures, which are frequently subject to change. 24-hour shift work is almost always required, and less than 20% of the workforce has rosters in which more than 50% of shifts are predictable. Most workers have no roster at all. Almost all workers in the industry, permanent or not, must call in daily to find out if they are due to work or not, and if so at what time. … "

[57] The GWE employment type, which was clearly intended to accommodate these rostering practices, allows for any configuration and number of full shifts to be worked over a 12 month period provided the minimum or average guarantee is met. This is in contrast to the typical working arrangements of a regular rostered part time employee, which the *Stevedoring Award* does not contain.

[58] In arriving at the decision to insert casual conversion clauses into modern awards, we made a finding in the principal decision that there were a significant proportion of casual employees who:

- have worked for their current employer for long periods of time as a casual;
- have a regular working pattern, which in some cases may consist of full-time hours; and

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[22] Ibid at [11]

[23] *Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [59] per Watson VP

- are dissatisfied with their casual status and would prefer permanent to casual employment.[24]

[59] We concluded that if casual employment turns out to be long-term in nature, and of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then that employee should not be denied access to permanent employment.[25] In considering the terms of a casual conversion clause we stated:[26]

> "The essence of the casual conversion concept, we consider, is that the casual employee has been working a pattern of hours which, without significant adjustment, may equally be worked by the employee as a full-time or part-time employee. … ."

[60] The difficulty in applying these concepts to conversion from casual employment to GWE employment in the *Stevedoring Award* is that, as earlier explained, GWE employment does not connote any substantial regularity in working hours. The working of a minimum or average number of shifts per week is a significantly different concept from working shifts which establish a regular working pattern. Indeed as all parties acknowledge, the notion of a regular working pattern for stevedores is a rare occurrence. Accordingly there is no standard of regularity for GWE employment which can be applied to casual employment to establish a criterion for eligibility for conversion.

[61] Although conversion from casual to GWE employment would not provide any guarantee of regularity of hours, it would still allow the converting employee access to all NES entitlements, which was the fundamental basis for us determining to establish a model casual conversion clause. For this reason, we consider that the casual conversion for the *Stevedoring Award* should facilitate conversion from casual to GWE employment. However it will be necessary to establish a special criterion for the eligibility of casuals to convert to GWE employment, since the simple application of the model provision concerning conversion to part-time employment would allow almost any casual employee to request conversion. Our provisional view is that the special criterion should be a requirement that the casual employee must have worked at least 28 hours per month in 10 of the 12 months preceding the conversion request. This will ensure that only casuals who have an ongoing working relationship with the employer are eligible to apply. The form of conversion clause consistent with this provisional view is as follows:

> **10.4 Right to request casual conversion**
>
> **(a)** An employee engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or guaranteed wage employment.
>
> **(b)** A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a

[24] [2017] FWCFB 3541, 269 IR 125 at [366]

[25] Ibid

[26] Ibid at [376]

full-time employee or guaranteed wage employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months, but has worked at least 28 hours per month in 10 of the preceding 12 months, may request to have their employment converted to guaranteed wage employment, with a guaranteed minimum number or average number of full shifts each week corresponding to the pattern and number of hours the employee has worked over the period referred to above.

(e) Any request under this clause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time employment, the employer may agree to or refuse the request. The request may only be refused on reasonable grounds and after consultation with the employee.

(g) Reasonable grounds for refusal may include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time employee in accordance with the provisions of this award, that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 9. Under that

procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time employment as provided for in this clause, the employer and employee must discuss and record in writing the conversion to full-time employment.

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this clause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause 10.4(p).

[62] A draft determination will be published, and interested parties will then have 14 days to make submissions in response to it.

CASUAL CONVERSION - *LOCAL GOVERNMENT INDUSTRY AWARD 2010*

Submissions of the Local Government Associations

[63] The Local Government Associations[27] (LGA) submitted that the Commission did not have the power to insert the model casual conversion clause into the *Local Government*

[27] Municipal Association of Victoria, Local Government Association of Tasmania, Local Government Association of South Australia, Local Government Association of Queensland, Local Government Association of Northern Territory, Local Government and Shires Association of New South Wales; and Western Australian Local Government Association

Industry Award 2010 because to do so would offend the implied constitutional limitation on Commonwealth legislative power enunciated in the High Court decisions in *Melbourne Corporation v Commonwealth*[28] and *Re Australian Education Union; Ex parte State of Victoria*[29], namely that Commonwealth laws of general application could not operate to destroy or curtail the continued existence of the States or their capacity to function as governments. This prohibition, the LGA submitted, extended to laws affecting local governments which impaired their right to determine the number and identity of the persons it wishes to employ, and the model casual conversion clause was a law of this nature. In the alternative, the LGA submitted that the model clause should not be placed in the *Local Government Industry Award* because it conflicted with requirements in legislation applying to local governments in Victoria, Western Australia and the Northern Territory concerning the merit selection of employees for positions. In the alternative, the LGA submitted that the model clause should be modified for the purposes of the *Local Government Industry Award* to include, as an additional reasonable ground for refusal of a conversion request, that the conversion would be contrary to or inconsistent with State or Territory legislation that regulated the employment of the employees by the employer.

Submissions of the Australian Municipal, Administrative, Clerical and Services Union (ASU) and the ACTU

[64] The ASU and the ACTU jointly submitted that the model casual conversion clause did not infringe the principle stated in *Melbourne Corporation* and *Re AEU*. The application of the principle required an assessment to be made as to the practical effect of the relevant law, and the model casual conversion clause did not infringe the principle because the clause in substance did no more than change the employment entitlements associated with an employee whom the employer had already employed for a period of at least 12 months. No evidence or other material had been advanced by the LGA which demonstrated that the model clause would cause a significant impairment to the right of local governments to determine the number and identity of their employees. In relation to the alternative submissions of the LGA, the ASU and the ACTU submitted that it was unremarkable that a federal award provision required different employment practices than State and Territory legislation, since this was expressly contemplated by s 29 of the FW Act, and in any event the legislation referred to was not inconsistent with the model clause, which applied only to existing employees and said nothing about the capacity of an employer to increase or reduce its workforce.

Consideration

[65] The *Melbourne Corporation* principle applies to local governments established under State legislation.[30] In *Re AEU*, the High Court determined that a federal award which impaired the capacity of a State Government or authority to determine the number and identity of its employees infringed the limitation imposed by the *Melbourne Corporation* principle.[31] The principle applies where the curtailment or interference with the State's

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[28] (1947) 74 CLR 31

[29] (1995) 184 CLR 188

[30] *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349, 112 FCR 232 at [225]-[226] per Finkelstein J

[31] (1995) 184 CLR 188 at 232

constitutional power is significant, which is to be judged qualitatively and by reference, among other things, to its practical effects.[32]

[66] We do not consider that the model casual conversion clause which we have determined infringes the *Melbourne Corporation* principle for two reasons. First, it does not curtail or impair the capacity of local governments to determine the number and identity of their employees because the clause operates only in respect of existing employees of local governments. The model clause confers a right to request conversion on particular casual employees who have already been selected for employment by their employer and worked a regular pattern of hours for a period of at least 12 months. The principal effect of a successful conversion request is to alter the employment entitlements of an existing employee by enabling the employee to access the benefits of the NES. The prescription of wages and working entitlements for State employees does not infringe the implied limitation.[33]

[67] Second, and in any event, the model conversion clause does not give an entitlement to conversion, but only an entitlement to request conversion and have that considered by the employer in a structured process. The employer may refuse the conversion request on reasonable grounds. While the clause does not permit the refusal of a conversion request on unreasonable grounds, we do not consider that this would constitute a significant impairment of a local government's employment powers because there is no basis to consider that a local government would desire to engage in unreasonable conduct.

[68] We also do not consider that the fact that State and Territory legislation applicable to local government may be inconsistent with the model clause is by itself a reason not to place the clause into the *Local Government Industry Award*. As submitted by the ASU and the ACTU, s 29 of the FW Act expressly contemplates that modern award provisions will prevail over State and Territory laws to the extent of the inconsistency. The LGA did not advance any evidence or submissions demonstrating that the industrial policy purpose of the relevant State or Territory legislation necessarily outweighed the policy purpose identified in the principal decision for the establishment of the model casual conversion clause.

[69] However we do consider that, to the extent that accession to a casual conversion request by a local government may result in a contravention of any merit selection requirement contained in State or Territory legislation, that should constitute a reasonable ground for refusal of the request. Merit selection in public employment is an important benefit to employees as well as the public, since it ensures that employment selections are not made on the basis of corruption, nepotism or favouritism and that the appropriately qualified are not overlooked for appointment in favour of the less qualified. By "merit selection requirement", we mean to refer to any legislative requirement that a person appointed to a position be appropriately qualified. We emphasise however that our conclusion in this respect does not involve a determination that any of the legislative provisions identified by the LGA in their submissions are inconsistent with acceptance of a conversion request.

[70] The modified casual conversion clause to be inserted in the *Local Government Industry Award* will be as follows (with the additional ground of refusal at paragraph (g)(v)):

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[32] *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1, 228 FCR 497 at [176]

[33] *Re AEU* (1995) 184 CLR 188 at 232

10.6 Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months;

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work; or

(v) acceptance of the request by a local government would contravene a merit selection employment requirement contained in State or Territory legislation applicable to local governments.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 9. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.4(c).

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of this subclause by 1 January 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in paragraph (p).

[71] A draft determination containing the above clause will be published, and interested parties will then have seven days to make final submissions as to its form. The final variation will take effect on 1 October 2018.

OVERTIME PENALTY RATES FOR CASUAL EMPLOYEES - *HORTICULTURE AWARD 2010*

[72] In the principal decision, we provisionally decided that the *Horticulture Award 2010* (*Horticulture Award*) should be varied to provide overtime penalty rates for casual employees on the basis of a 12 hour day and a 38 hour week.[34] We reserved the question of the averaging of hours over a seasonal period, and expressed the view that the averaging of hours over 8 weeks should be permitted in this respect. We directed interested parties to file further evidence and submissions in respect of this issue.[35]

[73] Pursuant to the timetabled directions, submissions were filed by the NFF, Ai Group, Voice of Horticulture (VoH), the Fruit Growers of Tasmania (FGT), the Australian Workers' Union (AWU) and the National Union of Workers (NUW) in relation to the issue.

NFF

[74] The NFF proposed an averaging of 38 hours per week over 6 months, which would amount to 988 ordinary hours over 26 weeks. It strongly opposed any restrictions on the daily spread of hours in which ordinary hours may be worked unless otherwise agreed between the parties. It also submitted that the rate of pay for overtime should be a flat 150% inclusive of the 25% casual loading. The NFF also filed a number of further witness statements in support of its submissions but, for reasons which will be explained, it never sought to place these into evidence.

Ai Group

[75] Like the NFF, the Ai Group submitted that the *Horticulture Award* should not specify a daily spread of hours, and that 6 months was an appropriate period over which ordinary hours should be averaged. In the alternative it proposed 13 weeks as the averaging period, together with a facilitative provision which would enable employers and employees to agree to extend the period by a further 13 weeks. Regarding rates of overtime, Ai Group proposed overtime penalties rate of 150% for casual employees inclusive of the casual loading.

VoH

[76] The VoH submitted that ordinary hours of casual employees should be 12 hours per day, and that overtime penalty rates should only be payable for work performed in excess of this and should not be limited to any specific time period.

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[34] [2017] FWCFB 3541, 269 IR 125 at [748]

[35] Ibid at [752]

FGT

[77] The FGT submitted that the averaging of 38 hours per week should occur over a 6-9 month period, since this would cover the vast majority of peak seasons and would be consistent with Australia's migration programs. Regarding ordinary daily hours for casual employees, FGT opposed any restrictions on the time of day or period in which ordinary hours of work were to be conducted, as harvest-related tasks are commonly performed outside 6:00am-6:00pm during peak periods.

AWU

[78] The AWU submitted that a significant portion of the horticultural industry used pieceworkers, to whom penalty rates did not apply, rather than casual employees on hourly rates, which would limit the effect of the introduction of overtime penalty rates. Regarding daily maximum hours, it submitted that the daily maximum should be the same as for full-time and part-time employees – that is, not exceeding 8 hours per day, except by arrangement between the employer and a majority of employees in which case ordinary hours should not exceed 12 hours on any day, and the span of hours for casuals should remain at 6:00am-6:00pm. The AWU submitted that the 38 weekly ordinary hours should be averaged over a period of no longer than four weeks, consistent with s 134 of the FW Act, and that casual employees should receive penalty rates for hours worked in addition to the ordinary weekly hours worked as averaged. The AWU also filed a number of further witness statements in support of its position.

National Union of Workers (NUW)

[79] The NUW supported the submissions of the AWU, and further submitted that the span of hours for casual employees should be the same as for other employees, and that the ordinary hours of work should not exceed 8 hours a day without the payment of overtime unless there is consent to longer ordinary hours up to a maximum of 12 hours a day. It also submitted that the period over which weekly hours should be averaged should be no longer than four weeks.

Further proceedings

[80] On the basis that the AWU had advised the Commission that it wished to cross-examine the makers of the further witness statements filed by the NFF, we indicated in the November decision that it would be necessary to conduct a further hearing in relation to the *Horticulture Award* (as well as the other outstanding issues). That hearing was listed for 1 February 2018 but, on 29 January 2018, the AWU advised that it no longer wished to cross-examine in relation to the NFF's witness statements. At the commencement of the hearing on 1 February 2018, the parties in attendance (the AWU, the NUW, the Ai Group and the NFF) jointly requested that a member of the Full Bench conduct a conciliation conference, and the representative of the Ai Group requested that the conference not be transcribed. We acceded to the request, and Deputy President Kovacic conducted a conciliation conference that day. The hearing did not proceed, with the result that the witness statements that had been filed were not tendered and no further submissions were made.

[81] Deputy President Kovacic subsequently conducted some follow-up conferences with the parties (that is, the AWU, the NUW, the Ai Group and the NFF). Arising out of those

conferences, a proposal for the implementation of the principal decision emerged which contained the following elements:

- a requirement for the ordinary hours of casual employees not to exceed 304 hours over an 8-week period;

- the ordinary hours of a casual employee to be worked between 5.00am and 8.30pm on any day of the week, and paid at the employee's minimum hourly wage plus the casual loading of 25%;

- in any State or Territory which does not observe daylight saving time, the capacity for an employer and a majority of employees to agree to permit the daily spread of hours to be moved forward to 4.00am to 7.30pm during the period in which daylight saving time is in operation in States and Territories which observe it;

- ordinary hours worked outside of the daily span of hours to attract a penalty rate of 15% in addition to the 25% casual loading;

- a maximum of 12 ordinary hours is able to be worked on any one day;

- all time worked in excess of 12 hours per day or 304 hours over an 8-week period is overtime, and will be paid at the rate of 175% of the employee's ordinary hourly rate of pay for his or her classification (inclusive of the casual loading); and

- any hours worked by a casual employee on a public holiday (whether ordinary hours or overtime) will be paid at the rate of 225% of the employee's ordinary hourly rate for his or her classification (inclusive of the casual loading).

[82] In the course of those conferences the Commission sought the parties' views as to whether or not they would be prepared to support the above proposal as the basis for the resolution of the abovementioned issues regarding casual employment in the *Horticulture Award*. The parties subsequently advised that they would not oppose or object to the *Horticulture Award* being varied to reflect the proposal.

Conclusion

[83] To the extent that the above proposal represents what could be characterised as a broad industry consensus as to an acceptable approach to implementing our conclusion in the principal decision concerning overtime penalty rates for casual employees in the *Horticulture Award*, we would provisionally be prepared to accept and give effect to it. Although it involves some problematic elements, including a less beneficial span of hours and overtime penalty rate for casual employees than for permanent employees, it may arguably be justifiable on the basis that it would give effect to the principal decision on at least an introductory basis, in circumstances where the horticultural industry has never paid penalty rates for casual overtime before and is rife with award compliance problems. However, we acknowledge that there are likely be other parties who, because they did not attend the scheduled hearing on 1 February 2018, did not have the opportunity to participate in the conference which occurred on that day and the ensuing exchange of views regarding the proposal. To that end, we propose to publish a draft determination to give effect to the proposal and then provide interested parties with 21 days to make further submissions in

relation to it. We will then determine whether any further conferences or hearings should be conducted before making a final determination.

MINIMUM ENGAGEMENT FOR PART-TIME AND CASUAL EMPLOYEES

Modern awards with no minimum daily engagement period for casual employees

Background

[84] In paragraph [408] of the principal decision, we expressed the provisional view that 34 modern awards (identified in Attachment G to the decision) which did not currently contain any minimum daily engagement period for casual employees should be varied to include a 2 hour minimum engagement period. The principal decision then invited any submissions any interested party wished to make concerning this provisional view to be filed on or before 2 August 2007.[36]

[85] The only submissions which took issue with the provisional view expressed in paragraph [408] of the principal decision concerned the *Local Government Industry Award* and the *Higher Education (Academic Staff) Award 2010 (Academic Staff Award)*. These will each be dealt with below. In the November decision, we noted that Attachment G to the principal decision had erroneously included 3 awards which already contained minimum daily engagement periods for casual employees,[37] and in a Statement issued on 22 December 2017[38] (December statement) we identified a further award which had erroneously been included.[39] Draft determinations for the remaining 27 modern awards in relation to which there was no challenge to the provisional view in the principal decision were published together with the December statement,[40] and interested parties were given an opportunity to make submissions in response. A draft determination in relation to the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* was also published.[41]

Submissions

[86] Three submissions were filed in response to the draft determinations. The ACTU submitted that the variations to effect the minimum engagement period should provide: "*The minimum period of engagement for a casual employee is two consecutive hours*". This, it contended, would make it clear to awards users that the two hour minimum period could not encompass two non-consecutive periods of work in a day akin to a "split shift" arrangement, even though from a strict legal point of view the inclusion of "*consecutive*" would legally be superfluous.

[87] The MUA submitted, in relation to the *Marine Towage Award 2010 (Marine Towage Award)*, that the award should be varied to provide for a minimum engagement period of one

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[36] [2017] FWCFB 3541, 269 IR 125 at [902]

[37] [2017] FWCFB 6181 at [26]

[38] [2017] FWCFB 6776

[39] Ibid at [3]

[40] Ibid at [9]

[41] Ibid at [8]

day, on the basis that clause 13.1 of the award provided for a daily rather than an hourly rate of pay, and that the predecessor pre-modern awards had provided for engagement by the day. It also submitted that the minimum casual engagement period in the *Port Authorities Award 2010 (Port Authorities Award)* should be set at 4 hours or, in the alternative, at 3 hours. This submission was based on the fact that some relevant pre-modern awards which preceded the *Port Authorities Award* provided for minimum engagement periods of 4 or 3 hours for casuals, as did some enterprise agreements applying to the Port Authority of NSW. The Maritime Industry Australia Ltd (MIAL), an industry employer association in the marine towage industry, subsequently made submissions opposing the MUA proposal. The MIAL submitted the MUA had not filed any submission taking issue with the provisional view stated in paragraph [408] of principal decision to provide for a 2 hour minimum engagement period for casual employees for awards, including the *Marine Towage Award*, which did not currently contain a minimum engagement period, and that the MUA was now seeking to disturb the Full Bench finding on a minimum casual engagement period as opposed to providing comment on the form of the award variation which was invited in the December statement.

[88] The AiGroup submitted that, in relation to the draft determination for the *Water Industry Award 2010 (Water Industry Award)*, the existing clause 10.5(a), which provides that "*A casual employee is an employee who is engaged and paid as such but will not include a part-time or full-time employee*", had erroneously been omitted and replaced by a provision implementing the 2 hour minimum engagement. It submitted that clause 10.5(a) should remain, and a new separate provision should be added to implement the 2 hour minimum engagement.

Consideration

[89] We accept the ACTU submission. It was not our intention that the 2 hour minimum engagement encompass non-consecutive periods of work within a day. In relation to the purpose of minimum engagement periods, we said in the principal decision:

> "[399] …However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment."

[90] Non-consecutive periods of work in a day, which might require multiple commutes to and from work or separate childcare placings, would likely require more than a minimum 2 hours' pay to justify the time, expense and inconvenience involved. The draft determinations will be varied to provide that the minimum engagement is 2 consecutive hours, so that where there is more than one engagement in a day, each engagement would have to consist of at least two hours' work and pay.

[91] There was consideration given to the proper expression of a 2 hour minimum engagement period for casual employees in two recent decisions concerning plain language

drafting issues in the *Hospitality Industry (General) Award 2010* and the *Restaurant Industry Award 2010*.[42] In each of those decisions it was emphasised that a minimum engagement period included a requirement for a minimum payment for 2 hours' pay if the casual employee is required to leave work before 2 hours' work has been completed, and the provision adopted for each award consistent with this conclusion was as follows:[43]

> "A casual employee must be engaged and paid for at least 2 consecutive hours of work on each occasion they are required to attend work."

[92] The same drafting will be used in the variation of the 28 awards here.

[93] In relation to the *Marine Towage Award*, we accept the MIAL's submission that the MUA is raising a new substantive issue rather than simply responding to the form of the draft determination which was issued in conjunction with the December statement. Notwithstanding this we will examine what has been submitted by the MUA.

[94] The MUA's submissions referred to two predecessor awards to the current modern award that were relied on during the award modernisation process in the development of the *Marine Towage Award*, namely the *Tug and Barge Industry (Interim) Award 2002* and the *Tugboat Industry Award 1999*. Each of these awards made reference to the payment of a daily rate for casuals but not in an entirely consistent manner.[44] Under the *Tug and Barge Industry (Interim) Award 2002* casuals engaged for less than 7 days continuously received the same rate of pay per day as full time employees plus a 25% loading in lieu of leave. Casuals engaged continuously for 7 days or longer received the same rate of pay per day as full-time employees with the same leave entitlements but no casual loading. The daily rate was defined as 1/7th of the rate of pay for the relevant classification.[45] There was no specification as to how the hourly rate was to be calculated. Under the *Tugboat Industry Award 1999* a casual employee was to be employed on a daily basis[46] and paid at the rate of 1/7th of the weekly rate plus a 20% loading. A casual engaged to relieve another employee at that employee's request would receive 1/7th of the weekly rate but no loading.[47] The hourly rate was defined as 1/40th of the weekly minimum rate.[48]

[95] The *Marine Towage Award* did not reflect the entirety of the predecessor provisions and provides that a casual employee is an employee engaged and paid as such.[49] Clause 13.3, *Casual rates of pay* provides that a casual employee will be paid no less than the hourly rate of pay for their classification plus a casual loading of 25%. There is no reference to a 20% casual loading (it now being 25%) or differing conditions for casual engagements of less than

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[42] [2018] FWCFB 4468 and [2018] FWCFB 4496 respectively.

[43] Ibid at [33]-[38] and [18]-[22] respectively.

[44] All of the other relevant pre-modern awards identified as relevant to the award modernisation process provided for a minimum engagement period of 4 hours, with the exception of the *A.W.U. Miscellaneous Workers' (ACT) Award 1998* and the *Shipping Award 2005* which provided for an hourly payment method with no minimum engagement period.

[45] *Tug and Barge Industry (Interim) Award 2002* at clauses 11.2.1 and 11.2.2

[46] *Tugboat Industry Award 1999* at clause 8.3

[47] Ibid, at clause 9.6

[48] Ibid at clause 6.10

[49] *Marine Towage Award* at clause 10.3(a)

or more than 7 continuous days, or to a lesser rate for a casual who relieves another employee at that employee's request.

[96] In those circumstances we do not accept, as was contended by the MUA, that the award modernisation Full Bench in making the modern *Marine Towage Award* necessarily determined that the minimum casual rates be set by reference to a minimum daily rate rather than a minimum hourly rate simply because clause 13.1, *Minimum Wages* does not contain an hourly rate as opposed to a minimum daily and weekly rate. Clause 13.3, *Casual Rates of Pay* is unequivocal in referring to a casual employee being paid an hourly rate of pay for each hour worked. The hourly rate of pay is defined in the Award as 1/35th of the minimum weekly rate.[50]

[97] During the award modernisation proceedings conducted by the Australian Industrial Relations Commission (AIRC), there were a number of submissions submitted by interested parties. The MUA and Maritime Towage Employers Group (MTEG) prepared respective draft modern awards that were submitted to the AIRC.[51] The issue of minimum payment for casual employees was initially an area of contention for the parties. The MUA sought to retain the casual provisions of the *Tug and Barge Industry (Interim) Award 2002* at 10.4 of their proposed award that required payment of a day's pay for casual engagements of less than one week. The MUA also proposed that casual employees engaged continuously for seven days or longer were to receive the same rate of pay as a full-time employee plus leave entitlements but no casual loading. However the MTEG's proposed casual clause referred to casuals receiving an hourly rate of pay plus a casual loading of 25%. The provision it proposed in this respect was as follows:

> "For each hour worked, a casual employee will be paid no less than the hourly rate of pay for his or her classification in clause 14.1(a), plus a casual loading of 25%."

[98] Following public consultation before SDP Watson on 27 March 2009, both parties presented further submissions on the proposed new modern award. The MUA's submission now proposed that the casual payment method be based on as an hourly rate of pay,[52] and the draft provision it advanced was as follows:

> "For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for his or her classification in clause 14.1 (a) plus a casual loading of 25%."

[99] The original MUA submission that expressed the payment method as a daily rate was abandoned; however the provision relating to casual engagements of seven continuous days or more was still sought.

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[50] Ibid at clause 3 Definitions and interpretation

[51] See Submission - MUA and AIMPE - regarding tug industry, 6 March 2009 and Submission on behalf of Maritime Towage Employer Group, 6 March 2009.

[52] See Further Submissions of the Maritime Union of Australia and the Australian Institute of Marine and Power Engineers in support of the making of a Marine Towage Award 2010, 17 April 2009 at clause 14.2 of Attachment A and 14.2 of Attachment B

[100] The award modernisation Full Bench made limited comment on the *Marine Towage Award* and did not directly address the issue of a minimum payment for casuals in its decision as part of the Stage 3 modern award process. The Award Modernisation Decision[53] in relation to the *Marine Towage Award* stated as follows:

> "*Marine Towage Award 2010*
>
> [215] We have made amendments to the scope clause of this award to permit the application of the award to towage operations conducted by port authorities and exclude its application to maintenance contractors covered by the Manufacturing Modern Award. We have deleted the classification definitions at the request of the unions. We agree that the classifications are capable of ready application without the definitions in the exposure draft or those initially proposed by the parties.
>
> [216] Other changes relating to allowances and superannuation have also been made consistent with the submissions of the parties."

[101] In summary therefore, the award modernisation Full Bench initially had before it contested positions relating to minimum engagement periods for casuals, but the final position of the MUA accepted casual payment at an hourly rate without any minimum engagement period. Clause 13.3, *Casual rates of pay* of the *Marine Towage Award* reflects the exact wording proposed by the MTEG, which we have set out above, which stipulates that casuals are to be paid an hourly rate of pay, with no reference to a daily rate of pay. The Full Bench did not provide for different conditions for casuals engaged for greater or less than seven continuous days. We conclude therefore that the award modernisation Full Bench made a decision not to include casual daily engagement provisions of the nature of those that were included in the *Tug and Barge Industry (Interim) Award 2002* and the *Tugboat Industry Award 1999*. The MUA has not adduced a merits case justifying a departure from the position arrived at by the award modernisation Full Bench. The MUA submission is therefore not accepted. Attention will need to be given to the form in which rates are expressed in clause 13.1 of the *Marine Towage Award* so that an hourly rate for the purpose of casual employment is identifiable.

[102] The MUA's submission in relation to the *Port Authorities Award* is also rejected. This represents an attempt to advance at the last minute an entirely new claim for an increased minimum engagement period. The opportunity given to interested parties to make submissions in response to the provisional view expressed in the principal decision was not intended for this purpose. In any event, the claim is not supported by any evidence or submissions addressing its merits.

[103] In relation to the *Water Industry Award*, we accept the Ai Group's submission that the existing clause 10.5(a) should remain, and that an additional provision should be added to clause 10.5 to provide for the 2 hour minimum engagement period.

[104] Further draft determinations will be published to give effect to our decision. Parties will be given the opportunity to file further submissions concerning these draft determinations within a period of 7 days. The variations will take effect from 1 October 2018.

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[53] [2009] AIRCFB 826

Minimum daily engagement period for casual employees - *Local Government Industry Award 2010*

[105] In submissions filed on 2 August 2018, the LGA submitted that the inclusion of a two hour daily minimum engagement period for casual employees would require local governments "*to change work practices and services that are provided to the community*", and that there were many instances in local government where casual employees were employed for less than 2 hours, such as fitness instructors, umpires, aged and personal care providers, for lunch or break coverage, in tourism centres and casual rangers dealing with one-off issues. It was submitted that to require such employees to be paid for 2 hours' work would "*be a major financial impact and may result in the removal of these positions and services*" and would be inconsistent with the current one hour daily minimum engagement period for part-time employees. In the alternative, it was submitted that any minimum engagement period should be only one hour.

[106] In the November decision, we noted that Local Government NSW had requested to be heard orally in relation to the issue of minimum engagement.[54] Accordingly a hearing was listed for 2 February 2018, and a direction was made that any further evidence in relation to the issue be filed by 22 December 2017. No evidence was filed pursuant to this direction by any of the LGA (or by anyone else). In a further submission filed on 1 February 2018, the LGA conceded that they had led no evidence in opposition to the addition of a 2 hour minimum engagement period for casuals and accordingly that there was "*no evidentiary basis as to why the this minimum should not be included in the Local Government Industry Award 2010*". At the hearing on 2 February 2018, counsel for the LGA indicated that "*we have abandoned any claim or any attempt to move away from the two-hour minimum stay* [sic]. *That's no longer a matter that we seek to challenge*."[55] We consider that these concessions by the LGA were properly made, and that no basis has been shown why we should depart from the provisional view expressed in the principal decision in respect of the *Local Government Industry Award*. Provision for a 2 hour minimum engagement for casual employees shall be added to the award. A draft determination consistent with our general conclusions earlier stated shall be published, and 7 days will be allowed for further comment. The variation shall take effect on 1 October 2018.

Minimum daily engagement period for casual employees - *Higher Education (Academic Staff) Award 2010*

Submissions - Australian Higher Education Industrial Association (AHEIA)

[107] The AHEIA was opposed to the *Academic Staff Award* being varied to include a 2 hour daily minimum engagement period for casual employees in accordance with the provisional view expressed in the principal decision. It submitted that:

- the employment of casual academics was usually on a semester basis, and academics have a high degree of autonomy as to how, where and when they performed work;

[54] [2017] FWCFB 6181 at [25]

[55] Transcript, 2 February 2018, PN 565

- the hourly rates of pay were high, commensurate with the role of casual academics as skilled professionals, and in addition to the 25% casual loading included a loading to compensate for the work associated with the delivery of teaching (for example, preparation, student contact and contemporaneous marking), with the result that casual academics were actually compensated for a total of 3 hours' work for each one hour of remuneration paid;

- the establishment of a 2 hour minimum engagement could result in employees being required to perform the paid associated work immediately before or after teaching delivery, which would interfere with academics' current autonomy as to how, when and where such work was performed.

Submission - Group of Eight Universities (Go8)

[108] The Go8[56] also opposed the addition of a 2 hour minimum engagement period for casuals in the *Academic Staff Award*. It submitted:

- none of the applications considered by the Full Bench at the hearing included the *Academic Staff Award*, and accordingly issues concerning the engagement of casual academic staff and their unique employment characteristics were not canvassed;

- the *Academic Staff Award* casual hourly rates already incorporated payment for preparatory additional hours of work associated with the delivery of teaching; effectively they were piece rates, so that the rate for a 1-hour lecture included payment for 3 hours representing 1 hour delivery and 2 hours preparation (plus the casual loading);

- the timing and spread of academic work involved a high degree of autonomy and self-determination on the part of the casual academic;

- many casual academic staff were students or staff with other occupations already present at the University;

- some academic work was highly specialised and did not extend to 2 hours' work on a day.

[109] The Go8 submitted, in the alternative, that if the 2 hour minimum engagement was to be included in the *Academic Staff Award*, it should be modified so that:

- an employee who performed academic activity which already incorporated payment for 2 or more hours would be taken to meet the 2 hour minimum daily engagement requirement;

- the minimum engagement requirement would not apply where the staff member could perform their academic activities in 2 or more hours on a single day but chose

[56] University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland

to perform them across a number of days such that they worked for less than 2 hours on any single day;

- it did not apply to employees who were students attending the university in that capacity on the relevant working day, or employees who had a primary occupation elsewhere including with the employing university.

National Tertiary Education Industry Union (NTEU) submissions

[110] The NTEU accepted that casual academic staff engaged on a sessional basis already enjoyed rates which met a 2 hour minimum payment in prescribing both delivery of teaching services plus at least 1 hour's associated working time. However, it submitted, other persons such as PhD students performed more ad hoc work such as tutoring, lecturing and marking as "true casuals", and their pay rates did not incorporate any additional working time. For these employees, a 2 hour minimum engagement would provide protection when they were called in to attend short meetings, demonstrations, short periods of marking and the like, and would ensure that the modern awards objective of providing for a fair and relevant safety net was met. The NTEU submitted that casual academic staff should be viewed in the same way as casual staff in other industries – that is, they should be compensated for the inconvenience and unpredictability of casual engagements via a minimum period of engagement.

Consideration

[111] As noted in the November decision,[57] no party requested an additional hearing in relation to the *Academic Staff Award*, and accordingly we will decide the matter based on the written submissions of the parties (summarised above).

[112] As submitted by the parties, casual employment under the *Academic Staff Award* has some unique characteristics. Clause 13.1 of the award provides for casual employment "*by the hour and paid a rate on an hourly basis*", and clause 13.2 provides that "*The minimum salary paid to academic staff employed on a casual basis will be at the rates provided for in clause 18.2...*". Clause 18.2 provides for hourly rates of pay, inclusive of the casual loading, for casual academics. The rates provided for are in 6 streams: Lecturing, Tutoring, Musical accompanying, Undergraduate clinical nurse education, Marking rate and "*Other required academic activity*". The rates in the first 4 streams all incorporate payment for preparation or "*associated working time*" ranging from 0.5 hours at a minimum to 4 hours at a maximum. For example, the hourly rate of $130.17 for a "*Basic lecture*" includes "*1 hour of delivery and 2 hours of associated working time*", while the rate of $50.79 for undergraduate clinical nurse education where there is "*Little preparation required*" incorporates "*1 hour of delivery and 0.5 hours associated working time*". However the last 2 streams, (Marking and "*Other required academic activity*") do not incorporate any additional working time, so that the hourly rate actually pays for one hour of work. The expression "*Other required academic activity*" is not defined, and presumably it covers any type of academic work under the award which is not encompassed by the other 5 streams.

[57] [2017] FWCFB 6181 at [25]

[113] We do not consider that there is any reason in principle why the provisional view we have reached concerning a 2 hour minimum engagement would not be applicable to casual academic staff. Such staff face the same fundamental issue as other casual employees which was identified in the principal decision - that is, the need, in order to avoid unfairness and exploitation, to ensure that casual employees are provided with sufficient work and income for each attendance at the workplace to justify the expense and inconvenience associated with the attendance. The precise circumstances of individual employees, including whether they have another primary occupation and the extent to which they have to travel to and from work in respect of each particular attendance, will of course vary widely, but the same fundamental issue arises. We consider that it is necessary, in order for the *Academic Staff Award* to meet the modern awards objective, that there be a 2 hour minimum engagement period for casual academic staff. In reaching that conclusion, we have had regard to the matters specified in paragraphs (a)-(h) of s 134 of the FW Act, and we have placed particular weight on paragraphs (a), (d), (da)(ii) and (f).

[114] However we accept that, in crafting a provision to implement a 2 hour minimum daily engagement period, it is necessary to take into account the incorporation into a number of the prescribed hourly rates in clause 18.2 of payments for preparatory and associated work. It would, we consider, constitute double counting if employees received the benefit of a 2 hour minimum payment in addition to the benefit of an hourly rate which was loaded for additional work. We also do not consider that the implementation of a 2 hour minimum engagement period should interfere with the autonomy of academic staff to determine how, when and where they perform any preparatory or associated work. Because preparation or associated time may occur non-consecutively with teaching time, we do not propose to require that the 2 hour minimum engagement period consist of 2 consecutive hours' work. Our provisional view as to how to implement these conclusions is to vary the *Academic Staff Award* to provide for a 2 hour minimum engagement period in the following terms:

> **13.2** A casual employee must be engaged and paid for at least 2 hours of work on each occasion they are required to attend work, inclusive of any allowance for preparation or associated working time provided for in clause 18.2.

[115] A draft determination will be published in the above terms, and parties will be given 7 days to comment upon it. We intend that the final variation take effect from 1 October 2018.

Part-time and casual minimum engagement and facilitative provisions

[116] In paragraph [409] of the principal decision, we determined to uphold a claim made by the AMWU to place a floor under facilitative provisions in four modern awards which allowed the daily minimum engagement period for part-time and casual employees to be reduced by agreement. As identified in the December statement, such provisions in fact only exist in two awards, the *Food, Beverage and Tobacco Manufacturing Award 2010* and the *Manufacturing and Associated Industries and Occupations Award 2010*.[58] Draft determinations to give effect to the principal decision in relation to these two awards were published in conjunction with the December statement. In respect of the minimum engagement period for part-time employees, the proposed new provision for the former award was as follows (emphasis added)

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[58] [2017] FWCFB 6776 at [6]-[8]

> "**12.2** A part-time employee must be engaged for a minimum of ***not less than*** 4 consecutive hours per day or shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for no less than 3 consecutive hours per day or shift. The agreement reached must be recorded by the employer on the employee's time and wages record."

[117] The proposed variation to the latter award was in the same terms.

[118] The Ai Group has submitted that the inclusion of the words "*not less than*" in the above provisions is tautological in effect. We agree, and the words will be deleted. Consistent with our conclusion concerning the 2 hour minimum engagement for casual employees, we will also vary the provision so that it refers to a requirement that a part-time employee be engaged *and paid* for a minimum of 4 hours. Further draft determinations to give effect to this conclusion will be published and parties will be given 7 days to comment. The final variations will take effect on 1 October 2018.

OTHER OUTSTANDING MATTERS

[119] In paragraph [645] of the principal decision, we determined to make variations to the *Social, Community, Home Care and Disability Services Award 2010* and the *Aged Care Award 2010* to clarify that rostering arrangements and changes may be communicated by any electronic means of communication. Draft determinations to give effect to this will be published and parties will be given 7 days to comment on the form of the variations. The final variations will take effect on 1 October 2018.

[120] At paragraphs [858]-[859] of the principal decision, we determined to vary the *Building and Construction General On-site Award 2010* to clarify the way in which the casual hourly rate was to be calculated consistent with the approach proposed by Master Builders Association. However the making of a final variation to give effect to this was deferred pending a decision by the Full Bench conducting the substantive review of the *Building and Construction General On-site Award* (and other construction awards) concerning the issue of allowances. It is expected that the decision will be issued in the near future and the issue will be progressed once that occurs.

VICE PRESIDENT

Appearances:

A. Britt of Counsel on behalf of the Municipal Association of Victoria, the Local Government Association of Tasmania, the Local Government Association of South Australia, the Local

Government Association of Queensland, the Local Government Association of the Northern Territory, the Local Government and Shires Associations of New South Wales and the Western Australian Local Government Association.
K. Rodgers and *G. Smith* on behalf of the Australasian Meat Industry Employees Union.
A. Herbert of Counsel and *K. McKell* on behalf of the Australian Meat Industry Council.
N. Keats on behalf of the Maritime Union of Australia.
S. Crilly, Solicitor, on behalf of Qube Ports Pty Ltd, Qube Bulk Pty Ltd, DP World Group of Companies, Patrick Stevedores Holdings Pty Ltd and Victoria International Container Terminal.
S. Crawford on behalf of the Australian Workers' Union.
B. Rodgers and *K. Pearsall* on behalf of the National Farmers' Federation.
S. Smith on behalf of the Australian Industry Group.
E. Barrett on behalf of the National Union of Workers.

Hearing details:

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