



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

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

(AM2014/196 and AM2014/197)

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

SYDNEY, 5 JULY 2017

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

Contents

1. INTRODUCTION AND STATUTORY FRAMEWORK	5
2. HISTORY AND NATURE OF CASUAL AND PART-TIME EMPLOYMENT	16
3. COMMON CLAIMS	51
4. HOSPITALITY AWARDS.....	183
5. SCHCDSI AWARD AND AGED CARE AWARD	238
6. RETAIL, FAST FOOD AND HAIR AND BEAUTY AWARDS	269
7. HORTICULTURE, PASTORAL AND WINE INDUSTRY AWARDS	285
8. ROAD TRANSPORT AWARDS.....	319
9. BUILDING AND CONSTRUCTION AWARDS.....	332
10. BLACK COAL MINING INDUSTRY AWARD	339
11. RAIL INDUSTRY AWARD	343
12. LEGAL SERVICES AWARD.....	348
13. NEXT STEPS – DIRECTIONS	351
ATTACHMENT A	356
ATTACHMENT B.....	359
ATTACHMENT C.....	361
ATTACHMENT D	363
ATTACHMENT E.....	366

ATTACHMENT F	367
ATTACHMENT G	368

ABBREVIATIONS

AAA	The Accommodation Association of Australia
ABI	Australian Business Industrial
ABS	Australian Bureau of Statistics
ACA	Australian Childcare Alliance
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFEI	Australian Federation of Employers and Industries
Aged Care Award	<i>Aged Care Award 2010</i>
AHA	Australian Hotels Association
AHEIA	Australian Higher Education Industrial Association
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AMIC	Australian Meat Industry Council
AMWU	Australian Manufacturing Workers' Union
ANMF	Australian Nursing and Midwifery Federation
APESMA	The Association of Professional Engineers, Scientists and Managers, Australia
APTIA	Australian Public Transport Industrial Association
ARA	Australian Retailers Association
ASU	Australian Municipal, Administrative, Clerical and Services Union
AWU	The Australian Workers' Union
Black Coal Award	<i>Black Coal Mining Industry Award 2010</i>
Building Award	<i>Building and Construction General On-site Award 2010</i>
Bus Award	<i>Passenger Vehicle Transportation Award 2010</i>
CAI	Clubs Australia Industrial
CFMEU	Construction, Forestry, Mining and Energy Union
CMIEG	Coal Mining Industry Employer Group
Clerks Award	<i>Clerks – Private Sector Award 2010</i>
Clubs Award	<i>Registered and Licensed Clubs Award 2010</i>
Commission	Fair Work Commission
Fast Food Award	<i>Fast Food Industry Award 2010</i>
Federal Court	Federal Court of Australia
FILRI	Fraser Institute Labour Regulation Index

Food and Beverage Award	<i>Food, Beverage and Tobacco Manufacturing Award 2010</i>
FW Act	<i>Fair Work Act 2009 (Cth)</i>
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
Graphic Arts Award	<i>Graphic Arts, Printing and Publishing Award 2010</i>
Group of 8 Universities	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
HABA	Hair and Beauty Australia
Hair and Beauty Award	<i>Hair and Beauty Industry Award 2010</i>
Health Professionals Award	<i>Health Professionals and Support Services Award 2010</i>
HIA	Housing Industry Association
High Court	High Court of Australia
Higher Education Award	<i>Higher Education Industry—General Staff—Award 2010</i>
HILDA	Household, Income and Labour Dynamics in Australia
HSU	Health Services Union of Australia
Horticulture Award	<i>Horticulture Industry Award 2010</i>
Hospitality Associations	Collectively the AHA, MIMA and AAA
Hospitality Award	<i>Hospitality Industry (General) Award 2010</i>
Hospitality Awards	The Clubs Award, the Restaurant Award and the Hospitality Award (collectively)
JES	Joint Employer Survey
Joinery Award	<i>Joinery and Building Trades Award 2010</i>
Law Firms	Russell Kennedy, Norton Rose Fulbright, Arnold Bloch Leibler, Hall & Wilcox, Clayton Utz, Thomson Geer, Corrs Chambers Westgarth, Maddocks, DLA Piper, Allen & Overy, Piper Alderman, Dibbs Barker, Ashurst, Herbert Smith Freehills, Minter Ellison, Allens, Gilbert & Tobin, Lander & Rogers, King & Wood Mallesons, Davies Collison Cave, and Gadens
Legal Services Award	<i>Legal Services Award 2010</i>
Long Distance Award	<i>Road Transport (Long Distance Operations) Award 2010</i>
Manufacturing Award	<i>Manufacturing and Associated Industries and Occupations Award 2010</i>
MBA	Master Builders Association
Meat Award	<i>Meat Industry Award 2010</i>
MIMA	The Motor Inn, Motel and Accommodation Association
MUA	Maritime Union of Australia
NES	National Employment Standards
NFF	National Farmers Federation

NOSHS	National Outside of School Hours Services Association
NRA	National Retailers Association
NSWBC	New South Wales Business Chamber
NSW Commission	Industrial Commission of New South Wales or Industrial Relations Commission of New South Wales
NTEU	National Tertiary Education Industry Union
NUW	National Union of Workers
OECD	Organisation for Economic Co-operation and Development
Pastoral Award	<i>Pastoral Award 2010</i>
PGA	The Pharmacy Guild of Australia
PWDA	People with Disability Australia
Rail Award	<i>Rail Industry Award 2010</i>
Rail Employers	Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd
RCI	Restaurant & Catering Industrial
RCSA	Recruitment & Consulting Services Association Australia & New Zealand
Restaurant Award	<i>Restaurant Industry Award 2010</i>
Retail Award	<i>General Retail Industry Award 2010</i>
Review	4 yearly review of modern awards
Road Transport Award	<i>Road Transport and Distribution Award 2010</i>
RTBU	Rail, Tram & Bus Union
SAWIA	South Australian Wine Industry Association
SCHCDSI Award	<i>Social, Community, Home Care and Disability Services Industry Award 2010</i>
SDA	Shop, Distributive and Allied Employees Association
St Ives	St Ives Group
Stevedoring Award	<i>Stevedoring Industry Award 2010</i>
Stevedoring Employers	Qube Ports Pty Ltd, Qube Bulk Pty Ltd and the employing entities of the DP World group of companies
TCFUA	Textile, Clothing and Footwear Union of Australia
Transitional Review	Transitional (or 2 year) review of modern awards under Item 6 of Schedule 5 to the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> (Cth)
TWU	Transport Workers' Union of Australia
VMRSR Award	<i>Vehicle Manufacturing, Repair, Services and Retail Award 2010</i>
Wine Award	<i>Wine Industry Award 2010</i>
WR Act	<i>Workplace Relations Act 1996</i> (Cth)

1. INTRODUCTION AND STATUTORY FRAMEWORK

1.1 Origin and subject matter of these proceedings

[1] The *Fair Work Act 2009* (Cth) (the FW Act) provides, in s.156, that the Fair Work Commission (the Commission) must conduct a 4 yearly review of all modern awards. The Commission is currently conducting the first 4 yearly review, which was required by s.156(1) to start as soon as practicable after 1 January 2014. In a statement issued on 6 February 2014¹, the Commission identified that the current 4 yearly review would consist of an Initial stage which dealt with jurisdictional issues, an Award stage which dealt with each modern award individually, and a Common issues stage. In a further statement issued by the Commission (Ross J, President) on 17 March 2014², “common issues” were characterised as being likely to be “proposals for significant variation or change across the award system, such as applications which seek to change a common or core provision in most, if not all, modern awards”. Matters identified as common issues would be referred to a specific Full Bench for determination in a “stand-alone” proceeding rather than being dealt with in the context of each individual modern award in the Award stage.

[2] This decision concerns the common issues proceedings dealing with part-time and casual employment. Potential common issues about these subject matters were first identified in a statement issued on 1 October 2014.³ Following this, there was a contest between the peak industrial organisations and other interested parties about whether some or all of these issues should be referred to a separate Full Bench to be dealt with as common issues. This dispute was resolved in a statement issued by the Commission (Ross J, President) on 1 December 2014.⁴ Relevant to these proceedings, the statement said:

“[12] The ACTU is proposing model clauses dealing with the following issues:

- Casual conversion - where a casual employee has the right to elect to have their employment converted to full-time or part-time employment;
- Casual conversion - where a casual employee is deemed to be employed on a permanent full-time or part-time basis after a certain length of time unless electing to remain employed as casual;
- Minimum engagements; and
- Other provisions relating to casual employees.⁴

[13] The ACTU seeks a model casual conversion clause and a four hour minimum payment/engagement for casual and part-time employees covered by a number of awards. The ACTU are also seeking to insert clauses into awards stating that

¹ [2014] FWCFB 916

² [2014] FWC 1790

³ [2014] FWC 6904

⁴ [2014] FWC 8583

employees are not to be engaged and re-engaged to avoid award obligations; that employers shall give existing casuals opportunities to increase working hours by agreement; and that upon engagement casual employees must be informed by the employer about their classification level and rate of pay.

[14] Various employer organisations including ACCI and Ai Group have foreshadowed their strong opposition to the ACTU's claims. A number of submissions, particularly by employer parties, also opposed these claims being dealt with as a 'common issue', largely on the basis that the Commission should have regard to the circumstances in the particular industry or sector covered by an award and not adopt a 'one size fits all approach'. These submissions are more appropriately directed at the *merit* of the claims advanced rather than the *process* adopted for the hearing and determination of the claims.

[15] The ACTU claims are properly characterised as 'common issues' and will be referred to a 'stand alone' Full Bench (the Casual and Part-time Employment Full Bench). The characterisation of a claim as a common issue simply relates to the process adopted for hearing and determining the claim, it does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards. Interested parties who oppose the ACTU's claims on the basis of the particular circumstances pertaining to the modern award in which they have an interest will have an opportunity to make such submissions to the Casual and Part-time Employment Full Bench.

[16] In addition to the ACTU claims a number of employer parties have foreshadowed claims in relation to the various aspects of casual and part-time employment. For example, Ai Group are seeking changes to the casual and part-time employment provisions in some 25 particular awards for reasons relating to the industries concerned. The employer claims tend to relate to awards of specific interest to the relevant organisation and do not seek a common standard across all or most awards. On that basis it is contended that such claims do not have the character of a 'common issue'. I agree. But that still leaves the question of the most appropriate way of dealing with these claims...

...

[19] To ensure that the range of issues relating to casual and part-time employment are dealt with efficiently and to minimise the risk of inconsistent decisions it is appropriate that all matters pertaining to casual and part-time employment be dealt with by one Full Bench, the Casual and Part-time Employment Full Bench. This means that the ACTU and employer claims referred to in the submissions filed and matters which arise during the award stage, will be referred to the Casual and Part-time Employment Full Bench. The referral of these claims to that Full Bench simply relates to the process adopted for the hearing and determination of these claims."

[3] This Full Bench was subsequently constituted to deal with the part-time and casual employment issues identified as part of the Common issues stage of the review.

[4] Since the 1 December 2014 statement, further issues arising from individual awards or groups of awards concerning part-time and/or casual employment have been referred to this Full Bench. The result has been that we have been required to hear and determine a number of

claims advanced by interested parties which affect all, or large numbers of, modern awards, as well as claims which are discrete to particular awards or groups of awards.

[5] A number of claims have been given the nomenclature “*common claims*” because they affected all or a large number of awards. The common claims are dealt with in Chapter 3 of this decision. The claims were, briefly, as follows:

- (1) *The Australian Council of Trade Unions (ACTU)*: The ACTU common claim consisted of three elements. The first concerned casual conversion. The ACTU sought a model casual conversion clause to be placed in 88 modern awards which did not already contain such a clause as well as in 17 modern awards which do currently contain such a clause. The ACTU further sought that the existing casual conversion clauses in 5 other modern awards be altered so that casual employees meeting specified criteria would be deemed to have become permanent employees after an identified period. The second element was a standard provision for modern awards to require a standard daily minimum engagement period of 4 hours for all casual and part-time employees. The third element was a model clause which prohibited employers from engaging and re-engaging casual employees to avoid award obligations, required consultation with current casual and/or part-time employees about increasing their hours of work prior to engaging new employees, and required that casual employees upon engagement be informed of their classification and rate of pay.
- (2) *The Australian Manufacturing Workers’ Union (AMWU)*: The AMWU has claimed 2 variations to the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award), the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (VMRSR Award), the *Graphic Arts, Printing and Publishing Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010* (Food and Beverage Award). The first would vary the existing casual conversion clauses to a “deeming” model of conversion. The second would vary the current minimum engagement provisions for casual and part-time employees so that the minimum period would be 4 hours, or 3 hours by written agreement between the employer and the employee.
- (3) *The Australian Industry Group (Ai Group)*: The Ai Group has sought a variation to the existing casual conversion clauses in 21 of modern awards to remove the requirement upon employers to notify eligible casual employees of their right to request to convert to permanent employment.
- (4) *The Recruitment & Consulting Services Association Australia & New Zealand (RCSA)*: The RCSA has similarly sought to have the notification requirement in the existing casual conversion clauses in 20 modern awards removed.

[6] The claims in relation to specific awards were, in summary:

Hospitality Awards

- The Australian Hotels Association (AHA), The Accommodation Association of Australia (AAA) and The Motor Inn, Motel and Accommodation Association

(MIMA) are seeking to introduce more flexible part-time employment provisions in the *Hospitality Industry (General) Award 2010* (Hospitality Award).

- Clubs Australia Industrial (CAI) is likewise seeking the introduction of more flexible part-time employment provisions in the *Registered and Licensed Clubs Award 2010* (Clubs Award).
- In respect of the Clubs Award, Hospitality Award, and the *Restaurant Industry Award 2010* (Restaurant Award), United Voice seeks to introduce a provision which entitles casual employees to overtime penalties in circumstances where the employees have worked in excess of 38 hours per week or exceeded 10 hours per day. It also made late claims for the minimum daily engagement period for casual employees to be increased from 2 hours to 3 hours in each (in the alternative to the ACTU's claim for 4 hours in all awards), and for the daily maximum ordinary hours for full-time and part-time employees under each award to be equalised at 10 hours.

These claims are dealt with in Chapter 4 of this Decision.

SCHCDSI Award and Aged Care Awards

- Australian Business Industrial (ABI) and the New South Wales Business Chamber (NSWBC) are seeking a variation to the part-time employment provisions in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHCDSI Award) to allow greater flexibility in the rostering of the hours of part-time employees in relation to a certain category of work (primarily related to the implementation of the National Disability Insurance Scheme). Jobs Australia supported these variations.
- The St Ives Group is seeking variations to the *Aged Care Award 2010* (Aged Care Award) and the SCHCDSI Award to make part-time employment more flexible and to amend provisions in relation rostering.

These claims are dealt with in Chapter 5 of this Decision.

Retail Awards

- The Shop, Distributive and Allied Employees Association (SDA) is seeking variations to the *General Retail Industry Award 2010* (Retail Award), the *Fast Food Industry Award 2010* (Fast Food Award) and the *Hair and Beauty Industry Award 2010* (Hair and Beauty Award) to establish an entitlement for casual employees to the payment of overtime when performing work in excess of ordinary hours.
- The Ai Group proposes that the Fast Food Award be varied to allow employers and casual employees individually to agree to a minimum daily engagement period of less than the current minimum of 3 hours.

These claims are dealt with in Chapter 6 of this Decision.

Horticulture, Pastoral and Wine Industry Awards

- The Australian Workers' Union (AWU) is seeking a variation to the *Horticulture Award 2010* (Horticulture Award) to clarify that a casual employee is entitled to overtime rates where the employee has worked outside the span of ordinary hours.
- The National Farmers Federation (NFF) is seeking a variation to the *Pastoral Award 2010* (Pastoral Award) to reduce the minimum period of engagement of dairy operators from 3 hours to 2 hours.
- The South Australian Wine Industry Association (SAWIA) is seeking a variation to the *Wine Industry Award 2010* (Wine Award) to reduce the minimum engagement of casual employees from 4 hours to 2 hours.

These claims are dealt with in Chapter 7 of this Decision.

Road Transport Awards

- The Australian Public Transport Industrial Association (APTIA) is seeking to introduce a new provision in the *Passenger Vehicle Transportation Award 2010* (Bus Award) which clarifies the operation of the minimum engagement period obligation for casual school bus drivers, and enables casual school bus drivers and their employer to agree to a minimum payment per engagement of less than the current 2 hours in certain circumstances.
- The Transport Workers' Union of Australia (TWU) is seeking to insert a new provision in the Bus Award to clarify that a casual employees engaged solely for the purpose of transportation of school children to and from school may be rostered to perform 2 separate engagements per day with each engagement being a minimum of 2 hours.
- The Ai Group seeks the introduction of provisions in the *Road Transport (Long Distance Operations) Award 2010* (Long Distance Award) to enable employees to be employed on a part-time basis. The award currently only allows for full-time and casual employment.

These claims are dealt with in Chapter 8 of this Decision.

Building and Construction Awards

- The Master Builders Association (MBA) and the Housing Industry Association (HIA) have made separate and differing applications to vary the casual employment provisions in the *Building and Construction General On-site Award 2010* (Building Award) and the *Joinery and Building Trades Award 2010* (Joinery Award) to clarify how casual hourly rates are to be calculated.
- The HIA and the Ai Group both seek a reduction in the daily minimum engagement period for casual employees in the Joinery Award from 7.6 hours to 4 hours.

These claims are dealt with in Chapter 9 of this Decision.

Black Coal Mining Industry Award

- The Ai Group seeks that the *Black Coal Mining Industry Award 2010* (Black Coal Award) be varied to remove the current restriction which only allows casuals to be engaged in staff classifications. The removal of this restriction would have the effect of permitting casuals to be engaged across all classifications of the award.

This claim is dealt with in Chapter 10 of this Decision.

Rail Industry Award

- The Rail, Tram & Bus Union (RTBU) seeks a variation to the *Rail Industry Award 2010* (Rail Award) to clarify that the casual loading of 25% will be paid when overtime and penalty rates are applicable.

This claim is dealt with in Chapter 11 of this Decision.

Legal Services Award

- A group of 21 law firms⁵ seeks a variation to the *Legal Services Award 2010* (Legal Services Award) to reduce the minimum payment for casual employees from 4 hours to 3 hours.

This claim is dealt with in Chapter 12 of this Decision.

1.2 Statutory framework – general principles

[7] Section 156 of the FW Act provides:

“156 4 yearly reviews of modern awards to be conducted

Timing of 4 yearly reviews

(1) The FWC must conduct a *4 yearly review of modern awards* starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).

Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).

⁵ Russell Kennedy, Norton Rose Fulbright, Arnold Bloch Leibler, Hall & Wilcox, Clayton Utz, Thomson Geer, Corrs Chambers Westgarth, Maddocks, DLA Piper, Allen & Overy, Piper Alderman, Dibbs Barker, Ashurst, Herbert Smith Freehills, Minter Ellison, Allens, Gilbert & Tobin, Lander & Rodgers, King & Wood Mallesons, Davies Collison Cave and Gadens.

What has to be done in a 4 yearly review?

(2) In a 4 yearly review of modern awards, the FWC:

(a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

(c) must not review, or make a determination to vary, a default fund term of a modern award.

Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 2: For reviews of default fund terms of modern awards, see Division 4A. Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

Each modern award to be reviewed in its own right

(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

[8] The Commission is constrained in its conduct of a 4 yearly review by s.138, which provides:

“138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.”

[9] Section 136 sets out the terms which may or must be included in a modern award. Section 136(1)(a) refers to Subdivision B of Division 3 of Part 2-3 of the FW Act as setting out the terms that may be included in a modern award. Section 139, which falls within Subdivision B, sets out the general categories of terms which may be included, and s.139(1)(b) specifically provides that a modern award may include terms about the following matters:

“(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;”

[10] The modern awards objective referred to in s.138 is set out in s.134 as follows:

“134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

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

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

This is the *modern awards objective*.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's *modern award powers*, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[11] The general principles as to the interpretation and application of the above provisions in the conduct of the 4 yearly review have been comprehensively stated in a number of decisions issued in the course of the review, most notably the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*⁶, the *4 Yearly Review of Modern Awards - Annual Leave Decision*⁷ and the *4 Yearly Review of Modern Awards - Penalty Rates Decision* (the *Penalty Rates Decision*).⁸ We intend to follow those principles. It is not necessary to fully reproduce all that is stated in those decisions, but in the context of the issues in these proceedings 3 matters bear emphasis. Firstly, in the *Penalty Rates Decision* the Full Bench made it clear that it was not necessary, in order to justify the variation of a modern award, that a "material change in circumstances" since the making of the modern award(s) under review be demonstrated.⁹ Rather, it summarised the task of the Commission in the conduct of the 4 yearly review as follows (footnotes omitted):

"1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.

⁶ [2014] FWCFB 1788 at [19]–[24]

⁷ [2015] FWCFB 3406 at [11]–[38]

⁸ [2017] FWCFB 1001 at [95]–[141], [162]–[165], [230]–[270]

⁹ *Ibid* at [230]–[264]

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
 - the legislative context which pertained at that time may be materially different from the FW Act;
 - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
 - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.”

[12] Secondly, in order to be satisfied that a modern award is not achieving the modern awards objective, it is not necessary to make a finding that the award fails to satisfy one or more of the considerations required to be taken into account under s.134(1). The Commission's task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions.¹⁰

[13] Thirdly, the requirement in s.156(5) to review each award “*in its own right*” is intended to ensure that the review is conducted by reference to the particular terms and particular operation of each particular award, rather than by a global assessment based upon generally applicable conditions. However this does not mean that the review of a modern award is to be confined to a single holistic assessment of all of its terms, nor does it prevent the Commission from reviewing 2 or more modern awards at the same time.¹¹ We will deal with this issue in greater detail later in this decision in the context of submissions advanced by the Ai Group and the Australian Chamber of Commerce and Industry (ACCI) in opposition to the ACTU's claims.

¹⁰ Ibid at [162]–[163], citing *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [105]–[106], [109]

¹¹ Ibid at [102]–[103], citing *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [85]–[86]

1.3 Terminology used in this decision

[14] Most modern awards provide for three types of employment: full-time, part-time and casual. Different terminology has been used to distinguish full-time and part-time employment from casual employment. Full-time and part-time employment were for a long time described as “weekly” employment, on the basis of the notice period usually required under awards to terminate the employment. As discussed later, this was fundamentally different to casual employment, which may be terminated on short or no notice. However the label of “weekly” employment has generally fallen into disuse, particularly having regard to the longer notice periods prescribed by s.117 of the FW Act where the employment has lasted longer than a year. Another common description of full-time and weekly employment, as distinct from casual employment, is “permanent” employment. This is somewhat of a misnomer, since no employment is truly permanent, but this expression is in common currency and will be used throughout this decision. It is particularly useful to distinguish part-time employment in the sense it is used in modern awards from casual employment involving the working of part-time (that is, less than full-time) hours.

2. HISTORY AND NATURE OF CASUAL AND PART-TIME EMPLOYMENT

2.1 Casual employment

[15] Before proceeding to direct consideration of the various claims concerning casual employment, it is first useful to examine the history and nature of casual employment. As will be made clear, the concept of casual employment is elusive, and its legal and practical incidents have been the subject of a considerable degree of conflicting or inconclusive analysis.

Early workers' compensation and other decisions

[16] Judicial consideration of casual employment as a distinct category of employment in the courts of the United Kingdom and Australia appears to have first occurred in the early twentieth century in connection with the application of workers' compensation legislation. One of the earliest decisions to have discussed casual employment in detail, in the context of employment practices at the London docks, was that of the UK Court of Appeal in *Barnett v Port of London Authority*.¹² The matter involved the proper method of determining the average weekly wages of 2 injured casual dock workers for the purpose of assessing the compensation to which they were entitled under the *Workmen's Compensation Act 1906* (UK), in circumstances where they had not been employed long enough to average their earnings. On the facts of the case, that depended on the number of days' work per week the employees would have worked. Cozens-Hardy MR described the system of employment applying to both workers as follows:

“At the docks of the Port of London Authority there are men on the permanent staff, who may be said to be divided into two classes. Then come casual labourers - (1.) B casuals, who have tickets entitling them to be called on next after the permanent men have been employed, and (2.) extra casuals, who have no tickets and are not called on until both the permanent men and the B casuals have been employed. The pay for the B casuals and the extra casuals is identical, namely, 7d. per hour with overtime.”¹³

[17] The majority considered that the preferential status of the “B casual” would in normal circumstances advantage him in terms of the allocation of work over the “extra casual”. Lord Justice Hamilton said in relation to the first of the 2 workers under consideration:

“I think there is no evidence on which he could find that the workman could average more than three days as a dock labourer. The applicant gave no such evidence, and the evidence for the respondents was that a man to whom the port authority had not given a ticket would only get three days' work per week as a dock labourer, of which only one would be in their employment, as against three or four if he had a ticket. The applicant had no ticket and was not entitled to one. It was his personal disability existing in fact, and so long as it lasted there was no evidence that he could get over three days' work a week on an average as a dock labourer.

¹² [1913] 2 KB 115

¹³ *Ibid* at p.122

...
... the acquisition of a ticket conditioned the chance of employment, and this was a fact bearing on the earnings of a person in the grade of a dock labourer in the port authority's employment that could not be disregarded."¹⁴

[18] This early decision made it apparent that persons who were regarded as “casuals” for the purpose of the legislation were not necessarily a homogenous class, and that different casuals could have different expectations of continuing employment depending upon the particular circumstances of their engagement. The common feature of the casual employment system described was however that employment was by the day.

[19] In *Cue v Port of London Authority*¹⁵, consideration was given to the employment arrangements of the deceased worker in relation to whom a compensation claim had been made pursuant to the *Workmen's Compensation Act 1906* (UK). The worker was a docker who had worked casually for 2 different employers over a period of time. In the judgment of Swinfen Eady LJ, the contractual basis of the worker's casual employment was described in the following terms:

“Perhaps these may be called successive contracts, because technically, even with casual employment, for the time of the actual employment there was a subsisting contract, but it was merely casual employment; that is to say, there were no running contracts under which the employer was entitled to require the labour of the workman or under which the workman was entitled to demand employment from the employer.”¹⁶

[20] In the same decision Pickford LJ described the worker's casual employment in the following terms:

“Now the nature of casual employment of that kind is quite well known. The contract that exists is the contract that arises from the taking on of men to do a job and the job is for a whole day or a half-day, as the case may be. As soon as that job is done the contract is done. He then on the next day, or if he has only worked half a day possibly the same day, takes another job from another employer, but he does not do that till the first job is finished. The result of that is that he only takes the second job, on which the contract arises, after the first one is finished, and he only takes a later one after the former one is finished.”¹⁷

[21] The above analysis was in aid of the conclusion reached by Pickford LJ (and the other members of the court) that, although the workman had performed work for 2 different employers, he could not be characterised for the purpose of the legislation as being engaged under “concurrent” contracts of employment because, being employed casually, there was never more than one contract of employment on foot at any one time. The analysis, in contractual terms, characterised the employment as a series of fixed-term employment

¹⁴ Ibid at pp.128–9

¹⁵ [1914] 3 KB 892

¹⁶ Ibid at p.900

¹⁷ Ibid at p.904

contracts, not lasting beyond a day, under which there was no continuing obligation upon the employer to employ, and no continuing obligation on the employee to attend for work.

[22] The same approach was taken in the House of Lords decision in *Price v Guest, Keen and Nettlefolds, Limited*¹⁸, which involved the consideration of a provision in the *Workmen's Compensation Act 1906* (UK) under which compensation to the widow of a deceased worker was to be assessed as “a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury”. Lord Atkinson said:

“In some cases, such as that of dock labourers, the man is, I believe, employed for the day and paid off at night. There is a new contract of service entered into each morning; but a continuous and unbroken succession of such contracts as these for three years might form the basis of an employment for three years. The rules do not require that one contract of service should cover the whole period of three years. It is the employment which is to cover that period in order to bring the case within the first limb of the rule.”¹⁹

[23] Issues concerning casual employees similar to those addressed in the UK cases referred to arose in the Australia courts after the introduction of statutory workers' compensation schemes in the various States. The High Court decision in *Doyle v Sydney Steel Co Ltd*²⁰ is the most important early example of these decisions, and like the UK cases involved a question as to how the average weekly earnings of a casual employee should be determined for the purpose of the assessment of workers' compensation (under the *Workers' Compensation Act 1926* (NSW)). In the judgment of Dixon J (as he then was), reference was made to a number of the UK cases including *Cue v Port of London Authority* and *Price v Guest, Keen and Nettlefolds, Limited*, and it was noted that the NSW Act had been amended to add a provision concerning the ascertainment of the average weekly earnings of casual workers in terms which reflected the analysis of Swinfen Eady LJ in *Cue* which has earlier been quoted.²¹ Dixon J then addressed the difficulty of determining average weekly earnings for short-term and intermittent workers, and in doing so referred to the lack of definition as to what was involved in casual employment:

“If, because of the shortness of the time during which the supposed employment by the fictional single employer has continued or because of its terms, it is impracticable to compute the rate of remuneration, recourse must be had to the standard of what another worker earns.

In the case of such typical casual work as wharf labouring, all this causes little or no difficulty. But unfortunately what is casual employment is ill defined. Indeed it is scarcely too much to say that it seems open to a tribunal of fact to treat most forms of intermittent or irregular work as casual. Where the employment involves a contract of service lasting some weeks followed by a long interval of idleness and then another such contract of service and so on, more difficulty arises, if the view is taken that the employee is a casual worker. Such a case is before us in the present appeal.

¹⁸ [1918] AC 760

¹⁹ *Ibid* at pp.771–772

²⁰ (1936) 56 CLR 545

²¹ *Ibid* at p.554

The worker, who is the appellant, is a boiler-maker. After ten months' work out of the State, he returned to New South Wales in May 1934. He succeeded in obtaining a week's work at his trade. This was followed by nearly six weeks' idleness. Then, after a little over two weeks' work for another employer, he remained unemployed for nine weeks. He had two more weeks' work for a third employer and then eight more weeks' idleness. Another fortnight's work brought him to 17th December, when his work ended. But he resumed with the same employer on 17th January and worked two weeks. After an interval of a week's idleness, he obtained employment with the respondent. After nearly six weeks' work, he again became unemployed on 14th March 1935, the date of his injury. Evidence was given of the manner in which boiler-makers are engaged, how they are taken on as occasion arises and put off when the work is finished, and how some are given more permanent employment. The evidence showed the fluctuations in the numbers employed by the respondent during recent years when work was not plentiful. It appears that the appellant was paid the wages of a casual. In these circumstances the Workers' Compensation Commission found that he was a casual worker. I do not know that this finding really operates against him. For even so, upon the facts the ascertainment of his average weekly earnings would depend on the question formulated by *Cozens-Hardy* M.R. in *Anslow v. Cannock Chase Colliery Co. Ltd.* He said:—"In my opinion the true test is this. What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked."²²

[24] Justice McTiernan also touched upon the characteristics of casual employment as follows:

"Now the term 'casual worker' is not capable of exact definition. *Hamilton* L.J. said in *Knight v. Bucknill* (1913) 6 B.W.C.C., at pp. 164, 165.: 'I think that casual is here used not as a term of precision, but as a colloquial term.' Each case is to be determined on its own facts, consideration being given not only to 'the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period of time over which the employment extends, indeed all the facts and circumstances of the case' (*Stoker v. Wortham* (1919) 1 K.B. 499, at pp. 503, 504., per *Swinfen Eady* M.R.)."²³

[25] The difficulty in attaching any precise meaning to the concept of casual employment was reiterated by the High Court in *Shugg v Commissioner for Road Transport & Tramways (NSW)*.²⁴ That matter concerned the question of whether a person employed by a NSW Government transport agency as a casual employee, who had continuously been employed for over 3 and a half years, was an "officer" within the meaning of the *Transport Act 1930* (NSW) and thus entitled to certain leave benefits. The relevant provision of this Act under which the person was engaged stated: "*The board may appoint, employ, and dismiss such casual employees as it deems necessary for the purposes of this Act, and may fix wages and conditions of employment where these are not fixed in accordance with the provisions of other*

²² Ibid at pp.555–556

²³ Ibid at p.565

²⁴ (1937) 57 CLR 485

Act". The majority (Latham CJ, Dixon, Evatt and McTiernan JJ; Starke J dissenting) determined that the employee was an officer notwithstanding that he was a casual. Latham CJ found that the provision of leave to the employee was not inconsistent with the right of the employer to dismiss him at any time:

"In the case of a casual employee still in the employment of the commissioner such considerations do not exist. There is, in my opinion, no difficulty in applying the words to a casual employee in such a position. If a casual employee has actually served for twelve months, it is quite possible to give him a week's leave on full pay. If he has completed twenty years of service, there is no difficulty in giving him 'one month's extended leave on full pay.' So also, if he has been required to work on a bank or public holiday, there is no difficulty in giving him leave on full pay for another day at some future time. In my opinion there is neither legal nor administrative difficulty in applying these provisions to casual employees who are still in the employment of the commissioner."²⁵

[26] Dixon J distinguished between casuals employed continuously for lengthy periods and those employed only on particular occasions:

"The expression 'casual' is a word of indefinite meaning which elsewhere has caused difficulty. We are apt to associate with the word elements of chance or of discontinuity. We perhaps think of casual employment as occasional or intermittent. But it has been found so difficult to fix any definite tests for casual employment that under Workmen's Compensation Acts refuge has been taken in treating it as a question of fact in each case. I do not think that sec. 101 means to confine the board's power of appointing casual employees to temporary or unforeseen occasions. This case shows that the board in the exercise of the power retains men in its employment who are required for regular work and for an indefinite duration of time. Treating the section in this way as authorizing general employment as distinguished from appointment to permanent office, it appears to me that it does not afford the criterion for determining who do and who do not fall within sec. 123. The distinction upon which the application of sec. 123 turns is, I think, between a general, indefinite or continuous employment and an employment for a particular occasion or occasions, or to fulfil some special or defined purpose of brief duration. If an employment is continuous, it may result in twelve months actual service or, indeed, conceivably in twenty years' service. I do not think that there is enough in sec. 123 or in the other sections dealing with officers to indicate that the word 'officer' in sec. 123 does not include men continuously employed in such a way, simply because they are appointed under sec. 101. The definition of 'officer' therefore appears to me to apply to sec. 123. But from its terms that section is inapplicable to cases such as were put in argument of men put on for a public holiday or holidays or for some other particular occasion and not employed continuously or indefinitely."²⁶

[27] Evatt J emphasised that the relevant Act empowered the employment of casuals for long periods of time, and stated:

²⁵ Ibid at p.491

²⁶ Ibid at pp.496-497

“The sole question which arises is whether the plaintiff was an ‘officer’ entitled to the benefit of sec. 123. By sec. 4, unless the context or subject matter otherwise indicates or requires, an officer means any ‘person employed or appointed by the Commissioner of Road Transport or by the Board.’ Prima facie, therefore, the plaintiff, as a person so employed, is an ‘officer’ within the meaning of sec. 123. It is contended that the context indicates otherwise. No doubt, the plaintiff is a ‘casual employee’ within the meaning of sec. 101. But, in my opinion, sec. 101 was inserted in order to provide statutory warrant for the practice adopted by the Railway Commissioners, of appointing persons temporarily and continuing them in employment for periods extending far beyond the period of six months contemplated by the *Government Railways Act 1912*. Sec. 101 gives a specific authority to employ without any such limitation of time. Thus the plaintiff has been a ‘casual’ for three and one-half years and apparently will be employed indefinitely.

Sec. 101 does not require or even suggest that a person appointed thereunder is not an ‘officer’ within sec. 123. The policy embodied in sec. 123 is that the granting of leave in respect of public holidays is regarded as necessary for the efficiency of the transport services, especially as, in the case of the running services, the strain of work is greatly increased by reason of the increased public use of the services on holidays. It would be surprising to find that leave is granted to one employee but denied to another similarly employed merely because the latter is not ‘permanent.’ There appears to be no obligation to make ‘casual’ employees ‘permanent’ after a certain term, so that, if the commissioner is right, a ‘casual’ might be employed for twenty years in the department but receive none of the benefits of sec. 123.”²⁷

[28] Starke J, in his dissenting judgment, considered that the statutory provision conferring leave benefits on “officers” was inapt to apply to casuals, stating:

“In my opinion this provision contemplates continuity of employment appropriate to the permanent and regular staff of the defendant, and is wholly inappropriate to the persons casually or intermittently employed.”²⁸

[29] It not possible to obtain from *Doyle* and *Shugg* any clear set of objective criteria by which it might be determined that employment is casual in nature. The judgment of Dixon J in *Doyle* disavowed the contractual analysis in the early UK cases we have earlier referred to that casual employment consists of a series of contracts lasting no longer than a day, since Dixon J contemplated that casual employment might consist of contracts of employment lasting for a period of weeks on each occasion. In *Shugg*, although it was pre-supposed that casual employment would display the characteristics of being occasional, intermittent and discontinuous, this did not always need to be the case, and it was possible for long-term regular employment to also be casual in nature.

Development of federal award regulation of casual employees

[30] The early development by the then Commonwealth Court of Conciliation and Arbitration of award provisions appropriate for casual employees was intertwined with the

²⁷ Ibid at p.498

²⁸ Ibid at p.494

development of the concept of weekly or “permanent” employment.²⁹ This may be illustrated by the early history of the award which subsequently became colloquially known as the Metals Award. The first award was made by the Court, constituted by its President, Higgins J in 1921 in *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.*³⁰ In relation to a claim for employees to receive weekly as distinct from hourly rates, Higgins J made a distinction between “regular” and “permanent” employment on the other hand and casual employment as follows:

“Weekly Rates

The claim is for weekly rates with one week’s notice on either side before termination of employment. The usual practice, here as in England, is to have hourly rates for engineers. In the log of 1919, this union claimed daily rates. I have often expressed myself in favour of weekly employment in all cases where the nature of the business makes it practicable. In Great Britain even dockers - waterside workers - have recently secured daily rates instead of hourly. The employment of engineers is regular and fairly permanent. Men keep at the same undertaking day after day, week after week, even year after year; and even if work is not ready for them, of [sic] if they are absent through illness or other cause, or if they lose an hour, even five minutes in some cases, they lose their pay. There is nothing that steady family men desire more than constant work, and some certainty as to their income for a week or more ahead. My wages – basis and secondary – are awarded on the assumption that the employment is regular; and if the work is casual, not regular (as in the cases of the builders labourers and the waterside workers), I award more per hour than in the case of regular work. The employment - whatever it is - should yield enough pay for the needs of family life and the suitable reward for special qualifications. Under weekly wages the employee tends to identify himself with the particular undertaking, to feel interested in the concern, and it takes much more to induce him to throw up a job if it is constant. It is in the interest of the employers as well as in the interests of the employees that the employment should not be casual, that a man should not feel himself to be a piece of flotsam or jetsam in the industry - that he should have a sense of homeship in the concern. Moreover, the wages prescribed will be less; I am providing for 10 per cent higher wages in undertakings such as Mort’s Dock, in which casual labour for urgent repairs to ships seems to be necessary. I have carefully considered the objections made by employers to the change proposed - for it is a great change; and I think the objections can be met. The chief objection is of course, that if the employees do not suffer the loss of an hour’s pay for an hour’s absence, the inducement to be punctual and regular is taken away. Of course, the employer will have power to discharge the employee on notice, or in case of wilful misconduct, to dismiss him forthwith, without paying him for the part of the week served; but, in dismissing certain employees, the employer may be rather punishing himself. For instance, roll-turners are essential for the steel works at Warratah; but they are very scarce; and they cannot be replaced by others. Mr Evernden, one of the union officials, assures me that the men would not take advantage of the weekly tenure by greater irregularity of attendance; that they

²⁹ Although “permanent employment” is a misnomer, it is a well-established expression used to describe employment, either full-time or part-time, that is not casual and is only terminable on notice except in circumstances where summary dismissal is justified. The expression is used in this decision on that basis.

³⁰ (1921) 15 CAR 297

would feel more bound in honour to attend, as the whole loss for non-attendance would fall on the employer. I shall not, until the experiment be tried, treat this sentiment of honour as a thing to be scorned. Moreover, the same official tells me that if absences are more frequent under the same weekly wage than under the hourly, he thinks that the Court would be justified in varying the award. In the Old country, this union often expels men for laziness; and the union would consider a rule for similar discipline. I propose also, in prescribing the weekly hiring, to allow a deduction of pay for absence without reasonable cause. Mr. Lamb, the Union Engineering Co., says that this power to deduct for absence would meet the difficulty; and Mr Gepp, of Electrolytic Co., of Hobart, says it will meet at least one objection. I provide also that the engagement shall be from day to day for fourteen days, in order that the employer may have a chance of proving a new man's competence and conduct. Perhaps I should add that the Metropolitan Gas Company of Melbourne has filed in this Court an agreement with the Federated Gas Employees Union, 10th December , 1920, for a weekly wage; but the agreement was made at my suggestion and in order to meet a difficult position."³¹

[31] In the award, clause 12(a) provided for weekly employment as follows:

“Weekly Hiring

12. (a) Except as to the casual employees referred to in clause 1 the employment is terminable on either side by one week's notice given on any day or (if the employer terminate it) by payment of one week's pay. But for the first fourteen days of employment the hiring shall be from day to day and during this period a day's notice or a day's pay shall be sufficient."³²

[32] The exception of casual employees from weekly hiring in the above provision referred to clause 1, which relevantly provided:

“But for casual employees of Mort's Dock and Engineering Company Limited, the Adelaide Steam-ship Company Limited, Chapman and Company Limited, and Poole and Steel Limited (at their respective works at Balmain) or of any other respondent the nature of whose business at the time of this award rendered similar casual employment necessary the minimum rates shall be per day and shall be one-sixth of the weekly rates above prescribed with the addition of 10 per centum."³³

[33] Higgins J's analysis was based on the notion that the defining characteristics of casual employment were that it involved work that was not constant or regular and daily engagement. He then assigned award entitlements to regular/permanent employees on the one hand and casual employees on the other on the basis that the employment in the former category would only be terminable on a week's notice or a week's pay in lieu (except in the case of misconduct or during an initial engagement period of 14 days), and that the employment in the latter category would be by the day and would attract an hourly rate of pay with a loading (of 10%). Higgins J's decision was a foundational one for industrial arbitration,

³¹ Ibid at pp.319–320

³² Ibid at p.338

³³ Ibid at p.333

since it established a structure of award entitlements for different modes of employment which has subsequently become ubiquitous – the alternatives being weekly employment on the one hand, and employment on an hourly rate with a casual loading on the other. However in the award that he made, Higgins J did not establish firm criteria by which employees might be placed and remunerated in one category or the other (apart from the general reference in clause 1 to the casual rates being applicable to casual employees employed by the specifically identified employers or by those whose businesses of their nature “rendered ... casual employment necessary”). That is, the award applied casual employment entitlements to those employees who had a pre-existing designation as a casual, rather than attempting to define the characteristics of an employee to whom casual award entitlements were permitted to be paid. As will become apparent, that also became a pervasive feature of subsequent awards in Australia.

[34] It may additionally be noted that Higgins J placed emphasis on the non-monetary benefits for employee morale of weekly as distinct from casual employment. That is a theme to which we will return later in this decision.

[35] The issue of weekly hiring was subsequently revisited in relation to the award. In 1930 in *Amalgamated Engineering Union v Metal Trades Employees Association*³⁴ the Court, constituted by Beeby J, said:

“Weekly and Hourly Hiring

A difficult matter involved in these disputes was the question of whether engagement of labour should be by the week or by the hour. Employers again pressed very strongly for the hourly system, the Amalgamated Engineering Union just as strongly urging that the weekly system inaugurated by Mr. Justice Higgins in 1921 should continue. All other unions concerned, however (though some of them had asked for weekly hiring in their claims), ultimately agreed to either hourly rates with an addition to cover holidays and absences through sickness, or to an alternative system under which employers could adopt either method of engagement.

When dealing with an application in 1927 by engineers to vary their award in conformity with the 44-hour decision, I was impressed by evidence of employers as to disabilities which the weekly system imposed, and award, at the discretion of the employer, either weekly or hourly hiring. At that time I believed that the alteration so made would not violently disturb the customs then prevailing, but later, on facts which then seemed sufficient, and which need not now be traversed, I restored the weekly system, reserving the whole matter for reconsideration on the hearing of disputes relating to other classes of employees engaged in the industry as well as engineers. After much anxious thought, and in view of the preference of the majority of workmen employed in the group of industries as a whole, I have decided that the employer shall have the right to employ men by the week as in the expired engineers’ award, or by the day, with a proviso that if employment is not by the week wage rates prescribed shall be increased to the extent of 5s. per week in lieu of holiday pay and as compensation for average absences through sickness. I am satisfied that every employer can so adjust his business as to guarantee (with the exception of work on the water front or field

³⁴ (1929) 28 CAR 923

work) at least one day's work, and with those exceptions have provided for day wages. I have decided on this course mainly for the purpose of bringing about uniformity. If all the unions had claimed weekly hiring the result might have been different. But as all except one declare a preference for the loaded daily or hourly rate, for the sake of harmonious working the minority must give way to the majority. I still believe that a large section of employees in this industry can with advantage be kept on weekly hiring. The man who is guaranteed a week's work, with a week's notice of dismissal, is more likely to be interested in the welfare of his workshop than one who can be dismissed at any moment. I make this change believing that the mistake which many employers made on a previous occasion of unnecessarily disturbing conditions will not be repeated. There is no reason why a large percentage of the skilled labour in the industries should not be engaged on the weekly basis. *I make no order compelling the adoption of either system, leaving employers free to arrange with their workmen which system shall operate, with the proviso that where the hiring is not weekly workmen shall receive the extra 5s. per week.*³⁵ (emphasis added)

[36] The award that was made by the Court relevantly provided as follows:

“Contract of Employment

13. (a) With the exceptions hereafter stated, employment may be by the week or by the day. If by the week, it shall be terminable on either side of one week's notice given on any day, or (if the employer terminate it without such notice) by payment of one week's wages.

...

(b) If the contract of employment is for daily hiring, the rates prescribed in clause 1 shall be increased 5s. per week as compensation for time lost on public holidays and unavoidable absences through sickness.”

...”

[37] As the emphasised passage in the decision of Beeby J and the award clause he determined make clear, the alternative modes of weekly employment and casual employment with a loaded rate were available as options to be selected by arrangement between the employer and the employee, and not on the basis of any objective criteria as to what constituted casual employment.

[38] In the succeeding award made in 1935³⁶, there was a reversion from daily hire to hourly hire for casuals, so that the “Contract of Employment” clause now included the following in subclause (a):

“Contract of Employment

16. (a) With the exceptions hereinafter stated employment may be by the week or by the hour. If by the week it shall terminable on either side by one week's notice given on any day, or (if the employer terminate it with such notice) by payment of week's wages.”

³⁵ Ibid at pp.971–972

³⁶ (1935) 34 CAR 449

[39] The *Metal Trades Award* made by the Court (O’Mara J) in 1941³⁷ modified the position further by defining weekly employment and casual employment as distinct categories of employment in the following way:

“*Weekly employment*

18. (a) Except as hereinafter provided employment shall be by the week. Any employee not specifically engaged as a casual employee shall be deemed to be employed by the week

...

Casual Employment

(d) A casual employee is one engaged and paid as such. A casual employee for working ordinary time shall be paid per hour one-fortieth of the weekly rate prescribed by this award for the work which he or she performs.”³⁸

[40] The method adopted in the 1941 Metals Award of defining casual employees as those “engaged and paid as such”, with payment being on the basis of an hourly rate with a casual loading, did not in substance change prior to the establishment of modern awards. Thus the *Metal, Engineering and Associated Industries Award 1998 - Part I* at the time it was made (in clauses 4.2.2 and 4.2.3(a)) defined full-time employment and casual employment as follows:

“4.2.2 Full-time Employment

Any employee not specifically engaged as being a part-time or casual employee is for all purposes of this award a full-time employee, unless otherwise specified in the award.

4.2.3 Casual Employment

4.2.3(a) A casual employee is to be employed by the hour. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 5.1 for the work being performed plus a casual loading of 20 per cent. The loading constitutes part of the casual employee’s all purpose rate.”³⁹

[41] The history of award regulation of casual employment in the metals industry was comprehensively reviewed by a Full Bench of the Australian Industrial Relations Commission (AIRC) in *Re Metal, Engineering and Associated Industries Award, 1998 - Part I*⁴⁰ (*Metals Casuals Decision*) – a decision which we will also consider later in the specific context of the casual conversion claims. The Full Bench noted⁴¹ that during the award simplification process conducted under the *Workplace Relations Act 1996* (Cth) (WR Act), the references in the

³⁷ (1941) 45 CAR 751

³⁸ *Ibid* at pp.774–775

³⁹ Print M1913

⁴⁰ (2000) 110 IR 247; Print T4991

⁴¹ *Ibid* at [56]

Metals Award to weekly employment had been removed apparently as a consequence of the 1997 Full Bench *Award Simplification Decision*⁴² which, in relation to the test case *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995*, re-categorised employment into 3 types: full-time, part-time and casual. Nonetheless the Full Bench described full-time employment as the “lineal descendant” of weekly employment.⁴³

[42] The Full Bench described the “manifest incidents” of casual employment under the Metals Award as being that the employee must be specifically engaged as a casual employee, that employment is by the hour, and that ordinary time work is paid at one thirty eighth of the weekly rate prescribed for the classification plus a casual loading of 20% forming part of the all purpose rate.⁴⁴ The Full Bench said that employment by the hour, which connoted a contract of employment based on “hourly hire”, was “the most important and most distinctive” incident of casual employment under the award, but found that in practice the position was somewhat different:

“[58] The evidence suggests that casual employment in the metals and manufacturing industry, in practice, is only infrequently by engagement that is a true hiring by the hour. It seems casual employment is often a continuing employment, until the need arises to interrupt or terminate it. It seems likely that, in such circumstances, the employment is terminated at will or on short notice, or is treated as expired if not renewed.”

[43] The Full Bench elsewhere described hourly employment under the award as likely to “have become a fiction for all purposes other than having the employment relationship expire at the will of the employer, or on abbreviated notice”.⁴⁵ As to the circumstances in which casual employment under the award could be used, the Full Bench said:

“[92] The Award now imposes no restriction on the circumstances in which a casual may be engaged, provided the employee is engaged as such. The history of award provisions for weekly hire and contract of employment in the industry does not support the submission made by the AMWU that the meaning of the word “casual” under the award should now be given a meaning associated with only irregular or occasional work. The gradual broadening of the function of the clause militates against the argument. Moreover, for the reasons we have indicated, we are unable to accept that it is sound in principle to attempt to distill from the circumstances in which a type of employment may have been used the determinants and incidents of the type of employment itself.”

[44] The Full Bench rejected a claim for the award to restrict the circumstances in which casual employment could be utilised, saying:

“[96] It does not follow from those requirements or principles that the award provisions should be expressed to exclude access to using the type of employment. Once it is accepted that hourly hire employment expiring on the term of each engagement unless

⁴² (1997) 75 IR 272; Print P7500

⁴³ (2000) 110 IR 247; Print T4991 at [10]

⁴⁴ *Ibid* at [11]

⁴⁵ *Ibid* at [101]

renewed is a necessary type of employment, the award's function is to define that type of employment more or less in those terms and to specify the incidents of its use in accordance with the award on the work to which it may be applied. We do not accept that it is appropriate in the circumstances of the industry covered by the Award to attempt to create an award duty as to the kind of work in which the type of employment will be used."

[45] The reasoning of the Full Bench in the *Metals Casuals Decision* concerning casual conversion will be discussed later. Relevant to the conceptual development of casual employment provisions in federal awards, the Full Bench ultimately varied clause 4.2.3 of the Metals Award to provide:

"4.2.3 Casual Employment

4.2.3(a) *A casual employee is to be one engaged and paid as such. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 5.1 for the work being performed plus a casual loading of 25 per cent. The loading constitutes part of the casual employee's all purpose rate.*"⁴⁶ (emphasis added)

[46] Thus, as well as implementing the Full Bench's decision to increase the casual loading to 25%, the new clause (as emphasised above) explicitly reaffirmed the position that the award's casual provisions were applicable to a casual employee engaged and paid as such.

[47] In the above historical analysis we have focused upon the Metals Award given its central place in the development of awards in the federal industrial relations system. The position we have described, whereby the incidents of casual employment were engagement and payment as such, with payment being on the basis of an hourly rate with a casual loading, became entirely typical of awards in the federal system as they were immediately prior to the award modernisation process carried out pursuant to Part 10A of the WR Act. There were however some exceptions to this. A small proportion of awards did contain explicit restrictions on the circumstances in which casual employees could be engaged by employers. These included restrictions on the work functions that casual employees could perform⁴⁷ and restrictions on the period for which they could be engaged.⁴⁸

Casual employment in termination of employment and award enforcement decisions

[48] The development of statutory unfair dismissal schemes in federal and state industrial relations legislation, and the questions which followed about the applicability of those schemes to casual employees, led to consideration in this different context about the nature and incidents of casual employment. The first significant decision in this category was *Ryde-Eastwood Leagues Club Ltd v Taylor*⁴⁹, a decision of the Industrial Relations Commission of NSW, which arose under the unfair dismissal regime contained in Ch.3 Pt.8 of the *Industrial Relations Act 1991* (NSW). The employer in the matter contended that the employee who had

⁴⁶ PR901028

⁴⁷ See e.g. *Professional Divers' - Maritime Union of Australia Award 2002*, cl.13.3.1

⁴⁸ See e.g. *Mobile Crane Hiring Award 2002* cl. 9.4.2; *Plumbing Industry (QLD and WA) Award 1999* cl.9.3.2

⁴⁹ [1994] NSWIRComm 112, (1994) 56 IR 385

made an application for an unfair dismissal remedy could not have been dismissed because he was a casual employee who was engaged on a shift-by-shift basis and who had not been re-engaged following the completion of his last shift by the employer. This contention was rejected at first instance and the employer appealed to a Full Bench of the NSW Commission.

[49] The Full Bench dismissed the appeal. In doing so, it distinguished an earlier Full Bench decision of the NSW Commission⁵⁰, in which it had been held that a casual employee had not been dismissed because it had not been established that there was a relationship of employer and employee in existence at the time when the employer declined to offer further casual work, on the basis that it turned on its particular facts.⁵¹ The Full Bench then referred to authorities to which we have earlier referred which demonstrated that “the term ‘casual worker’ is not capable of exact definition”, and said it was a matter of fact whether in a particular case there was “a contract of employment between an employer and an employee for employment as a casual on the basis of an on-going or continuing contract”.⁵² In that connection it referred to *Licensed Clubs Association of Victoria & Anor v. Higgins*⁵³, a decision of the Industrial Relations Commission of Victoria in Full Session, and quoted the following passage:

“We are assisted by a number of authorities in dealing with the commissioner’s conclusion and finding. These authorities establish that the issue of whether there was a dismissal within the meaning of the Act is not resolved by the award classification or name given to the employment relationship by the parties. Instead it has to be determined whether service has been given under one continuing contract or a series of separate contracts. In order to establish whether service has been given under a continuing contract or a series of separate contracts it is necessary to examine the facts as to the relationship.

...

A finding that a dismissal has taken place depends on whether or not there is a continuing contract of service. The following tests, going to issues of fact, can be applied in determining the nature of the contract of service:

- The number of hours worked per week.
- Whether the employee worked according to a roster system that was published in advance and whether the employment pattern was regular.
- Whether there was reasonable mutual expectation of continuity of employment.
- Whether notice was required by an employer prior to the employee being absent or on leave.

⁵⁰ *Pacific Waste Management Pty Ltd v Saley* (1993) 51 IR 339

⁵¹ [1994] NSWIRComm 112, (1994) 56 IR 385 at 393

⁵² *Ibid* at pp.393–396

⁵³ [1988] 4 VIR 43

- Whether the worker reasonably expected that work would be available.
- Whether the worker had a consistent starting time and set finishing time.”⁵⁴

[50] The Full Bench reviewed the facts and agreed with the finding made at first instance that the engagement of the casual employee in question occurred “within the umbrella of a broader, continuous, employment relationship which effectively provides an essential framework for each period contracted to be worked. That relationship, being a foundation for each engagement, surely does not come to an end in accordance with its own terms at the end of each shift.”⁵⁵ The Full Bench then stated the following conclusion:

“It is apparent that two classes of employee colloquially described as “casual” can readily be identified in the organisation of industrial relationships. The first class refers to those employees who are truly casual in the sense that there is no continuing relationship between the employer and the employee. The second class is where there is a continuing relationship which amounts to an on-going or continuing contract of employment; it is this second class of contract which, for the reasons set out earlier by us, is of such a nature as to attract the Commission’s jurisdiction under Pt.8 of Ch.3 of the Act. Whilst the cross-over point between the above described classes may be difficult to ascertain, it being a matter of fact in each case, we are confidently of the view that the relationship particular to this case fell clearly within the class of an on-going contractual relationship so as to be within the Commission’s remedial powers under the Act.”

[51] *Ryde-Eastwood Leagues Club* in summary recognised that engagement under a continuing contract of employment was not necessarily inconsistent with casual employment, and articulated indicia by which casual employment of this nature might be identified. It disposed of the notion that an indicium of casual employment was necessarily a contract of employment that commenced and terminated within the span of a single day or shift.

[52] *Reed v Blue Line Cruises Limited*⁵⁶, a decision of the Industrial Relations Court of Australia (Moore J), concerned the meaning of the exclusion of any “casual employee engaged for a short period” contained in reg.30B(1)(d) of the *Industrial Relations Regulations* (Cth) from the termination of employment regime set out in Pt.VIA Div.3 of the *Industrial Relations Act 1988* (Cth). Reg.30B(3) provided that a casual employee was taken to be engaged for a short period unless “(a) the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months; and (b) the employee has, or but for a decision by the employer to terminate the employee’s employment, would have had, a reasonable expectation of continuing employment by the employer.” Fundamental to the Court’s approach to the interpretation of this provision was that Pt.VIA Div.3 was enacted pursuant to the external affairs power to give effect to Australia’s obligations under the Convention concerning Termination of Employment at the Initiative of the Employer and the Recommendation concerning Termination of Employment at the Initiative of the Employer, that the exclusion in reg.30B(3) reflected that the Article 2(2) of the Convention allowed State parties to exclude

⁵⁴ Ibid at p.397

⁵⁵ Ibid at p.401

⁵⁶ (1996) 73 IR 420

“workers engaged on a casual basis for a short period”, and that reg.30A(2) required that words in the Regulations be given the meaning which they bore in the Convention.

[53] The Court noted that in Australian domestic law the expressions “casual employee” and “casual employment” had no fixed meaning, and rejected the proposition that the character of the employment for the purpose of reg.30B(3) could be determined conclusively by the character ascribed to it by the relevant award and adopted by the parties. In that connection the Court pointed to the fact that Article 2(2) did not refer to “casual employment” as such, but “engaged on a casual basis”.⁵⁷ The Court interpreted reg.30B(3) in the following way:

“What then, is likely to have been the feature of the employment at the time of the engagement that would characterise it as an engagement on a casual basis? Plainly it involves a notion of informality or flexibility in the employment following the engagement...

In my opinion, what is intended by Art 2(2)(c) is that the regime embodied in the Convention should not apply to employment where the employment is known to the parties at the time of engagement to be informal, irregular and uncertain and not likely to continue for any length of time. It is accepted that it would not be reasonable to impose that regime on employment of that character.

A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.

Regulation 30B reflects a similar concept having regard to how a casual engaged for a short period is identified. It can be seen that reg 30B(3) identifies the characteristics of such employment by identifying employees who are not of that class. Several features are specified which identify employees who are not of that class. The first is engagement with an employer for a period in excess of six months. The second is a sequence of periods of employment. Those periods of employment must themselves have two characteristics. They must have been both on a regular basis and also on a systematic basis. Lastly, the employee must have had a reasonable expectation of continuing employment at the time of termination. It is of some significance, in my opinion, that the regulation proceeds on the basis that, as a matter of fact, the engagement has been both regular and systematic. It is significant because it would indicate that casual employment of the type I earlier described, had existed but the parties had offered and accepted employment so as to regularise and systematise what otherwise could have been irregular and unsystematic. That is, the inherent informality, uncertainty and irregularity of casual employment had not been, as a matter of fact, a feature of the employment because of the conduct of the parties.

⁵⁷ Ibid at p.424

In my opinion, a casual employee for the purposes of reg 30B is an employee who is, from time to time offered employment for a limited period on the basis that the offer of employment might be accepted or rejected but in circumstances where it could be expected that further employment of the same type would or might be offered and accepted but there was no certainty about the period over which it would continue to be offered.”⁵⁸

[54] The Court again emphasised at the end of its reasons that “the regulation is intended to reflect, not entrenched notions of what may be a casual for the purposes of Australian domestic law, but rather what is comprehended by the expression ‘engaged on a casual basis for those periods’ in the Convention.” Its application to casual employment concepts outside that specific context must therefore be approached with caution.

[55] In *Hamzy v Tricon International Restaurants*⁵⁹ the Full Court of the Federal Court of Australia considered (among other things) the meaning of the expression “*employees engaged on a casual basis*” in s.170CC(1)(c) of the WR Act (which was part of the termination of employment scheme in Pt.VIA Div.3 of the WR Act), and whether it bore a different meaning to “*casual employee*” in what was by this time reg.30B(1)(d) of the *Workplace Relations Regulations 1989* (Cth) (WR Regulations). The Court referred to *Reed v Blue Line Cruises* with apparent approval, although it noted that the relevant provisions in the WR Act were no longer wholly based on the external affairs power and the termination of employment convention but were based on other sources of federal legislative power.⁶⁰ The Court then said:

“[38] In our opinion there is no material difference between the description ‘employees engaged on a casual basis for a short period’, in s 170CC(1)(c) of the *Workplace Relations Act*, and the description ‘a casual employee engaged for a short period’, in reg 30B(1)(d). Both descriptions embrace an employee who works only on demand by the employer (or perhaps only by agreement between employer and employee) over a ‘short period’ (whatever that may be). The essence of casualness is the absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work. But that is not inconsistent with the possibility of the employee’s work pattern turning out to be regular and systematic.”

[56] The Court in *Hamzy* ultimately determined, for reasons which are not presently relevant, that reg.3B(1)(d) and reg.3B(3) were invalid.

[57] In *Cetin v Ripon Pty Ltd t/as Parkview Hotel*⁶¹, a Full Bench of the AIRC (Ross VP, as he then was, Duncan SDP and Roberts C) considered whether an applicant for relief in respect of termination of employment was a “*casual employee engaged by a particular employer for a short period*” within the meaning of reg.30B(1)(d) of the WR Regulations (in the form that it then was) and thus excluded from the AIRC’s jurisdiction. The Full Bench applied the reasoning in *Hamzy* to the facts of the particular case to reach the conclusion that the applicant did not fall within the exclusion in reg.30B(1)(d), and said (footnotes omitted):

⁵⁸ Ibid at pp.425–426

⁵⁹ [2001] FCA 1589; (2001) 115 FCR 78

⁶⁰ Ibid at [36]–[37]

⁶¹ [2003] AIRC 1195; (2003) 127 IR 205

“[60] At the time her employment was terminated Ms Cetin was regularly working four shifts per week on Thursday, Friday, Saturday and Sunday evenings. It was understood between the parties that Ms Cetin was expected to turn up for work every week on those nights. If Ms Cetin was unable to work on a particular night she was obliged to give notice. Since November 2002 any fluctuation in Ms Cetin’s hours was due to fluctuation in the restaurant’s closing time on a particular night. Ms Cetin’s employment could not reasonably be said to be informal, uncertain or irregular. To the contrary, her employment was regular and systematic, and would have given rise to a reasonable expectation of continuing employment.

[61] In the matter before us the parties characterised Ms Cetin’s employment as casual and her employment was classified as casual under the Award. But in our view it would be wrong in principle to treat the character ascribed by an award to particular employment, and adopted by the parties, as conclusively determining the character of the employment for the purpose of regulation 30B(1)(d). Nor is the fact that Ms Cetin was paid a casual loading in lieu of sick leave, annual leave and public holidays determinative of whether or not she was a casual employee for the purpose of regulation 30B(1)(d). Each of these incidents is a consequence of the characterisation chosen by the parties. Rather than being conclusive, each of these matters are simply factors to be taken into account in determining the true character of the employment. As Lee J observed in *Gurran v Tarbook Pty Ltd*:

‘If parties to an employment contract have attempted in the terms of their contract to describe their relationship in a manner that does not accord with the facts, the relationship established by the facts will prevail.’

[62] Similarly as counsel in *Re Porter* put it: the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.

[63] Another cogent factor in this case is the evidence as to the change in the character of Ms Cetin’s employment. The initial part of Ms Cetin’s employment was characterised by fluctuating hours and an absence of regular engagements. This changed when Ms Cetin was transferred to the restaurant and began work as a waitress. At that point her employment became regular and systematic. This change in the character of Ms Cetin’s employment should also be seen against the background of the discussion at her initial employment interview. The evidence in this regard supports a finding that Ms Cetin was told that initially she would be engaged on a casual basis in the bar, but in the future regular shifts would be available in the restaurant.

[64] The time at which the nature of the employment is to be examined is at the time of the dismissal, not at the time of the initial engagement. Hence it is the nature of Ms Cetin’s employment at the time she was terminated which is relevant.”

[58] Two matters of significance may be noted in the Full Bench’s decision. The first was the Full Bench’s observation that the character of employment that commences on a casual basis may change over time, and that what begins as intermittent and irregular employment may be transformed into a more regular and systematic employment relationship in which the

parties have a mutual expectation of continuing future employment. This proposition we regard to be uncontroversial, and is a matter of significance which we take into account in our consideration of the casual conversion claims in Chapter 3 of this decision. The second is more problematic. The Full Bench approached the question of whether the applicant's employment was casual in the same way that courts have dealt with the issue of whether a particular contract for the performance of work between a business and an individual is properly characterised as an employment contract or a contract for services. The distinction between a contract of service and a contract for services has so long been established in the general law that it has been described as "too deeply rooted to be pulled out"⁶², and whether a contract falls within one category or the other is to be determined in accordance with a standard set of objective criteria, with the subjective label attached to the contract by the parties not capable of being determinative of the question. However, in relation to casual employment, this approach causes difficulty for 2 reasons. The first is that, as the High Court has emphasised in the decisions referred to above, casual employment cannot be assigned any fixed meaning, and there is a lack of any clear objective criteria by which it may be characterised beyond the right to terminate at short or on no notice and the lack of certainty as to future employment. The second difficulty in the industrial context is that because awards typically describe a casual employee as one who is engaged and paid as such, the subjective label placed on the employment at its commencement becomes determinative of the employee's award entitlements. If a different approach to the determination of casual employment is taken outside the award context, then a real potential for radical disconformity between award and other employment entitlements may arise, as we discuss further below.

[59] There have also been relatively recent cases in which the nature of casual employment has been considered in the context of award enforcement proceedings. In *Community and Public Sector Union v State of Victoria*⁶³ the Federal Court (Marshall J) considered, among other matters, whether certain employees of the State of Victoria were casuals for the purpose of the entitlements of the award which applied to them. The award applied to employees and officers employed pursuant to the *Public Sector Management Act 1992* (Vic) (which authorised the employment of persons on a casual basis) and provided for a 15% loading for persons employed on a casual basis. The Court said:

“[9] Whether a person is a casual employee or not is not determined by reference to the Award. The Award simply prescribes many of the terms and conditions of employment of such employees. In this matter it is contended by the applicants that the so-called casual prison officers at the Barwon gatehouse are not truly employed on a casual basis.

[10] Neither is the question of whether an employee is a casual employee or not determined solely by reference to the employer's categorisation of the position, although such consideration is a relevant factor in the overall determination. As is accepted by the parties, the term 'casual employee' has no fixed meaning. The true nature of any employment relationship will depend on the facts and circumstances of each case. See *Doyle v Sydney Steel Company Limited* [1936] HCA 66; (1936) 56 CLR 545 (at 551, 565).

⁶² *Sweeney v Boylan Nominees Pty Limited* [2006] HCA 19, (2006) 226 CLR 161 at [33]

⁶³ [2000] FCA 14, (2000) 95 IR 54

[11] The applicants submit that the relevant relationship is not one of casual employment. They rely on the fact that the relevant employees work hours which are consistent, regular and equivalent to those of a full time employee pursuant to a pre-determined roster. They also assert that the relevant employees are not free to accept or reject work at will. The applicants further submitted that the employment relationship is not informal, uncertain or irregular which is characteristic of casual employment.

[12] The Court rejects these contentions. First, it is not inconsistent with a casual employment relationship for employees to be engaged on a regular basis pursuant to a roster. See *Ryde-Eastwood Leagues Club Ltd v Taylor* [1994] NSWIRComm 112; (1994) 56 IR 385. Second, the evidence is that employees at the Barwon gatehouse can make themselves unavailable for duty and in fact do so without employer disapproval so long as reasonable notice of a roster change is given. In addition, two employees work only two shifts per fortnight. Third, it is not necessarily the case, as *Ryde-Eastwood* shows, that casual employment will always be informal, uncertain or irregular.

[13] It is further put on behalf of the applicants that the word ‘casual’ in s 35A of the PSM Act must be understood in the context of the judgment of Moore J in the Industrial Relations Court of Australia (‘IRCA’) in *Reed v Blue Line Cruises Limited* (1996) 73 IR 420. In *Reed* the meaning of the word ‘casual’ was addressed in the context of the Termination of Employment Convention (‘the Convention’) which does not refer to ‘casual employee’ but to a person ‘engaged on a casual basis for a short period’, see *Reed* (at 424). The Court does not consider *Reed* to be of assistance in the resolution of the current issue.”

[60] This aspect of the decision was affirmed by the Full Court of the Federal Court on appeal.⁶⁴ The Full Court determined that, because the relevant award applied its provisions concerning casual employment to “[p]ersons employed on a casual basis”:

“[5] ... the legal character of their employment, for the purposes of how the Award would operate, was determined by the manner of their initial engagement. It is irrelevant, in our opinion, that the evidence might support a conclusion that, after their initial engagement, their employment had some of the hallmarks of regular employment rather than casual employment. It is unnecessary to consider those authorities which accept that, in appropriate circumstances, employment can properly be characterised as regular casual employment. It is also irrelevant, for present purposes, whether the Award was drafted on the assumption that casual employees would work in a particular way and not in the way that Murrell and Hutchins in fact worked.”

[61] The Full Court decision thus emphasised, in the award context, the fundamental importance of the initial characterisation of the employment upon engagement.

[62] An approach similar to that of Marshall J above was taken by the Industrial Appeal Court of Western Australia in *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward*⁶⁵,

⁶⁴ *Community and Public Sector Union v State of Victoria* [2000] FCA 759

another award enforcement case. Le Miere J, with whom Steytler P and Pullin J relevantly agreed, said:

“[106] There is no one definitive test to distinguish between casual and permanent employees. There are several features characteristic of casual employment... The essence of casual employment is the absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work. It is not a necessary characteristic of casual employment that the employee work under a series of separate and distinct contracts of employment each entered into for a fixed period.”

[63] Le Miere J went on to reject the proposition that it was a necessary characteristic of a casual employee under the relevant award that the employee worked under a series of separate and distinct contracts of employment each entered into for a fixed period⁶⁶, and said:

“[110] ... There may be a continuing contract one term of which is that the employer can elect to offer work on a particular day or days and when offered the employee can elect to work or not. Such a contract might create a casual employment relationship.”

[64] *Melrose Farm* was referred to with approval by the Federal Court in *Fair Work Ombudsman v Maclean Bay Pty Ltd*⁶⁷ (Marshall J) and *Fair Work Ombudsman v South Jin Pty Ltd*⁶⁸ (White J).

[65] A somewhat different approach was earlier taken by the Federal Court (Gray J) in *Health Services Union of Australia v Gribbles Radiology Pty Ltd*.⁶⁹ That matter concerned an application for recovery of severance payments said to be payable under the terms of a particular federal award. The casual employment provision of the award relevantly provided that, for the purposes of the award, “A casual employee is one who is engaged in relieving work or work of a casual nature and whose engagement is terminable by an employer in accordance with the employer’s requirements, without the requirement of prior notice by either party, but does not include an employee who could properly be classified as part-time under clause 11 or full-time under clause 34 of this award”. In considering whether the employees the subject of the claim were casuals (and therefore excluded from the severance pay entitlements in the award), the Court noted that there was no universally accepted concept of what was a casual employee which could override the award, and the question of whether the employees were casuals was to be determined by reference to the award itself.⁷⁰ The critical factual feature of the case was that the employees, who were designated as casuals, performed part-time hours according to affixed roster system. The Court, having referred to *CPSU v State of Victoria*, said:

⁶⁵ (2008) 175 IR 455

⁶⁶ *Ibid* at [113]

⁶⁷ [2012] FCA 10 at [14]

⁶⁸ [2015] FCA 1456 at [71]

⁶⁹ [2002] FCA 856

⁷⁰ *Ibid* at [56]

“[59] Although regular rosters and long-term employment may not be necessarily inconsistent with casual employment, they are, in my view, powerful indicators that such employment is not properly to be regarded as ‘casual’ in ordinary parlance.”

[66] The Court ultimately decided the matter on the basis that, because the employees’ rosters meant that they could be properly classified as part-time employees under the award they were therefore excluded from the casual employment provision (which we have earlier quoted).⁷¹ The decision can therefore be characterised as one which turned upon the unusual casual employment provision in the award in question rather than as stating any broader proposition concerning the nature of casual employment. In any event the decision in *Gribbles* was ultimately overturned by the High Court on the basis of a separate issue concerning whether the employer was bound by the relevant award.⁷²

[67] A distinctive approach was also taken by the Federal Court (Barker J) in *Williams v MacMahon Mining Services Pty Ltd*.⁷³ That matter, which was an appeal from a decision of the Federal Magistrates Court, concerned (among other things) whether a particular employee was entitled to the “*guarantee*” of the payment of accrued annual leave on termination under s.235(2) of the WR Act. The employee in question was employed at a mine, and his contract of employment provided that he was casual employee and was to be paid a flat hourly rate of pay which was said to incorporate, among other things, a loading in lieu of paid leave entitlements.⁷⁴ He was employed for slightly over a year in accordance with a roster fixed in advance. The employer contended that he was not entitled to annual leave on termination by reason of s.227, under which the relevant provisions of the WR Act “*applied to all employees other than casual employees*”. There was no definition of “*casual employee*” in the WR Act.

[68] In its consideration the Court referred to *Doyle, Reed, Hamzy and Melrose Farm*. In particular the Court referred to *Reed* in the following way:

“[33] Nonetheless, the concept of a casual worker being involved in work which is discontinuous - intermittent or irregular - remains relevant and helpful in understanding the concept today. In *Reed*, Moore J, at IR 425, by reference to those and other well known authorities, observed:

A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.

[34] I do not consider that these observations by Moore J should be read other than as general observations concerning the concept of casual employment. Certainly, they were not, in my view, intended to be observations about employment on a casual basis under any particularly statutory or regulatory regime. They are a helpful commentary

⁷¹ Ibid at [60]–[64]

⁷² *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194

⁷³ [2010] FCA 1321; (2010) 201 IR 123

⁷⁴ Ibid at [9]

on what the early authorities, such as *Doyle*, have to say on the topic of what casual employment is under the general law today.”

[69] The Court went on to say that the fact that the employment parties described the employment as casual in nature “will not override the true legal relationship that arises from a full consideration of the circumstances”.⁷⁵ This is reflective of the approach taken in *Cetin v Ripon* which we have earlier discussed. Cited in support of this proposition was *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction, Forestry, Mining and Energy Union of Workers*⁷⁶, a decision concerning whether 2 particular workers were employees or independent contractors. The Court’s conclusion concerning whether the employee was a casual was:

“[42] In my view, all of the remaining named factors identified by the Federal Magistrate, which I have alluded to earlier, point squarely to the employee not being in casual employment. While it is plainly relevant to have regard to the fact the Contract could be terminated on one hour’s notice, when one has regard to the Contract overall, it was open to the Federal Magistrate to find that Mr Williams was not a ‘casual employee’ under the general law and therefore for the purposes of the WR Act. His engagement was not for the performance of work on an intermittent or irregular basis. The future was provided for. The nature of the work required of the employee was stipulated. A roster was in place which made clear the regularity of the employment. Travel arrangements were organised to facilitate it. All this suggests that this was an employment arrangement far beyond that of casual employment. That the Contract may be terminated on an hour’s notice may be said, as I consider it is, a countervailing relevant factor. In the event, that Federal Magistrate did not, on a proper reading of his judgment, consider this to be a determinative factor. It was open to him so to find. No error is revealed.”

[70] The above reasoning is, with respect, problematic in the award context for the reasons stated earlier in relation to *Cetin v Ripon*. It is difficult to reconcile with a number of the other authorities to which we have made reference (in particular, *Shugg, Ryde-Eastwood Leagues Club, CPSU v State of Victoria* and *Melrose Farm*). It treats casual employment as a distinct species of employment contract, whereas a number of the other authorities make it clear that the contractual arrangements capable of applying to casual employment are highly diverse and may range from an irregular sequence of daily, fixed-term contracts to a single continuing contract under which regular work is performed. It is also disharmonious with the award regulation of casual employment, which as earlier explained has typically simply applied an alternative mode of remuneration to employees engaged by the employer on a casual basis, rather than attempting to identify the circumstances in which casual employment may be utilised.

Award modernisation and casual employment

[71] The award modernisation process conducted in 2008–09 by the AIRC pursuant to Part 10A of the WR Act involved a wholesale consolidation of the terms of pre-existing federal and State awards (as contained in NAPSAs) into 122 modern awards. However this process

⁷⁵ Ibid at [38]

⁷⁶ [2004] WASCA 312; (2004) 141 IR 31

did not involve any re-analysis of the conceptual underpinnings of casual employment. With a small number of exceptions, modern awards continued the approach established in the *Award Simplification Decision* and confirmed in the *Metals Casuals Decision* of making provision for the 3 categories of full-time, part-time and casual employment, with casual employment provisions typically applying to employees engaged and paid on a casual basis. The AIRC Full Bench which carried out the process appears to have proceeded on the assumption that a casual under a modern award would also be a casual for the purposes of the NES provisions of the FW Act to come into effect on 1 January 2010.⁷⁷ The Full Bench also standardised the casual loading at 25%, consistent with the *Metals Casuals Decision*.⁷⁸

Casual employment under the Fair Work Act

[72] The expression “*casual employee*” is used extensively in the FW Act, but is not given a definition. It is used primarily in relation to the National Employment Standards (NES) provided for in Pt.2-2. In most cases, casual employees are excluded from the operation of the NES. The relevant provisions in this respect are as follows:

- s.65: a casual employee is not entitled to make a request under the section for flexible working arrangements unless the employee is a “*long term casual employee*”, which expression is defined in s.12 to mean a casual national system employee of a national system employer who has been employed by the employer “*on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months*”;
- s.67(2): casual employees are excluded from the parental leave and related entitlements established in Division 5 of Part 2-2 except in limited respects (discussed further below);
- s.86: casual employees are excluded from the operation of Division 7 of Part 2-2, which establishes the entitlement to paid annual leave;
- s.95: casual employees are excluded from the operation of Subdivision A of Division 7 of Part 2-2, which establishes entitlements for paid personal/carer’s leave;
- s.106: casual employees are excluded from the entitlement for payment for compassionate leave;
- s.111(1)(b): casual employees are excluded from the entitlement for payment for an absence from work because of jury service;
- s.116: the note to the section confirms that a casual employee not rostered to work on a public holiday is not entitled to payment for the holiday under s.116; and

⁷⁷ *Award Modernisation Decision* [2009] AIRCFB 34

⁷⁸ *Award Modernisation Statement* [2008] AIRCFB 717 at [20], *Award Modernisation Decision* [2008] AIRCFB 1000 at [47]–[50]

- s.123: casual employees are excluded from the operation of Division 11 of Part 2-2, which establishes entitlements to notice of termination or payment in lieu and redundancy pay.

[73] Limited aspects of the NES have application to casual employees:

- s.65: a long term casual employee is entitled to make a request under the section for flexible working arrangements;
- s.67(2): casual employees are not excluded from the unpaid pre-adoption leave entitlement in s.85 and the unpaid no safe job leave entitlement in s.82A;
- also in s.67(2): a long term casual employee is entitled to unpaid parental leave and associated entitlements under Division 5 of Part 2-2 if, but for the birth or expected birth of the child or the placement or expected placement of the child or the taking on a period of unpaid annual leave pursuant to s.71(6), s.72(3)(b) or s.72(4)(b), the employee would have had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and
- s.114: the entitlement to be absent from work on a public holiday, and the associated right to refuse a request to work on a public holiday if the request is unreasonable or the refusal is reasonable, apply to casual employees (as s.114(3)(e) makes clear);

[74] Casual employees are also excluded from the notification and consultation requirements relating to certain terminations of employment provided for in Part 3-6, Division 2 and Part 6-4, Division 3 (by ss.534(1) and 789(1) respectively). Section 384(1)(a) also effectively excludes some casual employees from the unfair dismissal regime in Part 3-2 of the FW Act by providing that their period of service does not count towards the minimum employment period required in order to be protected from unfair dismissal under ss.382 and 383, except where the employment of the casual employee was “*on a regular and systematic basis*” and during the period of service as a casual employee the employee “*had a reasonable expectation of continuing employment by the employer on a regular and systematic basis*”.

[75] In *Telum Civil (Qld) Pty Limited v CFMEU*⁷⁹ a Full Bench of this Commission gave consideration to the question to the meaning of the expression “*casual employee*” in the FW Act. The matter was an appeal from a decision issued pursuant to s.739 of the FW Act in resolution of a dispute raised under the dispute settlement procedure in an enterprise agreement. The dispute concerned whether a group of employees whose employment had been terminated upon the completion of a construction project were entitled to the NES redundancy payments in s.119 of the FW Act. The employer contended that the relevant employees were casuals and it was therefore exempted from the obligation to pay those entitlements by s.123(1)(c). The enterprise agreement in question required employees covered by the agreement to be engaged as either permanent employees or casual employees, and in respect of the latter provided for a casual loading of 25% to be paid “in lieu of and compensate for all benefits such as leave, notice, redundancy and any other full-time entitlements that do not apply to casual employees”. It was not in dispute that the relevant employees had been engaged as casual and had been paid the casual loading. Notwithstanding

⁷⁹ [2013] FWCFB 2434

this, at first instance it was determined that the employees were not to be properly characterised as being engaged on a casual basis to the extent that they worked full-time, regular and unvarying hours with fixed starting and finishing times and did not require a direction to attend in order to attend work, and on that basis the exclusion in s.123(1)(c) did not apply.⁸⁰

[76] The Full Bench disagreed with this conclusion and upheld the employer’s appeal. The Full Bench rejected the conclusion that the expression “*casual employee*” in s.123(1)(c) referred to the notion of casual employment under the general law⁸¹, which it characterised as being ill-defined and requiring “the application of criteria that do not deliver a clear and unambiguous answer in many cases but, rather, lead to results on which reasonable minds may differ”.⁸² It proceeded to consider the statutory expression in its context, including its historical context, and in that respect referred to the *Metals Casuals Case*⁸³ as demonstrating that the specification of casual employment in federal awards had diverged from the ill-defined general law position to one whereby a person was a casual employee if they were engaged as one and paid the casual loading.⁸⁴ It traced this position as continuing into modern awards made under Part 10A of the WR Act⁸⁵, and referred to the existence of casual conversion clauses in a number of modern awards (and pre-reform awards) as demonstrating that the employment of persons working systematic and regular hours on a casual basis was contemplated by those awards.⁸⁶ The Full Bench noted that the range of NES entitlements which did not apply to casual employees were compensated for in the casual loading, so that to apply the general law notion of casual employment to the FW Act would allow for double dipping by employees engaged as casuals and paid the casual loading who worked regular and systematic hours – an outcome it was unlikely that the legislature intended.⁸⁷ The Full Bench also pointed to references to casuals being employed on a regular and systematic basis in ss.12, 23(2)(b) and 384(2)(a) as demonstrating that the FW Act presupposed that an employee employed on a regular and systematic basis with a reasonable expectation of continuing employment on a regular and systematic basis could still be a casual employee.⁸⁸ The Full Bench concluded:

“[58] In summary, the FW Act provides for the regulation of terms and conditions of employment of national system employees through an *interrelated* system of the National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, it is obvious that the legislature intended that those components should interact consistently and harmoniously. We conclude that on the proper construction of the FW Act the reference to ‘casual employee’ in s.123(3)(c) and the rest of the NES - and, indeed, elsewhere in the FW Act - is a reference to an employee who is a casual employee for the purposes of the Federal

⁸⁰ [2012] FWA 10684

⁸¹ 2013] FWCFB 2434 at [20]

⁸² *Ibid* at [21]

⁸³ (2000) 110 IR 247; Print T4991

⁸⁴ [2013] FWCFB 2434 at [25]

⁸⁵ *Ibid* at [33]–[42]

⁸⁶ *Ibid* at [43]–[44]

⁸⁷ *Ibid* at [45]–[48]

⁸⁸ *Ibid* at [49]–[57]

industrial instrument that *applies* to the employee, according to the hierarchy laid down in the FW Act (and, if applicable, the Transitional Act). That is, the legislature intended that a ‘casual employee’ for the purposes of the NES would be consistent with the categorisation of an employee as a ‘casual employee’ under an enterprise agreement made under Part 2-4 of the FW Act (or under an ‘agreement based transitional instrument’ such as a workplace agreement or certified agreement made under the WR Act) that applies to the employee or, if no such agreement applies, then consistent with the categorisation of an employee as a ‘casual employee’ within the modern award that applies to the employee. Subject to any terms to the contrary, a reference to a ‘casual employee’ in an enterprise agreement (or agreement based transitional instrument) will have a meaning consistent with the meaning in the underpinning modern award (or pre-reform award/NAPSA).”

[77] The Full Bench did not accept that *Williams v MacMahon Mining Services Pty Ltd*⁸⁹ was of assistance since it was concerned with the different statutory context of the WR Act. However it is not clear to us that the statutory context made any difference, with the real position being that *Telum* and *Williams v MacMahon Mining Services* took quite different and inconsistent approaches to the same issue.

[78] *Telum* has, since it was issued, been consistently applied in decisions of this Commission. An approach apparently consistent with *Telum* was also taken by the Federal Court (White J) in *Fair Work Ombudsman v Devine Marine Group Pty Ltd*.⁹⁰ In that matter, which concerned the enforcement of the provisions of the Manufacturing Award, a question arose as to whether 2 employees the subject of underpayment claims were casual employees who were entitled to the casual loading under the award. The Court rejected the proposition that the employment status of the employees was to be determined by the general law as stated in *Reed v Blue Line Cruises Ltd*⁹¹ and *Hamzy v Tricon International Restaurants*⁹² on the basis that the clause 14 of the award under which the claim was made defined a casual as “one engaged and paid as such”.⁹³ The Court then identified 2 ways in which “engaged” in clause 14.1 could be interpreted. The first was that it referred to the way in which the parties themselves identified their arrangement at its commencement, and the Court referred to *Telum* as supporting this approach. The second was that it was to be read as “a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances”, and the Court referred to the decision of the Industrial Relations Commission of Western Australia in *Loves Bus and Taxi Service v Zucchiatti*⁹⁴ as supporting this approach.⁹⁵ The Court concluded that the first interpretation was to be preferred:

“[144] It is sufficient in my opinion to state that, in the present case, the former construction draws support from two considerations and should be adopted. First, the term “specifically engaged” in cl 12 indicates that the focus is on the agreement of the parties at the commencement of the employment as to the character of the

⁸⁹ [2010] FCA 1321; (2010) 201 IR 123

⁹⁰ [2014] FCA 1365

⁹¹ (1996) 73 IR 420

⁹² [2001] FCA 1589; [2001] 115 FCR 78

⁹³ *Ibid* at [137]–[138]

⁹⁴ [2006] WAIRC 5758; (2006) 157 IR 348

⁹⁵ [2014] FCA 1365 at [141]–[142]

employment. Secondly, the requirement in cl 14.3 for the observance of formality at the time of engagement of a casual employee suggests that the word “engaged” is directed to the agreement made between the parties rather than to the manner and circumstances in which the employee does in fact carry out his or her work.”

[79] However a discordant approach was taken in the recent Federal Circuit Court (Judge Jarrett) decision in *Skene v Workpac Pty Ltd.*⁹⁶ In that case, the issue was whether a worker was entitled to annual leave either under the enterprise agreement that applied to his employment, or under the NES annual leave provisions of the FW Act. There was no dispute that the worker had been paid a casual loading throughout his employment. The enterprise agreement (at clause 5.5.6) relevantly provided that the employer would advise employees at the time of their engagement of their employment status and terms of engagement, and the Court consistent with *Fair Work Ombudsman v Devine Marine Group* took the approach that this required a subjective rather than objective approach to be taken to determining the employee’s status. The Court said:

“[62] ... By cl.5.5.6 it is for the respondent to inform the employee of their status at the time of their engagement. Clause 5.5.6 is directed to the subjective intention of the respondent and the status assigned to the employee at the time of the engagement by the respondent. The offer of ‘casual employment’ is sufficient, in my view, to engage cl.5.5.6 of the WorkPac Agreement and impress upon Mr Skene the status of ‘casual FTM’.

[63] Having regard to the way in which the parties conducted the case, that finding must mean that Mr Skene is not a ‘permanent FTM’ and cl.19.1.1 has no application to him.”

[80] A different approach was taken to the claim for annual leave under ss.87 and 90 the FW Act. The Court determined that the worker was not a casual employee for the purpose of the exclusion from the NES annual leave entitlements in s.86, notwithstanding that it had found him to be a casual employee for the purposes of the enterprise agreement. In so determining, the Court relied upon the principles stated in *Williams v MacMahon Mining Services Pty Ltd.*⁹⁷ The Court said:

“[80] However, the approach to the determination of whether, as a matter of the contract between the parties, Mr Skene’s employment with the respondent was casual in my view falls to be determined according to the approach described in MacMahon and the cases there cited. In my view there is no warrant to interpret the phrase casual employee in s.86 of the Fair Work Act in a way that draws upon the definitional provisions of various industrial instruments according to the ‘industrial history’ of those instruments.”

[81] The last sentence of the above passage involves an implicit rejection of *Telum*. The Court then referred to a number of the objective incidents of the worker’s employment, including that he worked pursuant to a shift roster set 12 months in advance, worked continuously except for one paid absence, was subject to a fly in, fly out arrangement with the

⁹⁶ [2016] FCCA 3035

⁹⁷ [2010] FCA 1321; (2010) 201 IR 123

associated provision of free accommodation on-site, was expected to be available to work on an ongoing basis in accordance with the roster, and his hours of work were regular and certain. The Court weighed these matters against those matters which tended to indicate casual employment, namely that the worker was paid by the hour, his employment was terminable on one hour's notice, and his employment was designated and accepted as casual.⁹⁸ The Court concluded:

“[85] I am persuaded that Mr Skene should be seen as other than a casual employee for the purposes of s.86 of the Fair Work Act. The essence of casual employment, as described by the Full Federal Court in *Hamzy v Tricon International Restaurants* (2001) 115 FCR 79 and applied in *MacMahon*, is missing. There is no absence of a firm advance commitment as to the duration of Mr Skene's employment or the days (or hours) he would work. Those matters were all clear and predictable. They were set 12 months in advance.”

[82] The decision in *Skene* is currently the subject of an appeal to the Federal Court. No decision in the appeal had been issued at the time of writing of this decision. It may be observed, with respect, that the Federal Circuit Court decision if maintained is likely to be productive of significant difficulty, since it proceeds on the basis that there is a lack of integration between the concept of casual employment as it is dealt with in the FW Act and the casual employment provisions of modern awards and enterprise agreements made under the FW Act. Modern awards proceed upon the assumption that a casual employee under the award receives a 25% loading in lieu of the major NES leave entitlements, but *Skene* suggests that in respect of some employees the employer may be obliged to pay the employee the 25% casual loading under the award and in addition all the benefits of the NES under the FW Act. Conceivably, it could also conversely mean that a person who is not a casual for the purposes of the award and does not receive the casual loading (because the employer chose not to engage the person as a casual and pay him or her as such) *is* a casual for the purpose of the FW Act (applying the criteria referred to in *Skene*) and therefore is *not* entitled to NES benefits (except those applicable to casualls). The same problems could also arise in relation to enterprise agreements (as *Skene* itself demonstrates), which often reflect the casual provisions of modern awards because of the approval requirement in s.186(2)(d) that the agreement pass the better off overall test provided for in s.193 (under which the Commission must be satisfied that employees to whom the enterprise agreement would apply would be better off overall under the agreement than under any modern award which would otherwise apply).

[83] *Skene* is also at odds with the practical position which, from the evidence in this matter and our collective experience, actually applies, namely that employers universally treat persons as being casual employees (or otherwise) consistently for the purpose of NES and award or enterprise agreement entitlements.

[84] The parties before us advanced their respective cases on the basis (explicit or presumed) that a casual employee for the purposes of a modern award would also be a casual employee for the purposes of the FW Act. No authoritative court decision has determined that *Telum* was incorrectly decided. We propose to proceed on the basis that *Telum* represents the correct approach, at least for modern award-covered employees.

⁹⁸ [2016] FCCA 3035 at [81]–[82]

[85] The above analysis demonstrates that, beyond the basic proposition that a casual employee will almost always be an employee engaged and paid as such, it is difficult to assign any consistent legal or practical criteria to the concept of casual employment. From a contractual perspective, a casual employee may be engaged under a succession of hourly or daily fixed-term contracts, or under a succession of fixed term contracts for a longer period, or under a single ongoing contract with no fixed term but terminable at short notice. In practical terms, casual employment may be used for the performance of short-term, intermittent and irregular work at one end of the range, but at the other end it may be used for long term work with regular, rostered hours. In respect of the modern award context with which we are concerned, casual employment has under most modern awards evolved into an alternative payment and entitlement system available at the election of the employer upon engagement (subject to the operation of any casual conversion provision which may currently exist in the modern award).

2.2 Part-time employment

[86] Part-time employment is, ostensibly, a simple concept, namely weekly employment for a number of hours of work per week (or per roster cycle) which is less than full-time hours. It is usually conceived as involving all of the benefits of full-time employment paid on a pro-rata basis. Certainly that is the case under the FW Act with respect to NES entitlements and unfair dismissal rights. However modern award part-time clauses typically have certain features which do not apply to full-time employment provisions. These have arisen as a result of the historical rationale for the introduction of part-time employment in awards.

[87] Part-time employment was originally conceived as a limited facility to permit the employment of women with family responsibilities to be employed, with care required to be taken that it did not become a vehicle for the undermining of full-time employment. An early statement of this rationale was contained in *Re Clerks (State) Award*⁹⁹, a 1953 decision of the Industrial Commission of New South Wales (Taylor J, President). The NSW Commission said:

“Part-time Employees. - The evidence indicates that in respect of a considerable number of establishments employers are unable to get female employees to work on a full-time basis. The application seeks award approval to the employment of such persons on a part-time basis, that is to say, they shall be paid at an hourly rate multiplied by the number of hours per week so worked. The evidence further shows that the employees in respect of whom this award provision is now sought are in the main female employees who are unable for reasons which have been given to work a full working week but are able to work a portion of a working week. It is clear from the evidence that the employers seek this provision because, although they expressed themselves as being willing to employ such persons on a full-time basis, they are unable to engage them on this basis.

...

‘Part-time Employees,’ on the evidence, are not in my opinion strictly casuals. They are persons who are prepared to give a portion of their time, in most instances

⁹⁹ [1953] AR (NSW) 199

somewhat less than the normal working week, to an employer. They do not go from place to place but are employed in the one establishment. It seems proper that provisions should be made to meet this class of employee. The evidence shows that in most instances they are married women who have domestic obligations but who are still required, perhaps by force of economic circumstances, to do some work. They cannot give a full week's work because of their own personal problems, but such work as they can give they are employed for. It is quite proper that a just and reasonable minimum rate should be fixed for them for the work so performed. I think that it is a proper provision and the award now to be made will contain such a provision. It would only apply to female employees and there will be stringent safeguards against its possible abuse.”¹⁰⁰

[88] Consistent with this rationale, the earliest part-time employment clause in the federal Metals Award was confined in its operation to female employees.¹⁰¹

[89] The concern that part-time employment not be used as means to reduce the hours of work of existing full-time employees was articulated by a Full Bench of the Australian Conciliation and Arbitration Commission in 1983 in *Re Vehicle Industry – Repair, Services & Retail – Award 1980*.¹⁰² In that matter there was an employer application for the award to be varied for an unrestricted part-time employment clause to apply to all but one classification in the award. The Commission rejected the claim in this form for the following reasons:

“In substance, the employers’ application and the re-drafted provision which was later submitted to the Commission would allow an employer to employ part-time employees in any circumstances and as an alternative to full-time employment, without any restrictions except that part-time employment would be by mutual agreement with the persons concerned. This would be a significant extension of the basis on which part-time employment has been provided for in the past. It would enable employers to employ part-time employees, as distinct from full-time and casual employees, to meet the particular operations of a company regardless of the situation of the available labour force. However desirable this might be from the employers’ point of view, we emphasize that this is an industry which is largely non-unionised, is scattered throughout the metropolitan and country areas and is comprised of many small firms as well as the larger companies in the city areas. In those circumstances a provision such as that sought by the employers could well result in employees being forced to accept work for less hours than the weekly standard and being paid correspondingly less notwithstanding that they were available for, and desired, full-time work.

As indicated earlier, although the claim was in general terms the main impact of the evidence before us was to emphasize the present plight of the industry due to the double impact of a severe and widespread drought and ‘the worst economic recession since the 1930s’ (*National Wage Decision*, 23rd December, 1982 (1982) 3 I.R. 1. Little evidence was put before us to demonstrate the need for such a provision in other circumstances. To the contrary, the evidence given mainly indicated that the objective was to reduce hours by allowing the transfer of existing labour to part-time

¹⁰⁰ Ibid at p.224

¹⁰¹ (1971) CAR 389 at pp.393–394

¹⁰² (1983) 5 IR 100

employment as a temporary measure to mitigate labour costs and retain workers in employment pending economic improvement in the industry. While there has been a long standing request by employers for a part-time employment provision in the award there was no evidence which demonstrated that there was normally a shortage of persons seeking full-time employment in the industry. Nor was there evidence of a pool of unemployed persons who could only work part-time. The whole thrust of the evidence before us was in relation to the continued employment of existing employees, and of engaging new employees, on a basis of less than full-time in the present adverse situation.

To the above extent the application before us is outside the existing principles as developed to date in respect of part-time employment. In the circumstances we do not consider that a case has been made out for a general provision in this instance and the claim as framed is refused...¹⁰³

[90] The Commission instead awarded, on a short-term basis only, a limited provision to allow for a reduction of hours by agreement to deal with the recessionary circumstances then prevailing.

[91] With societal recognition that men as well as women had family responsibilities, gender restrictions on access to part-time employment were removed. In the *Parental Leave Test Case*¹⁰⁴ in 1990 the ACTU advanced a comprehensive case for parental leave which included the capacity to move to part-time work for a period after the birth of a child. The ACTU's case involved the contention that the expansion of part-time work had been important in increasing the participation of women with children in the workforce, but also that it was necessary to grant award provisions to allow men to better balance their work and family responsibilities because, among other things, "female participation in the paid workforce is nevertheless hampered by an unequal sharing of parental and domestic responsibilities".¹⁰⁵ The Confederation of Australian Industries responded by claiming part-time provisions which opened up part-time work to all employees generally, and contended that freeing up part-time employment for only those with young children was "unreasonable and discriminatory".¹⁰⁶ The Full Bench said in relation to the part-time claims:

"On the desirability of part-time employment there is, in a sense, no issue between the ACTU and CAI or any other party or intervener. As we noted earlier, much of the argument advanced by CAI was in support of award provisions which would make part-time work available generally and not only to employees who had assumed responsibility for caring for a child after birth or adoption. This part of the ACTU claim was thus subsumed by the CAI counterclaim. The ACTU resisted, however, any suggestion that part-time work, unrestricted by provisions relating to part-time employment elsewhere in an award, should be available to parents beyond the second birthday or the second anniversary of the placement of a child. It opposed these proceedings being used to establish a general award right to part-time employment. The issue therefore was not whether part-time work should be made available in

¹⁰³ Ibid at pp.103–104

¹⁰⁴ (1990) 36 IR 1

¹⁰⁵ Ibid at pp.3–4

¹⁰⁶ Ibid at p.6

connection with the birth or adoption of a child, but rather what limits, if any, should be placed on its availability.

There are a number of cogent reasons why part-time work should be more generally available for both men and women. This is a matter raised for the consideration of the trade union movement and employers by the August 1989 national wage decision. We do not believe, however, that these proceedings should become a vehicle for establishing a general unqualified right for an employer to employ people part-time which is, in essence, the CAI counterclaim. These proceedings have their origin in the desire of the ACTU to establish or advance a range of rights for the natural or adoptive parents of young children. It is on this basis that they have assumed the status of a test case and this decision is made, in all respects, on the basis that the ACTU has indicated that its affiliates will not resist the introduction into private sector awards of any of the provisions we may decide upon as part of an entire scheme benefiting the parents of young children.

There was, as we have said, no issue between the parties about the desirability of part-time employment for parents of young children. Further, the evidence before us makes clear the demand for such employment from parents, particularly women. The Commonwealth government and all of the States, as well as the other interveners, supported the introduction of part-time work as claimed. We have therefore decided to provide for part-time work for parents associated with the birth or adoption of their child.”¹⁰⁷

[92] A significant expansion of award part-time employment provisions occurred as a result of the 1995 *Personal Carer’s Leave Test Case - Stage 2*.¹⁰⁸ The AIRC Full Bench made the following finding in that matter:

“It is apparent from the evidence that part-time employees are an integral part of the labour force. Part-time employment is one of the ways in which families reconcile their work and family commitments. The evidence shows an employee preference for part-time work, particularly among women.”¹⁰⁹

[93] The Full Bench went on to determine that, first, part-time work provisions should, on application, be introduced into awards which did not already have them and, second, that the adequacy and relevance of existing provisions should be reviewed against the characteristics of the particular industry or enterprise covered by the award.¹¹⁰ The Full Bench determined that 2 matters needed to be taken into account in the development of “fair and equitable” part-time work provisions. The first was that it was necessary to ensure that part-time employees were provided with pro-rata entitlements to the benefits available to full-time employees, including equitable access to training and career path opportunities. The second was:

“Secondly, part-time work needs to be clearly distinguished from casual employment. While the provision of pro rata benefits is one means of providing such a distinction

¹⁰⁷ Ibid at pp.12–13

¹⁰⁸ (1995) 62 IR 48

¹⁰⁹ Ibid at p.72

¹¹⁰ Ibid at p.72

other measures are also needed. In particular part-time work provisions should specify the minimum number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked.

Regularity in relation to hours worked is an important feature of part-time employment. In the absence of such regularity reduced hours of work may not be conducive to reconciling work and family responsibilities. For example, if hours of work are subject to change at short notice it can create problems for organising child care as these arrangements generally require stable hours and predictable timing...”

[94] Part-time employment provisions awarded after the *Personal Carer’s Leave Test Case - Stage 2 Decision* did not contain express restrictions limiting their operation to persons with family responsibilities, but provisions drafted in accordance with the principles established in that decision tended to be structured in a way which facilitated their utilisation by employees with family responsibilities. The part-time employment provision established for the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* as a result of the *Award Simplification Decision*¹¹¹ became a model clause adopted in many awards. Its features were described in a Full Bench decision¹¹² issued as part of the award modernisation process conducted pursuant to Part 10A of the WR Act as follows:

“[136] ... The provision characterises a regular part-time employee as an employee who works less than full-time hours of 38 per week, has reasonably predictable hours of work and receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work. It requires a written agreement on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day, with variation in writing being permissible. All time worked in excess of mutually arranged hours is overtime.”

[95] In many modern awards this means that part-time employees, unlike full-time employees, may not have their rostered hours changed by the employer on the provision of a specified period of notice, but must consent in writing to any change. For example, in relation to the establishment of 3 modern awards as part of the award modernisation process, the *Aged Care Award*, the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010*, the Full Bench said:

“[147] ... One matter which was raised in all but the *Medical Practitioners Award 2010* related to the use of part-time employees. There are a number of common features for the use of part-time employees. To begin, they must have reasonably predictable hours of duty. Underlying provisions vary but generally there is a requirement to provide certainty when employing part-timers. We have included a relevant provision. The next issue is in relation to changes to working hours of part-timers. There are of course notice periods for roster changes contained in the underlying awards but these seem not to be used in relation to part-timers. Instead, part-time hours appear to be changed regularly on a daily basis where the employee consents. Many employers saw this as a necessary flexibility. The private hospital

¹¹¹ (1992) 75 IR 272; Print P7500

Section 1.01 ¹¹² *Award Modernisation Decision* [2009] AIRCFB 826

industry employer associations estimated that, on average, part-timers would work an extra six hours per week. The impact of this consent is that the employee does not receive overtime for working in excess of the rostered hours when requested but is paid at the ordinary time rate.

[148] We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.

[149] Whilst all the relevant underlying awards have different provisions there is a general opportunity for part-time employees to consent to working additional hours at ordinary rates within an average of less than a 38 hour week. We have sought to provide some common provisions which retain cost savings for employers in the knowledge that any change requires written consent. There was never any suggestion that asking part-timers to work additional hours did not relate to unforeseen circumstances on the day.”

[96] In relation to the Aged Care Award, the Full Bench in *Appeal by Leading Age Services Australia NSW - ACT*¹¹³ confirmed that the provisions of the award allowing unilateral change to rosters without the consent of the employee were not available in the case of part-time employees, to whom a specific scheme of provisions applied which required the employee’s written consent to any change in hours. The Full Bench pointed to the requirement in the award for part-time employees to have “reasonably predictable hours of work” and said:

“[19] ... This requirement for reasonable predictability in hours of work stems, we consider, from the originating concept of part-time employment as being suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work. It follows that the other provisions of the Award applying to part-time employees must so far as the language permits be read as giving content to the definitional requirement of reasonable predictability in hours of work.”

[97] Thus the typically distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – reflect the original rationale for part-time employment to which we have earlier referred. Part-time employment has been treated as peculiarly suitable for those with major family or other personal commitments in their lives, and award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours.

¹¹³ [2014] FWCFB 12

3. COMMON CLAIMS

3.1 The ACTU claim

[98] The ACTU claim was advanced on the basis that it constituted an integrated package of changes directed at the problem of insecure employment in Australia. It described its approach as having 2 main elements: to provide a “*pathway*” out of casual employment for long-term regular casual employees who desire it, and to improve minimum hours of work for both casual and part-time workers. Its case was based on the following fundamental propositions:

- in recent decades, dramatic changes to the composition of the workforce and the way employers engage their workers has undermined the security of employment of a substantial number of employees;
- for a significantly large category of workers, casual employment is being used in a manner that departs from the proper purpose and intention of casual employment and undermines the fairness and relevance of the safety net;
- whilst industrial arbitration tribunals in Australia have endorsed casual employment as a non-standard form of engagement that is irregular or short-term and non-ongoing, the exponential growth in casual employment has been accompanied by the growth of a large number of workers who are in fact engaged as casuals on a long-term and regular basis;
- many such workers are permanent workers in all but name, in that their work is regular and ongoing yet they enjoy significantly inferior rights and conditions compared to permanent workers, and also experience a range of adverse consequences as a result of being casually employed;
- many employers choose not to provide entitlements afforded to permanent employees simply by paying a casual loading and adopting the nomenclature of casual employment, and where this is left to operate at large without any coherent checks and balances, it undermines the safety net;
- many long-term casual employees would wish to convert to permanent employment, but only 28 of the 122 current non-enterprise modern awards contain a casual conversion clause which gives a right to convert;
- the variation of modern awards generally to provide for a model casual conversion clause would provide casual employees who wish to move into permanent employment a pathway for doing so;
- in some modern awards which already have a casual conversion clause, the clause is inadequate and should be varied to deem casuals to have converted to permanent employment after 6 months unless they opt out;

- a significant number of casual employees are engaged on shifts that are too short to be viable, having regard to the fixed costs of attending work including travel costs and childcare, travel time and the overall impact on earnings;
- a 4 hour daily minimum for casual and part-time employees is a necessary standard to ensure security of pay and a viable income, particularly for those working less than full-time hours, for low income earners, for employees with family responsibilities and for women;
- working time insecurity is a key component of insecure employment, and it is common for casual and part-time employees to be required to work short shifts of only 3 hours or less;
- casual and part-time employees express a high level of preference for more hours of work; and
- the ACTU's proposed changes were necessary for the modern awards objective in s.134 of the FW Act to be met and to establish a fair and relevant safety net.

[99] The ACTU's model casual conversion clause (as framed in terms of clause numbering for the *Aboriginal Community Controlled Health Services Award 2010*) is as follows:

“10.5 Casual Conversion

- a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment.
- b) An irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.
- c) An employee who has worked on a full-time basis throughout the period of casual employment has the right to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment has the right to convert to part-time employment, on the basis of the same number of hours and times of work as previously worked.
- d) The employer must give the employee notice in writing of the provisions of this clause within four weeks of the employee having attained the six month period.
- e) An employee who has attained the six month period, may elect to convert to full-time or part-time employment by providing four weeks' notice in writing to their employer, and within four weeks of receiving such notice the employer must consent.
- f) If a casual employee elects to convert to full-time or part-time employment, the employer and employee must discuss and document:
 - i. whether the employee will become a full-time or part-time employee;

- ii. if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, in accordance with clause 10.3—Part-time employment.
- g) A casual employee’s right to convert is not affected if the employer fails to comply with the notice requirements in this clause.
- h) A casual employee who converts to full-time or part-time employment may only revert to casual employment by written agreement with their employer.
- i) A casual employee who converts to full-time or part-time employment shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.
- j) Nothing in this clause obliges a casual employee to convert to full-time or part-time employment, nor does it permit an employer to require a casual employee to convert if the employee does not wish to do so.
- k) Casual employees (including irregular casuals) must be given written notice of the provisions of this clause by their employer within four weeks of commencing employment.
- l) An employer shall not reduce or vary an employee’s hours of work in order to avoid or affect the provisions of this clause.
- m) Any disputes about the application or operation of this clause shall be dealt with under the procedures set out in clause 9 - Dispute resolution.”

[100] The ACTU seeks that the above model conversion clause be included in a total of 105 modern awards (including 17 awards which already contain a casual conversion clause, but which the ACTU considered to be satisfactory). A list of the 105 awards for which this variation is sought is contained in Attachment A to this decision.

[101] For the small number of modern awards that already contain a casual conversion clause, the ACTU has applied for the clause to be varied to adopt a variant to its model clause which involves casual employees being deemed to have become permanent after a period of 6 months’ employment unless the employee chooses to opt out. This deeming casual conversion clause has the effect of allowing a regular casual employee’s employment to be deemed to have converted to permanent employment automatically after 6 months unless the employee chooses to opt out. The “*deeming*” variant of the model casual conversion clause proposed by the ACTU is as follows:

“12.5 Casual Conversion

- (a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of

employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

- (b) For the purpose of this clause an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.
- (c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.
- (d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 12.5 if the employer fails to comply with the clause 12.5(d).
- (e) An employee who would otherwise be deemed a full or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under clause 12.5(d) or after the expiry of the time for giving such notice.
- (f) Unless the employee elects to remain a casual employee, the employer and employee must discuss, and document:
 - (i) whether the employee will become a full-time or part-time employee; and
 - (ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 12.3—Part-time employment.
- (g) A casual employee who is deemed to be employed on a full or part-time basis may only revert to casual employment by written agreement with the employer at any time.
- (h) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 12.5(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 12.5(a).
- (i) A casual employee who is deemed to be employed on a full or part-time basis shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, right to request flexible

working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

- (j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.
- (k) An employer shall not reduce or vary an employee's hours of work in order to avoid or affect the provisions of this clause."

[102] The ACTU seeks that the "*deeming*" variant of the model casual conversion clause be added to the following 5 modern awards:

- *Food, Beverage and Tobacco Manufacturing Award 2010;*
- *Graphic Arts, Printing and Publishing Award 2010;*
- *Higher Education Industry—General Staff—Award 2010;*
- *Manufacturing and Associated Industries and Occupations Award 2010; and*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010.*

[103] The ACTU also, as earlier stated, sought the introduction of a model clause which provides for a standard minimum engagement period of 4 hours for both casual and part-time employees. In respect of casual employees this involves variations to the modern awards listed in Attachment B to this decision, and in relation to part-time employees it involves variations to the modern awards listed in Attachment C.

[104] The ACTU has also sought that a further model clause be placed into modern awards which would, first, require employees are not to be engaged and re-engaged to avoid award obligations, second, introduce an obligation for employers to offer additional hours of work to existing casual or part-time employees first before engaging any new casual or part-time employees and, third, provide that upon engagement casual employees must be informed by the employer of their classification and rate of pay (further ACTU model clause).

[105] The further ACTU model clause is as follows:

- "10.3 (a)** An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or the employee's work or position outsourced by the employer, to avoid any obligation under this award.
- (b)** An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours.

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

[106] The further ACTU model clause is proposed to be inserted into the modern awards listed in Attachment D.

3.2. The AMWU claim

[107] The AMWU sought 2 variations to the casual and part-time employment provisions in the following awards:

- *Manufacturing and Associated Industries and Occupations Award 2010;*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010;*
- *Graphic Arts, Printing and Publishing Award 2010; and*
- *Food, Beverage and Tobacco Manufacturing Award 2010.*

[108] First, like the ACTU, the AMWU sought that existing casual conversion clauses in each award be varied so that casual employees were deemed to be permanent after an identified period unless they elected to remain as casuals. The clause they sought for each of the 4 awards was, in substance, the same as the “*deeming*” variant of the ACTU’s model clause, and for that reason it is not necessary to reproduce it. The AMWU adopted the ACTU’s case with respect to casual conversion, and also contended that:

- the current casual conversion clause was not operating to discourage the trend towards the use of ‘permanent casuals’, as predicted in the *Metals Casuals Decision* in 2000;
- the proportion of casuals in the manufacturing industry had increased from 14.1% in 2000 to 16.9% in November 2013;
- a conversion clause based on employee election was unviable because the employee was necessarily in precarious employment and would be at risk, or feel that they were at risk, of negative consequences arising from an election request, such as the loss of further shifts;
- addressing such negative consequences through court proceedings against adverse action or to enforce the award was not a viable option for casual employees;
- the Commission no longer had the power to determine disputes concerning the exercise of an election as it did at the time of the *Metals Casuals Decision* in 2000;
- a provision which deemed a regular casual to be permanent after 6 or 12 months but allowed the casual to opt out if they wished to remain casual would address these problems;

- the provision of this nature would still allow employees to have access to irregular casual employment indefinitely, and to regular casual employment for 6 or 12 months, or indefinitely where the employees chose to remain casual.

[109] Secondly, the AMWU sought minimum engagement provisions for part-time and casual employees in the following terms:

“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.”

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

3.3 The Ai Group claim

[110] The Ai Group is seeking a variation to existing casual conversion clauses in 21 modern awards to remove the requirement upon employers to notify eligible casual employees of their right to request to convert to permanent employment. The Ai Group’s variation effectively places the onus upon casual employees to identify themselves as eligible for conversion and to exercise their right to elect for conversion, should they wish to do so.

[111] The existing clauses establish a right for an employee who is not an “*irregular casual employee*” and “*who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months*”¹¹⁴ (or 12 months in the case of some of the awards). An “*irregular casual employee*” is defined as “*one who has been engaged to perform work on an occasional or non-systematic or irregular basis*”.¹¹⁵ The clauses then impose the existing obligation of employers¹¹⁶:

“(b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 14.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 14.4 if the employer fails to comply with clause 14.4(b).”

[112] The Ai Group’s proposed variations would remove this obligation from the 21 modern awards. Those awards are listed in Attachment E to this decision. In support of the claimed variations, the Ai Group contended:

- the notification requirement imposed a disproportionate burden on employers, in that it demanded considerable time and cost on the part of the employer yet only a small

Article II. ¹¹⁴ See for example cl.14.4(a) of the *Manufacturing and Associated Industries and Occupations Award 2010*

¹¹⁵ See cl.14.4(k) of the *Manufacturing and Associated Industries and Occupations Award 2010*

¹¹⁶ As per cl.14.4(b) of the *Manufacturing and Associated Industries and Occupations Award 2010*

proportion of casuals once notified decided to elect to convert, and the election could then be refused on reasonable business grounds;

- under the current provisions any failure to notify did not in any event affect the employee's right to elect to convert;
- it was not known at the time that casual conversion clauses were first formulated with the notification requirement that only a small proportion of casuals would wish to convert;
- in contemporary circumstances employees have ready access to numerous sources of information about their award rights and did not therefore need to be informed of those rights by their employer, and in addition the employer was required by s.125 of the FW Act to provide new employees with a copy of the *Fair Work Information Statement*;
- additionally, modern awards contained a standard obligation to ensure that copies of the award were available to employees at the workplace;
- it was unfair to impose an overlapping requirement upon employers, the failure to comply with which exposed them to pecuniary civil penalties for breach of the award; and
- the notification requirement was no longer necessary to achieve the modern awards objective, and thus could not be included under s.138 of the FW Act.

3.4 The RCSA claim

[113] The RCSA similarly sought to have the notification requirement in the existing casual conversion clauses in 20 modern awards removed.¹¹⁷ The RCSA contended:

- casual employment was an important category of employment of value to both employers and employees;
- the financial penalty to which an employer was exposed for breach of the current notification requirement was disproportionate to the benefit gained from the provision;
- only in a small proportion of cases was the election right exercised by employees once notified of the right by their employers; and
- employers required considerable time to undertake the task of identifying employees who were eligible to elect to convert and then to notify them.

¹¹⁷ The 20 awards are those listed in Attachment E except for the *Cotton Ginning Award 2010*

3.5 Expert and economic evidence

[114] The principal expert witness called by the ACTU in support of its claim was Professor Raymond Markey¹¹⁸ of Macquarie University. Attached to his statement of 19 October 2015 were 2 reports: the first, entitled “*Report on Casual and Part-Time Employment in Australia*” (First Markey Report), was prepared in conjunction with Dr Joseph McIvor of Macquarie University; and the second, entitled “*Supplementary Report: Casual and Part-Time Employment in Australia*”, was prepared in conjunction with Dr McIvor and Dr Martin O’Brien of Wollongong University (Second Markey Report).

First Markey Report

[115] The First Markey Report was, notwithstanding its title, concerned almost entirely with casual employment. It integrated information and expressed conclusions derived from a review of the literature, data from the Australian Bureau of Statistics (ABS), data from Wave 13 of the Household, Income and Labour Dynamics in Australia (HILDA) survey, and data from a survey of 838 casuals and 43 labour hire workers conducted on behalf of the ACTU (ACTU survey) (noting that the report acknowledged limitations with sampling for the ACTU survey and treated it as a “*useful but less precise guide than the ABS or HILDA data*”¹¹⁹). The following statistical information was contained in the First Markey Report:

- (1) Approximately one quarter of Australian employees did not have leave benefits (a statistical proxy for casual employment) in 2013. The proportion of casual employees increased rapidly during the 1990s, when most jobs created were casual jobs, but has stabilised in recent years. Australia has a very high level of casual employment amongst OECD economies.
- (2) Casuals disproportionately occupy jobs with part-time hours: 71% of casual jobs are part-time, and nearly 54% of part-time jobs are occupied by casuals.
- (3) Casuals tend to be younger than permanent employees, and are much more likely to be dependent students. About 38% of casuals are aged 15–24 years, and 19% of casuals are dependent students. About 54% of all casual employees are women.
- (4) The highest proportion of all casual employees across industry sectors were in Accommodation and food services (20%), Retail trade (19%) and Health care and social assistance (11%). A number of industry sectors had much lower proportions of casuals, with Rental, hiring and real estate, Financial and insurance services, Information, media and telecommunications, Electricity, gas, water and waste services and Mining at about 1%.
- (5) The notion of casual employees as informal and intermittent workers does not necessarily characterise much of actual casual employment. The HILDA survey identified that 60% of persons who self-identified as casuals had regular shifts and had worked for their current employer for at least 6 months. If this was applied to

¹¹⁸ Witness statements – 19 October 2015, Exhibit 110; 9 March 2016, Exhibit 111; Oral evidence – Transcript 23 March 2016 at PN8863–PN9905

¹¹⁹ Witness statement – 19 October 2015, Exhibit 110 at RM-2, at p.10

ABS data on the number of employees without leave benefits, that would amount to 1.3 million persons. The HILDA survey also identified that 28% of persons who self-identified as casuals had worked for their current employer for 3 years or more.

- (6) The proportion of workers who had completed work-related training in the last year was 40% for permanent employees and 22% for casuals.
- (7) The responses to a question in the ACTU survey concerning casual employees' reasons for working as casuals were: 49% indicated "*It was the only work available, I had no choice*"; 44% indicated "*I freely choose to work casual because it is more flexible/convenient for me*"; 3% indicated "*I need the higher wage with casual loading*"; and 4% gave other reasons.
- (8) The ACTU survey also indicated that 40% of casual employees had very little say in the hours that they worked, 18% of all casuals had worked a shift of 2 hours or less in the past 3 months, and a further 19% had worked a shift of only 3 hours in the past 3 months. The industries with the highest proportion of casuals working short shifts (3 hours or less) were Other services, Arts and recreation services, Accommodation and food services, Education and training, and Health care and social assistance. Female employees were more likely than male employees to work short shifts.
- (9) Casual employees are disproportionately represented among award-reliant employees, with 55% of award-reliant employees being casuals, and appear disproportionately in low-paid industries such as Accommodation and food services and Retail trade.
- (10) The HILDA survey showed that casuals had the highest propensity for wanting to work more hours, with 43% of casual part-time workers wanting more hours compared to 23% of permanent part-time workers.
- (11) 17% of casual part-time females and 37% of permanent part-time females cited caring for children as the main reason for working part-time hours.
- (12) The average weekly pay for workers without leave benefits working part-time hours was \$359, with the average figure for males in that group being \$373 and for females \$351.

[116] The following propositions were also derived from the First Markey Report from a review of the literature:

- casual status undermines organisational commitment and contributes to high levels of turnover;
- business has emphasised the ability to deploy labour in a contingent manner through casual employment (numerical flexibility), but there is little available evidence that numerical flexibility delivers gains in productivity, and it may undermine functional flexibility (which emphasises the use of training and development to allow staff to carry out a range of functions);

- many casuals report that casual employment restricts rather than facilitates their own flexibility needs;
- any benefits to employees with regard to flexibility are largely dependent on the total hours of work rather than the weekly variance of hours inherent in casual work, and casual work appears to offer no advantage over permanent part-time work in this respect;
- short shifts eat into the time economy and net earnings of work, and it can be argued that reasonable minimum shift lengths enhance flexibility for employees by ensuring a balance between time spent at work and time spent in travel and preparation;
- the casual loading has a limited ability to compensate for low base rates of pay and the absence of paid leave rights among casuals;
- for those who prefer a full-time job, casual employment is often not a path to greater job security later, and many casuals lack access to career progression, face greater risks of unemployment, are underemployed, and feel marginalised in the workplace with a lack of access to training, promotions and even staff meetings;
- the low pay, variability and insecurity of income associated with casual employment makes it difficult for casuals to manage their finances and secure lending, which is likely to lead to lower wealth accumulation over time;
- casual employment has been linked to feelings of anxiety, stress and powerlessness, and to long term negative health effects, and the lack of paid sick leave may cause employees to come to work when sick; and
- extending leave and other rights to casuals and making these leave rights portable between employers, is one way of mitigating the insecurity associated with casual work, and such an approach would be consistent with the “*flexicurity*” approach taken in some Nordic and other European countries.

[117] The First Markey Report stated the following overall conclusions:

“Both the problems of low pay and precarious hours are exacerbated when shifts are excessively short. Many casuals are working very short shifts, and many would prefer longer minimum shifts. While employers may condemn minimum shifts as a restriction on flexibility, minimum shifts are likely to increase flexibility for employees and allow them to better balance work and pay. The longer minimum shift of four hours proposed by the ACTU seems likely to facilitate this.

The ‘flexibility’ associated with casual employment is also unlikely to deliver gains in productivity for the economy, in spite of employer contentions to the contrary. The marginalisation and lack of training associated with casual employment undermines productivity and innovation, and the example of the highly casualised University sector indicates these may also undermine certain aspects of service delivery. Casual employment also undermines organisational commitment.

Seen in this light, the ACTU proposals seem likely to enhance both productivity and employee flexibility. The right to convert seems likely to increase organisational commitment and increase proportions of permanent employees, which will in turn facilitate a more skilled, productive and innovative workforce closely tied to and integrated with the organisation with which they work. Meanwhile, the extension of rights to casuals reduces the precariousness associated with casual work, and the extension of conversion rights will ensure that the choice of casual work is a more genuine one.”¹²⁰

Second Markey Report

[118] The Second Markey Report was prepared in response to a request from the ACTU to elaborate on a number of identified matters referred to in the First Markey Report. The Second Markey Report included the following information and propositions:

- the ACTU survey was a “valid and substantial research instrument”¹²¹;
- the proportion of casual workers was 15.8% in 1984, peaked at about 27% in 2000–2003, and stabilised at about 24% from 2005 onwards;
- growth in the proportion of male casual employment was most pronounced, at 9.4% in 1984, 23.6% in 2001 and has remained at around 20–22% since 2005, while female casual employment was at 25.7% in 1984, peaked at 32.4% in 2002, and declined to about 26.5% in 2013;
- full-time casual employment is at about 7% of the workforce, part-time casual employment (where there has been the strongest growth) has been at about 17–18% since 2002, and permanent part-time employment has grown from 5.9% in 1988 to reach a new high of 14.6% in 2013;
- by industry, the highest casual densities are in Accommodation and Food Services (65.4%), Agriculture, forestry and fishing (39.9%), Administrative and support services, which includes contract cleaning (39.8%), Retail trade (39.3%), and Arts and recreation services (35.9%);
- by age groups, casual density is highest in the 15–19 year old group (70.7%), the 20–24 year old group (37.8%) and the 65 years and over group (35.9%);
- however a majority of all casuals (59%) are aged between 25 and 64 years, with 19.2% of all casual employees aged between 15–19 years and 18.6% aged between 20–24 years;
- according to HILDA, around 73% of all casuals had worked for their current employer for 6 months or longer, regardless of their work schedule (that is, regardless of whether they perform “regular” work, which is a problematic and ill-defined concept);

¹²⁰ Witness statement – 19 October 2015, Exhibit 110 at RM-2, at p.40

¹²¹ Witness statement – 19 October 2015, Exhibit 110 at RM-3, at p.7

- for definitional purposes, self-perception as a casual aligns with a self-identification of an absence of leave entitlements in about 96–97% of cases;
- the ACTU survey showed that across all industries, 11.7% of casual employees worked only 1–4 hours per week and 16.4% worked 5–8 hours per week;
- around 28% of casual employees were not covered by superannuation as compared to just 2.4% of permanent employees;
- long-term casuals (6 months or more with the same employer) were a majority of all casuals in total and in every industry sector, and of all long-term casuals, 21.9% worked in Accommodation and food services, 20% worked in Retail trade and 10.7% worked in Health care and social assistance;
- long-term casuals were a large majority of casuals in every age group, and 22.4% of all long-term casuals were in the 15–19 year old group and 22.9% were in the 20–24 year old group;
- 59.1% of long-term casuals were women;
- the ACTU survey showed that 27.5% of all long-term casuals would prefer permanent employment, and by industry sector the lowest was 13.3% in Construction and the highest was 45.8% in Information, media, and telecommunications, Financial and insurance services, and Rental, hiring and real estate services;
- the ACTU survey also showed that 77% of casuals who had asked for conversion to permanent employment had succeeded, and almost 20% of casuals surveyed had made such a request; and
- analysis of Australian Workplace Relations Study (AWRS) data indicated that the mean employment tenure for casual employees is only 2 years less than that for permanent employees; that casuals employed continuously by the same employer for over 6 months account for over 10% of all employees, over 25% of part-time employees and 88% of all casual employees; that such long-term casuals were over 75% of all casuals in all industry sectors except Transport; that 43% of casual employees and a majority of casual employees in Manufacturing, Construction, Wholesale, Transport, IT, Public administration and Arts and recreation services, and Community and personal services workers would prefer longer hours; under half of all casuals, as compared to over 60% of total employees, received training, and a significantly higher percentage of these had to pay for their own training.

Dr Tom Skladzien

[119] The AMWU adduced evidence concerning the economic impacts of its claim from Dr Tom Skladzien¹²², who worked as its National Economic and Industry Adviser and had previously occupied senior economic advisory and modelling positions in the Commonwealth Government. It is clear that Dr Skladzien could not be characterised as an expert witness in the proper sense because his position was not independent of the AMWU, but we accept that he was possessed of significant economic expertise and experience, and accordingly we consider that his evidence had probative value to that extent. Dr Skladzien relied in part upon a survey conducted by the AMWU which we discuss later. In his statement Dr Skladzien said:

- casual employment, for those who would prefer to be permanently employed, carried with it significant costs including economic costs (such as difficulty in accessing finance), personal costs (such as anxiety about future income and work) and social costs (such as the absence of leave entitlements), or a combination of these (uncertainty about time usage and the ability to plan a “normal” life);
- these uncertainties had broader economic effects which the grant of the AMWU claim would mitigate;
- manufacturing in Australia remained under considerable pressure, with low levels of profits and investment, and without significant policy intervention would continue its relative decline;
- the Prime Minister’s Manufacturing Taskforce had issued a report in 2012 which made recommendations about measures to address manufacturing decline, and recognised that cost-cutting was not sufficient to reverse the fortunes of the sector and that deeper drivers of productivity (namely quality, technology, innovation, service and better supply chain access) needed to play a greater role;
- numerous studies had recognised that high performance workplaces were defined by trust, collaboration and openness between employer and employee, with the employer welcoming the feedback of workers in a well-defined and structured, cooperative environment;
- if casual employees felt insecure in their work and fearful of having work denied them if they were seen to exhibit excessive independence, they were unlikely to perform the type of employee role that high performance workplaces required;
- the grant of the AMWU claim, which would increase the number of casuals becoming permanent employees, would make high performance workplaces more attainable and would likely improve firm productivity and profitability;
- the evidence was that employers invested less in the skills of casual employees, so that a more permanent workforce was likely to lead to a more skilled workforce;

¹²² Witness statement – 10 October 2016, Exhibit 138; Witness statement – 9 March 2016, Exhibit 139; Oral evidence – Transcript 24 March 2016 at PN11240–PN11414

- casual employees were useful to help businesses balance ebbs and flows in demand for products, but for that purpose casuals should be used as a complement to the permanent workforce and not as a substitute for it;
- the AMWU's claim only applied to casual staff who had effectively worked in permanent positions for at least 6 months, and it was therefore reasonable to assume that it would not impact upon the availability or use of casuals for the legitimate task of managing fluctuating demand;
- disturbingly there was significant circumstantial evidence that manufacturing businesses were using casual employees to lower labour costs independently of the need for flexibility in labour supply, which implied that the casual loading was not sufficient to compensate employees for the value of lost security and entitlements;
- this also implied that the AMWU claim might carry a cost, but this would be a transfer of value from the business to the worker rather than a loss to the economy as a whole, and the claim would mitigate likely underinvestment in skills and health and safety which led to real costs for the business and the broader economy;
- the AMWU claim was unlikely to generate either positive or negative discernible macroeconomic impacts, but would have significant impacts on specific businesses and individuals which will have economy-wide positive effects even though they may not be measurable;
- the greater conversion of casuals to permanent employment, and the greater certainty it would bring them, would be likely to boost their consumption and decrease the need for precautionary saving, and improve productivity; and
- the claim would also diminish economic inequality generally, which would improve aggregate outcomes.

Dr Elsa Underhill

[120] The AMWU also called evidence from Dr Elsa Underhill¹²³, Senior Lecturer and Director of Research in the Department of Management at Deakin University. Dr Underhill has undertaken extensive research since the early 2000s on the implications of labour hire employment for health and safety, and has been an expert witness for WorkSafe Victoria in prosecutions for injuries or fatalities to labour hire workers. In her statement, Dr Underhill expressed conclusions concerning health and safety outcomes associated with casual employment based on a review of the research literature and her own research (noting that most labour hire employees are engaged on a casual basis). Her main conclusions were:

- the link between casual employment and poorer health and safety outcomes was well established;
- a range of studies (Australian and international) conducted as a result of the rapid growth of precarious employment since the 1990s and the associated increase in

¹²³ Witness statement – 10 October 2015, Exhibit 92; Oral evidence – Transcript 22 March 2016 at PN7849–PN7982

employment insecurity had produced remarkably consistent results confirming the relationship between casual or temporary employment and adverse health and safety outcomes;

- casual employment is not homogeneous, and the degree of job insecurity will be influenced by institutional settings such as the level of employment protections and entitlements, and the macroeconomic conditions during particular periods;
- a number of studies in relation to actual and perceived job insecurity (including employee concern about continuity of employment and income) have demonstrated adverse health outcomes, including poorer mental health, an increase in the incidence of coronary heart disease, and an increase in fatigue (caused by the second job-holding often associated with casual employment);
- disadvantages of casual employment, including lesser access to workplace health and safety information, exclusion from consultation processes, and lower levels of instruction and training about work tasks and safety, contributed to a much higher propensity for casual employees to be exposed to hazards at work and to be injured at work;
- casual employees are also more likely to present for work when sick or injured because of a fear of job loss or a lack of paid sick leave entitlement, which can impair recovery and lead to greater susceptibility to further injury;
- employees who chose casual employment for lifestyle reasons or where it was secondary to other activities such as education were less likely to report adverse health outcomes; and
- the most effective way to mitigate the risks is to limit the employment of casual workers to situations where permanent employment cannot be accommodated, because many of the factors associated with adverse health and safety outcomes amongst casual workers are inherent to the flexibility which underpins employers' decisions to hire casual employees.

[121] In cross-examination, Dr Underhill was taken by the Ai Group to an article published by Professor Sue Richardson of the National Institute of Labour Studies at Flinders University (together with Laurence Lester and Guangyu Zhang) entitled “*Are Casual and Contract Terms of Employment Hazardous for Mental Health in Australia?*”¹²⁴ The report was subsequently received into evidence.¹²⁵ The report analysed HILDA data to examine the impact of fixed term and casual employment on mental health as compared to permanent full-time employment. The outcome of the analysis was that no significant relationship could be identified between mental health outcomes and casual employment, even in the case of employees with lower educational attainments and therefore fewer employment options. The authors said that this did not demonstrate that no-one suffered from being employed on a

¹²⁴ Richardson, S, Lester, L and Zhang, G (2012) *Are casual and contract terms of employment hazardous for mental health in Australia?*, Journal of Industrial Relations, 12 November 2012, Vol. 54(5) at p.557. The version shown to Dr Underhill was a pre-publication version, but did not differ in substance from the published version.

¹²⁵ Exhibit 93

casual basis, but rather that while some were harmed, others benefitted such that there was on average no systematic relationship. They regarded this outcome as confirming their hypothesis that unique characteristics of the Australian labour market, in which health care and unemployment benefits were not tied to prior employment history, casual employees enjoyed a loaded rate of pay and superannuation benefits, had protections against unfair dismissal and discrimination, had access to some forms of unpaid leave, and were in most cases entitled to penalty rates for work outside normal business hours and a minimum shift of 3 hours, served to ameliorate the potential harmful effects on mental health of casual employment. It also meant that casual (and fixed-term) employment might for these reasons be reasonably preferred by some workers, including persons with significant caring responsibilities, workers approaching retirement and full-time students. The authors acknowledged that their findings went against the weight of international and Australian evidence of the harmful effects of being employed on a casual basis.

[122] Dr Underhill in response to the Richardson article said that the analysis did identify that particular subgroups of casuals did suffer adverse mental health outcomes compared to other employees, in particular male casuals working full-time hours with only year 12 qualifications and female casuals working part-time hours, which confirmed that it was necessary to break down the categories of casual employment to distinguish between those who prefer casual employment and those who were locked into it. She therefore criticised the analysis as not sufficiently disaggregating the data to provide more useful conclusions. She also criticised the report for relying on data which depended on employees self-identifying as casuals rather than being identified on the basis that they had no paid leave entitlements.

Brian Howe

[123] The AMWU also relied upon a report prepared by Mr Brian Howe¹²⁶, formerly Deputy Prime Minister of Australia and minister in various portfolios including social security, health, housing, community services and regional development during the 1980s and 1990s, and subsequently an honorary Professorial Fellow at Melbourne University engaged in overseeing research on social policy issues. In 2011–12 he chaired an ACTU-sponsored inquiry into insecure work together with Mr Paul Munro, a former presidential member of the AIRC, Ms Jill Biddington, a former union official and educator, and Ms Sara Charlesworth, Associate Professor and Principal Research Fellow at the Centre for Work+Life at the University of South Australia. That inquiry received a large number (over 550) of written submissions and conducted public hearings at towns and cities throughout Australia, and resulted in a report entitled “*Lives on Hold - Unlocking the Potential of Australia’s Workforce*”. Mr Howe’s report was based largely on the findings of the “*Lives on Hold*” report (which was attached to Mr Howe’s witness statement), but also referred to other published research literature. It dealt with the impact of long term casualisation on the individual and society and the “*the implication of not having a deeming casual conversion clause in Modern Awards*”¹²⁷. Mr Howe’s report stated that:

- the internationalisation of the Australian economy had undoubtedly improved living standards but at the same time had led to unprecedented growth in insecure work;

¹²⁶ Witness Statement – 11 November 2015, Exhibit 108

¹²⁷ Witness Statement – 11 November 2015, Exhibit 108 at para 1

- casual and fixed term employment was concentrated in a few industries (retail, tourism and hospitality) but was present in most industries and was now part of the culture of modern commerce and industry;
- the evidence before the ACTU inquiry demonstrated that casual workers felt a lack of dignity in doing the same work as permanents but as second class citizens, often worked for long periods for a single employer, felt it difficult to plan their lives when they were on a call-in system, lacked written contracts and were consequently unaware of the terms of their employment and their entitlements, lacked a sense of being able to work up to a higher status position, were rarely included in educational programs or training, and were often migrant workers who were paid less than award wages in appalling conditions;
- where conversion entitlements formed part of an award, ways were found by the employer to avoid the award by terminating contracts and rehiring;
- the knowledge revolution in the economy had fostered polarisation of the workforce, with one section of the workforce being casualised and disposable;
- the importance of a deeming provision was that it gave employees the opportunity to realise the status of an ongoing employee, obtain security of income and entitlements and gain access to training and development programs and career opportunities;
- recent research had demonstrated that a lengthy period of casual employment had a major impact on lifetime earnings;
- Australia's social security system was not well integrated with the labour market and penalised those who were temporarily out of work rather than facilitating successful transitions between jobs, thus exacerbating the precariousness of insecure employment;
- employers have to a large extent divested themselves of responsibility for training and development of workers, which has particularly disadvantaged those with an insecure foothold in the economy; and
- the deeming provision claimed by the AMWU would prevent the institutionalisation of precarious employment through the misuse of casual employment whilst retaining some flexibility for the employer with its labour force.

Jill Biddington

[124] The ACTU also called evidence from Ms Jill Biddington¹²⁸, who as earlier stated participated in the ACTU's inquiry into insecure work and was involved in the preparation of the "*Lives on Hold*" report, concerning the conclusions she derived from that inquiry. She, like Mr Howe, emphasised the stigma and the lack of equality with full-time employees which was felt by the casual employees who gave evidence to the inquiry.

¹²⁸ Witness statement – 9 October 2015, Exhibit 2; Oral evidence – Transcript 14 March 2016 at PN611–PN838

Dr Deborah Vallance

[125] The AMWU also called evidence from Dr Deborah Vallance¹²⁹, its National Health and Safety Coordinator. Dr Vallance has worked in the health and safety area for the AMWU for 20 years. Like Dr Underhill, she referred to Australian and international research on ‘insecure work’ and concluded that “... *there is strong evidence that those in insecure work, which includes casual workers, experience poorer health and safety and poorer overall health outcomes than permanent workers ...*”.¹³⁰ She said that the features of casual employment that impacted on health and safety include job insecurity, unclear lines of communication, lack of awareness of rights and confusion about roles. Dr Vallance gave further evidence that participation in consultative workplace arrangements is difficult for insecure workers. She said that converting casuals to permanent status would have positive impacts on casual workers’ health and safety, by removing recognised health and safety risks. During cross-examination by the Ai Group, Dr Vallance did not accept the proposition that difficulties participating in workplace consultative arrangements did not apply to long term regular casuals working for an employer.

Withers Report

[126] The ACCI adduced expert evidence from Professor Glenn Withers¹³¹ of the Australian National University. He prepared, in conjunction with Professor Phil Lewis of the University of Canberra and Mr Tim Dalton of Applied Economics Pty Ltd (an economics consultancy firm of which Professor Withers was the managing director) a report dated 22 February 2016 (Withers Report)¹³² concerning casual employment and part-time employment in Australia, the likely effects of the ACTU claim if granted, and the First Markey Report and the Second Markey Report.

[127] The Withers Report placed the growth in casual and part-time employment in Australia in the context of the following propositions:

- (1) The structure of the economy has over recent decades shifted away from agriculture and manufacturing towards service industries. Technological change, in particular in information and communication technologies, has led to a relative decline in occupations requiring manual skills and a relative growth in occupations requiring high levels of education, cognitive skills and interactive skills. There had also been a significant shift towards occupations which are more likely to be characterised by casual and part-time work.
- (2) External shocks and globalisation had also contributed to a decline in demand for traditional “*blue-collar*” skills and a need for a more flexible labour market.
- (3) The growth in the casual workforce had occurred without any diminution in the share of the population in permanent employment and concurrently with a reduction in unemployment as a share of the economy. From 1982 to 2011, the

¹²⁹ Witness statement – 8 October 2015, Exhibit 52; Oral evidence – Transcript 17 March 2016 at PN4778–PN4821

¹³⁰ Witness statement – 8 October 2015, Exhibit 52 at para 33

¹³¹ Witness statement – 22 February 2016, Exhibit 136; Oral evidence – Transcript 24 March 2016 at PN10726–PN11202

¹³² Witness statement – 22 February 2016, Exhibit 136 at GW3

share of the population in permanent employment did not change, but the share of casual employees increased by 7.2%, the share of unemployed persons decreased by 0.7%, and the share of persons not in the labour force decreased by 4.8%.

- (4) The growth in the casual workforce allowed the absorption into the labour market of large increases in labour caused by increased female worker participation (from under 45% in 1978 to over 60% in 2014) and immigration, and had facilitated the workforce participation of young people and women with children. In relation to young people, the increase in year 12 retention rates and the expansion in university and TAFE places since the 1980s are closely related to increased participation in casual and part-time work.
- (5) The traditional 9-to-5 pattern of organising labour was less suited to a modern service-based economy in which the typical worker was a white collar employee in the service sector. For sectors with the highest proportion of casuals – Accommodation and food services (65%), Agriculture, forestry and fishing (40%), Administrative and support services (40%) and Retail trade (39%) – clearly casual employment plays a crucial role in the efficient management of businesses and profitable production because the patterns of demand throughout the day and night vary greatly and are not easily accommodated within a 9-to-5, 5 day employment schedule.
- (6) For many businesses, the optimal operational strategies and organisational structures favoured the greater use of casual and part-time employment, and flexible work arrangements enable firms to operate efficiently and create jobs. Any reduction in the flexibility of working arrangements would be expected to reduce firms' efficiency, output and employment.
- (7) Casual and part-time work has important benefits for many workers, including that for young workers it has been complementary to enhancement of formal qualifications, and for female workers with family responsibilities it has facilitated ongoing attachment to the workplace and has thus helped to maintain or improve prospects for further potential employment.
- (8) The data suggested that the perceived insecure employment arrangements of part-time work are regarded as satisfactory for most workers. ABS surveys of part-time workers indicate that almost 70% are happy with the hours they work although the figure is lower for males (65%) than for females (75%). Around 20% of part-time males and less than 10% of part-time females express a wish for full-time work, suggesting that only a minority are taking part-time work because they cannot find full-time work.
- (9) The availability of casual and part-time work was also attractive to international students studying in Australia, which enhanced the international education sector.
- (10) The payment of a casual loading to compensate casual employees for the absence of leave and other entitlements meant that there was no general cost advantage through employing casual workers, which implied that the use of

casual employees must have significant productivity advantages. The ease with which the hours of work for casual employees can be varied and with which casual employees may be dismissed constitute significant flexibility advantages for employers.

- (11) The increase in demand for casual workers has come about in three ways: first, because the structure of the economy has changed in favour of service industry sectors which employ large proportions of casual and part-time workers, such as accommodation, cafes, restaurants and recreational and personal services; second, the substitution of permanent full-time workers for casual and part-time employees brought about by technological and social change and increased competition; and thirdly the effect of general employment growth. The first effect is estimated to have contributed less to the growth in casual employment than the second.
- (12) Casual and part-time work often provides a “*stepping-stone*” for welfare recipients into stable employment, because it provides valuable work experience, on-the-job training and a work ethic and has positive effects on motivation and health. However this issue is the subject of different views and conflicting evidence, and the effect is likely to depend to a large extent on the characteristics of the individual.

[128] In relation to the characteristics of casual employment, the Withers Report concluded:

- (1) Aggregate statistics about casual employees had to be interpreted with caution because casuals were a highly heterogeneous group with significant differences in age, education, occupation and industry. Compared to permanent employees, they were disproportionately likely to be young, to be female, to work part-time, to have lower levels of education, and to work in certain industries and occupations. These differences rather than casual employment status *per se* explained many of the differences in average outcomes between casual and permanent employees.
- (2) The occupational groups with the highest proportion of casual employees are labourers and sales workers. This illustrates that most casual work is associated with relatively low levels of human capital, even if the persons performing them (such as university students) possess above average human capital. 43% of casuals have obtained an educational qualification higher than year 12, compared to 69% of permanent employees.
- (3) Younger employees are most likely to be casuals, with 71% of 15–19 year olds engaged casually. The next age groups most likely to be casual are 20–24 year olds (38%) and employees aged 65 years and over (36%). Younger employees are also more likely to be working in Accommodation and food services, where 24% of employees were 15–19 years old, and Retail trade, where 18% of employees were 15–19 years old; this was to be compared with 6% of all employees in the 15–19 year old age group. The growth in demand for casuals has facilitated the growth in the labour supply of young people, which has assisted in financing their studies.

- (4) Females make up higher percentages of casuals in the age groups 35–44 and 45–54. While for males casual employment falls continuously after age 25–34, for females the prevalence of casual employment remains constant over the age profile from 20–54. This suggests that casual work is particularly important for the life-work balance of women.
- (5) Dependent students make up 19% of casual employees but only 1% of permanent employees. Only 43% of casuals are a husband, wife or partner compared to 65% of permanent employees.
- (6) In terms of hours worked, 71% of casual employees work part-time compared to 19% of permanent employees. Females are much more likely to work part-time than males. HILDA data shows that casual part-time employees work around 16.1 hours per week on average, whereas permanent part-time employees work 22.7 hours per week.
- (7) ABS data (based on employees with and without leave entitlements) showed that 48% of all casuals worked in three industry sectors (Retail trade, Accommodation and food services, and Health care and social assistance).
- (8) ABS data showed that part-time employees were more likely than full-time employees to work for small firms. However, AWRS data does not show any clear relationship between casual employment and firm size.
- (9) The differential between weekly earnings of casual and permanent employees identified in the First Markey Report exaggerated the effect of casual employment on earnings. The disproportionate representation of certain ages, occupations and industries may explain much of the differential, and the fact that casual part-time employees work fewer hours than permanent part-time employees needs to be taken into account. A more meaningful comparison is between hourly wages rather than weekly wages. Using the HILDA data, casual part-time employees earned on average \$21.48 per hour compared to \$28.87 per hour for permanent part-time employees, and full-time casual employees worked earned on average \$24.93 compared to \$33.91 for permanent full-time employees. Within key groups containing the largest concentrations of casual employees, the differential was significantly reduced or disappeared. For part-time workers in Retail trade, the average hourly wage for casuals was \$20.12 compared to \$20.81; in Accommodation and food services it was \$17.04 compared to \$17.72. The differential was also much lower in the age groups 15–19 and 20–24, which contained 40% of all casuals. Wage differentials increased in older age groups and also at higher levels of educational attainment.
- (10) Casual employees appear to participate less in work-related training than permanent employees, but much of this difference is likely to be explained by different nature of the jobs they hold (in that many jobs that lend themselves to casual employment do not require much training), and overall evidence suggests that lower training participation has little impact on the future employment prospects or job satisfaction of casuals. Part-time casuals in Retail trade and Accommodation and food services were as likely to participate in work-related

training as permanent part-time employees, but there was a significant difference between full-time casuals and permanents.

- (11) Workers' self-evaluation of job satisfaction can vary widely, and most of this variation is attributable to factors other than whether a job is casual or permanent. The evidence from studies using HILDA data suggests that casual status, when compared to permanent status is associated with slightly lower job satisfaction for men, but not for women, and that it has no significant effect on overall life satisfaction or on mental health.

[129] The Withers Report also modelled the aggregate economic effects of the ACTU claim based on a “*Computable general equilibrium*” (CGE) model used by Independent Economics. The model was used to examine the effect of reducing Australia’s casual share of employment to the OECD average, which was seen as the measure of the change sought by the claimants for it. This was done by adjusting Australia’s score under the Fraser Institute Labour Regulation Index (FILRI), which assesses the degree of regulation of the labour markets in various countries and gives a lower score to more regulated labour markets, to match the lower OECD average score. The outcome that would be produced was a one-third reduction in the share of casual employment. Based on a study which calculated that each one point increase in the FILRI reduced the unemployment rate by 0.835 percentage points, the grant of the ACTU claim was estimated to lead to a rise in unemployment by 0.28 percentage points. Additionally, there was a “*modest estimate*”¹³³ that the reduction in the casual employment share would cause a loss of 30% of the labour productivity gains achieved since labour market deregulation commenced in 1993, with the result that there would be a reduction in labour productivity of 0.07%. These effects on employment and labour productivity were then used as key policy inputs into the Independent Economics CGE model. This produced a reduction in real Gross Domestic Product calculated on an expenditure basis of 0.20% by 2017–18, and a loss of 0.18% in employment on a full-time equivalent (FTE) basis. This translated to a permanent loss of \$3.7 billion in real annual GDP and 19,000 FTE jobs. The job losses would be concentrated in those industries which were especially reliant on casual employment.

Third Markey Report

[130] In a report annexed to a second witness statement of Professor Markey dated 9 March 2016¹³⁴ (Third Markey Report), Professor Markey (assisted by Dr McIvor and Dr O’Brien) addressed a number of propositions raised by the submissions and evidence of a number of employer parties, including the common claims of the Ai Group and the RCSA to which their attention was drawn by the ACTU. A number of these propositions referred to the economic challenges Australia was said to be facing as a result of technological change, an ageing population, the growing importance of productivity growth as a source of economic growth, the competitive and disruptive pressures from populous industrialising countries such as China, India and Indonesia, higher wages growth than other countries in recent years, rising energy costs, declining international competitiveness, and a decline in productivity and economic growth. The Third Markey Report challenged the existence and nature of the specified challenges, but went on to say that in any event:

¹³³ Witness statement – 22 February 2016, Exhibit 136 at GW-3, at para 241

¹³⁴ Witness statement – 9 March 2016, Exhibit 111 at RM-4

- established research did not provide any clear link between increasing casualisation or part-time employment and productivity growth;
- part-time and casual employment might have productivity benefits because shorter hours increased employees' application and decreased fatigue, and might be favoured by individual employees with high productivity such as students, but it might also reduce labour productivity through decreased employee commitment, high staff turnover, inefficiencies and capital costs;
- the Productivity Commission's 2015 report into the workplace relations system found that the evidence with respect to the impact of the workplace relations system on productivity, unemployment and overall economic performance was mixed and inconclusive;
- beyond theorising, there was little reason to believe that economic benefits would accrue from greater casualisation of the workforce, and it was more likely to undermine productivity;
- regression analysis showed that a relatively high proportion of employment expenses for part-time and casual employees were fixed costs (such as childcare), so that reducing hours would not reduce these costs, particularly for female employees;
- the employer proposals would only redistribute hours for the existing workforce and is unlikely to significantly improve labour force participation;
- the Productivity Commission had suggested that employers could better pursue productivity gains by, among other things, encouraging greater employee engagement and greater trust between employers and employees;
- the ACTU survey showed that of the approximately 80% of casuals who had not made a request for conversion to permanent employment, just under half indicated that they were satisfied with their current arrangements, with the remainder indicating that they were too afraid to ask because of job security concerns (10%), or that they believed permanent status was not available (25.1%), or that they were not convinced their employer would allow them to change (8.3%), or other reasons, which indicated that they desired more permanent employment but felt constricted in their ability to make an effective request;
- the same survey found that the notification of a right to convert might increase the propensity of employees to make such requests, in that of the 27% who had received such a notification, 40.3% had made a request – roughly double the rate of the sample as a whole;
- of those who had received a notification but had not made a request, 69.6% had not done so because they were content with their current arrangements;
- however a requirement to notify might be insufficient to properly realise employee choice in the form of employment, given that research has attributed the limited use of conversion clauses thus far to the lack of power perceived and experienced by casuals and difficulties associated with pursuing conversion and challenging

objections, and this supported an approach whereby casuals were deemed to be permanent after employment for a period of 6 months unless they opted out;

- there is no support for the notion that the large proportion of employees desire to work fewer hours per engagement, nor would shorter engagements improve employee flexibility;
- shorter engagements would not be likely to affect the rate of unemployment one way or the other, but it would be likely to exacerbate the problem of underemployment and increase the proportion of income spent on employees' employment costs.

Fourth Markey Report

[131] Also attached to Professor Markey's second witness statement was a further report prepared in conjunction with Dr McIvor (Fourth Markey Report) which responded to the Withers Report and to the Ai Group submissions insofar as they referred to the "joint employer survey"¹³⁵ (Employers' Survey) and engaged in a critique of the ACTU survey. In response to the Withers Report, the Fourth Markey Report said:

- the emphasis on the youth of the casual workforce was misleading because only about 38% of all casuals were aged 15–24 years, and only 19% of casuals were dependent students compared to the 26% who were parents with dependents;
- the Withers Report frequently conflated casual and part-time employment, and many of the benefits attributed by the Withers report to casual employment are in fact benefits associated with part-time hours, not casual work *per se*;
- the Withers Report did not present evidence that it was the casual status of the work, rather than the opportunity to work part-time, which facilitated employment opportunities for young people and women with children;
- nor did the Withers Report present any evidence that the change in the skill mix of the workforce and the increased importance of the services sector necessitated the increased use of casual employment;
- the preference in the Withers Report to analyse earnings by reference to hourly rather than weekly income did not take into account that weekly income was an important indicator of employee's actual income;
- because of the casual loading, it would be expected that hourly wages for casual loading would be higher than those of their permanent counterparts, but the evidence in the Withers Report shows that this is not the case and that in most cases casual hourly rates are actually lower;
- this result implies that the insecurity of income faced by casual employees due to variable hours is compounded by lower hourly pay;

¹³⁵ Witness statement – 9 March 2016, Exhibit 111 at RM-5, at para 44

- the tenure of casual employment is not in itself an indicator of security, given the variability and unpredictability of hours, lack of leave rights and other job protections that continue to characterise casual employment; and
- the ACTU survey demonstrates that a 4 hour minimum shift length would meet the preferences of most workers in most categories, while negatively affecting few workers.

[132] In relation to the Employer’s Survey, the Fourth Markey Report made the general criticism that the survey did not ask about employers’ preferences or their satisfaction about various matters, as did HILDA and the ACTU survey, but asked employers to speculate on the effects of particular regulations or proposed regulatory changes. Answers to such questions were not likely to reveal objective or factual evidence of the likely effects of regulatory changes but rather the preferences, wants and desires of employers with respect to those regulations. The questions in the Employers’ Survey concerning their use of casuals on a “regular”¹³⁶ and “irregular”¹³⁷ basis employed terminology that was fraught, ill-understood and ill-defined, and led to confused and contradictory answers which were of no value.

[133] In response to the Ai Group critique of the ACTU survey, the Fourth Markey Report said that the sample of employees surveyed was randomly and independently selected by an experienced survey organisation, Survey Sampling International (SSI), which obtained the raw data and provided it to the Centre for Workforce Futures for analysis. The survey questionnaire was prepared by the ACTU in consultation with Professor Markey. The survey was conducted online and respondents were not informed of the background to the survey or its connection with these proceedings.

O’Brien Report

[134] Separate to the Fourth Markey Report, Dr Martin O’Brien made a witness statement dated 9 March 2016 which attached a report responding to the economic modelling section of the Withers Report (O’Brien Report).¹³⁸ The O’Brien Report began by observing that the use of CGE models had been widely criticised because “*they tend to be constructed and utilised by private consultant groups who use them for profit making purposes and are not soundly based upon academic rigour*”¹³⁹ and in particular because they have been used to prove conclusions which have in the first place been assumed as inputs into the model. In the case of the Withers Report, conclusions detailing detrimental effects to the economy had been assumed and imposed upon the CGE model. The inputs consisted solely of an increase in unemployment of 0.28 percentage points and a decrease in productivity of 0.07%, and the CGE model was used to quantify how these negative shocks would reverberate through the aggregate economy. The unemployment assumption was itself the product of a number of assumptions – first, that the ACTU claims would reduce the casual employment share to match the OECD average; second, that this reduction would be achieved by way of a reduction in the FILRI score for Australia to align with the OECD average; third, that each percentage point decrease in the FILRI score would increase unemployment by 0.835%, so

¹³⁶ Witness statement – 9 March 2016, Exhibit 111 at RM-5, at para 48

¹³⁷ Witness statement – 9 March 2016, Exhibit 111 at RM-5, at para 48

¹³⁸ Witness statement – 9 March 2016, Exhibit 144 at MO-2

¹³⁹ Witness statement – 9 March 2016, Exhibit 144 at MO-2, para 1

that the reduction in Australia's score would increase unemployment by 0.28 percentage points. The productivity assumption was also derived from 2 further assumptions – fourth, that the ACTU claim would affect Australia's Employment Protection Legislation (EPL) index calculated by the OECD and, fifth, that there was a significant relationship between the EPL and labour productivity in Australia. The O'Brien Report criticised all but the first of these assumptions as being invalid. Further, any potential countervailing benefits from the grant of the ACTU claims were ignored.

Julie Toth

[135] Ms Julie Toth¹⁴⁰ is employed as the Chief Economist of the Ai Group, and was called by the Ai Group to give evidence of a general economic and statistical nature. Ms Toth has been employed by the Ai Group since April 2012, and has previously worked in various roles as an economist and held a number of formal economics qualifications.

[136] In her witness statement Ms Toth provided information on casual employment data, in particular data gathered by the ABS on whether employees had access to paid leave entitlements. She identified that the method used by the ABS to determine casual employment had changed slightly (from supplementary surveys to using the full scope and sample) and therefore the results might differ slightly over time. She said that ABS data indicated that casual employees as a proportion of the total workforce had been stable at around 24% of employees and 19–20% of all employed persons since 1998.

[137] Ms Toth also gave evidence about labour market flexibility, and noted that the Markey Reports' statements regarding "*evidence that numerical flexibility necessarily delivers gains in productivity is scant*"¹⁴¹ appeared to only look at the firm level, rather than at a broader economy wide level. She said that the Markey Reports addressed only the effects of 2 types of flexibility within firms and did not examine broader measures of labour flexibility across the economy or across the population.

[138] Ms Toth considered that the ACTU claims about worker and jobseeker preferences might be inconsistent with ABS data on unemployment, underemployment and part-time work. Ms Toth accepted that ABS data showed a rise in the proportion of casual employment in the manufacturing sector, but disagreed with Dr Skladzien's assertion that the increase in the proportion of the manufacturing workforce that was casual had contributed to skill shortages or to poor productivity performance in manufacturing. She suggested rather that performance problems in manufacturing had occurred for other unrelated reasons.

3.6 ACTU witnesses

[139] The ACTU called evidence from a number of casual and part-time employees who described the history and circumstances of their employment and what they perceived as its disadvantages. Their evidence is summarised below.

¹⁴⁰ Witness statement – 23 February 2016, Exhibit 54; Oral evidence – Transcript 18 March 2016 at PN4870–PN5105

¹⁴¹ Witness statement – 23 February 2016, Exhibit 54 at para 38

Jack Todaro

[140] Mr Jack Todaro¹⁴² was a former university student who worked as a casual employee in the hospitality industry from August 2013 until May 2016. As a casual employee Mr Todaro relied on working shifts for his income, and he often had to put his university work aside in order to accept shifts. Mr Todaro said that he worried that if he declined to accept a shift, his employer would not continue to offer him work, seeing him as unreliable. He said that he has seen staff let go for refusing to accept shifts. Mr Todaro's shift times varied from anywhere between 3 to 9 hours, and if he was ill and unable to swap his shift, Mr Todaro was forced to take time off without pay. During cross-examination Mr Todaro stated that he did not work a consistent pattern of hours and days each week. He said that while working at one restaurant his hours were reduced so much that he had to seek additional employment, and worked 2 hospitality jobs until this became too much for him. In his most recent hospitality role Mr Todaro did not have a set roster and would often be informed a week before or on the day of the shift if he was to work or not.

Tracy Kemp

[141] Ms Tracy Kemp¹⁴³ was a Disability Support Worker at FSG Australia (FSG). She had been employed in this role since December 2011 and had worked in the social and community services industry in various roles for approximately 14 years. FSG provided care staff to assist clients with disabilities to live their life in a meaningful and productive way. Ms Kemp gave evidence that *"the uncertainty of my casual work can make it difficult to plan my life outside of work hours and I would prefer the stability and security of permanent employment"*.¹⁴⁴ She had not requested conversion from casual to permanent status because she was concerned that *"this would not be looked upon favourably by my Employer ... because they seem to prefer employees to remain flexible"*.¹⁴⁵ She said that casual workers were reluctant to take time off work because they were concerned that they might not be placed back on the roster, and she tried to minimise the effects of leave on her pay packet by taking only short periods off work at a time. Casual workers at FSG were expected to do short shifts; the shortest shift she had done was 3 hours and some colleagues had been required to perform 2 hour shifts. In cross-examination by ACCI, Ms Kemp was asked why she had not made any real effort to move out of casual employment, and she answered that *"The current job that I have, the only downside I would say would be the casualisation of it, the casual nature of it. Everything else about that job, I really, really enjoy it."*¹⁴⁶

Limasene Potoi

[142] Ms Limasene Potoi¹⁴⁷ was a permanent part-time Disability Support Worker and has worked at Disability Attendant Support Services Inc. (DASSI)¹⁴⁸ since 18 August 1997. Since approximately 2007 Ms Potoi had also worked full-time for Merri Outreach Support Service,

¹⁴² Witness statement – undated, Exhibit 309; Oral evidence – Transcript 17 August 2016 at PN2980–PN3075

¹⁴³ Witness statement – 9 October 2015, Exhibit 1; Oral evidence – Transcript 14 March 2016 at PN344–PN599

¹⁴⁴ Witness statement – 9 October 2015, Exhibit 1 at para 8

¹⁴⁵ Witness statement – 9 October 2015, Exhibit 1 at para 8

¹⁴⁶ Transcript 14 March 2016 at PN494

¹⁴⁷ Witness statement – 21 December 2015; Exhibit 8; Oral evidence – Transcript 15 March 2016 at PN1264–PN1354

¹⁴⁸ DASSI is now known as Independence Australia

a homeless support service. Ms Potoi said that she worked 2 jobs “*because my husband earns a low income and we are trying to start a family*”.¹⁴⁹ In the part-time job for DASSI, Ms Potoi described working a 1.5 hour shift to put a client back into bed, which once travel was included took about 3 hours in total. If a client cancelled the shift or went into hospital, she did not get paid for the shift at all.

Linda Rackstraw

[143] Ms Linda Rackstraw¹⁵⁰ was from July 2005 to April 2013 employed at Bendigo Health as a permanent part-time Food and Domestic worker, in October 2012 she took a second job as a casual Crew Member at a McDonald’s outlet in Bendigo and worked there for almost 3 years, until July 2015. She said that while working at McDonald’s she had little control over her shift times and days of work, and found it difficult to plan her life and spend time with her family. She lost shifts and pay when she had to go to medical appointments. Ms Rackstraw said “*my financial security and peace of mind was much better when I was working part-time, when I knew when I was working and what I would be earning each week*”¹⁵¹, and would have preferred the leave entitlements of permanent employment to the extra casual loading she received.

Stanley Morgan

[144] Mr Stanley Morgan¹⁵² has worked in the disability services industry for approximately 15 years, and was employed as a Support Worker with Centacare. He was employed there on a casual basis from approximately 2004–07, when he became permanent part-time. He had also worked on a casual basis for 3 other employers from 2000–07, 2000–02 and 2002–04, all in disability services positions. He said it was necessary for him to hold multiple jobs in order to earn enough money to meet his living expenses, and he often had to go straight from one job to the next. He could not get a loan from a bank because he was considered not to have a regular income. As a casual, he felt obliged to accept any shifts that were offered to ensure his job security.

Scott Quinn

[145] Mr Scott Quinn¹⁵³ was a Disability Support Worker at Community Based Support Tasmania (CBS). He had worked in disability services/aged care since about July 2006. He currently worked an average of 37 to 40 hours per week; but was only contracted for 60 hours per fortnight. Mr Quinn worked varying hours over a 7 day period, including early morning starts and later night finishes, and his shifts (consisting of appointments lasting from 30 minutes to 4 hours) could vary from day to day or hour to hour. He said he enjoyed his work, which was why he had not sought alternative employment, but the variability in hours made it difficult for him to make appointments and do other things.

¹⁴⁹ Witness statement – 21 December 2015, Exhibit 8 at para 24

¹⁵⁰ Witness statement – 8 October 2015, Exhibit 9; Oral evidence – Transcript 15 March 2016 at PN1357–PN1540

¹⁵¹ Witness statement – 8 October 2015, Exhibit 9 at para 25

¹⁵² Witness statement – 26 October 2015, Exhibit 140; Oral evidence – Transcript 24 March 2016 at PN11417–PN11478

¹⁵³ Witness statement – 16 December 2015, Exhibit 11; Oral evidence – Transcript 15 March 2016 at PN1550–PN1738

Madeline Minervini

[146] Ms Madeline Minervini¹⁵⁴ was a casual checkout operator at Romeo's IGA, and has worked there for 9 years. She was also studying to become a nurse. She said that her hours of work varied, and were generally between 8 and 14 hours per week. This lack of regularity and certainty in hours and income caused her financial hardship and difficulties in budgeting, and she said that "*I am always cutting back spending due to the worry of what next week will bring*".¹⁵⁵ She could also not obtain finance because of her low income and the casual and uncertain nature of her employment. When she was sick she still went to work because she could not afford any loss of income, and she never went on holidays. She would like to convert to permanent part-time employment with the ability to work extra hours, and regarded the certainty of hours and income and paid leave entitlement as more important than the casual loading. She had asked to convert to a permanent position, but this had been declined.

Colin Aiton

[147] Mr Colin Aiton¹⁵⁶ was employed as a labourer/pallet-maker by Westend Pallets. He started his employment with Westend in late 2008, and normally works 38 hours per week, Monday to Friday. When he got sick he normally took unpaid leave, but he and other employees also often attend work when sick, and said "*At times myself, as well as other employees, have been at work throwing up in buckets because we so [sic] sick*".¹⁵⁷ He also described illness spreading through the workplace because of employees attending work when sick. He had recently applied for a home loan from Westpac, but this had been refused because he was a casual employee. Mr Aiton gave evidence that he wanted to convert to permanent employment, and had approached his employer about this but had been told there was no hope of this happening.

Michael Fisher

[148] Mr Michael Fisher¹⁵⁸ was also employed as a labourer/pallet-maker at Westend Pallets. He started his employment with Westend in September 2012 and normally works 38 to 40 hours per week, Monday to Friday. Recently he (and all the other casual staff) had been required to transfer to employment with a labour hire company, Flexi Personnel, to perform the same work he had previously been performing as a direct employee of Westend. He never refused any shift that was offered because he was concerned that he would not get another shift and would lose his \$100.00 attendance bonus. He would prefer to be a permanent employee, which would assist him on obtaining a home loan since he was sick of renting.

Kylie Grey

[149] Ms Kylie Grey¹⁵⁹ had been a permanent part-time employee at North Melbourne Children's Centre since 15 March 2015, and before that she was a casual employee for

¹⁵⁴ Witness statement – 11 November 2015, Exhibit 15; Oral evidence – Transcript 15 March 2016 at PN2146–PN2315

¹⁵⁵ Witness statement – 11 November 2015, Exhibit 15 at para 9

¹⁵⁶ Witness statement – 31 August 2015, Exhibit 16; Oral evidence – Transcript 15 March 2016 at PN2319–PN2427

¹⁵⁷ Witness statement – 31 August 2015, Exhibit 16 at para 20

¹⁵⁸ Witness statement – 1 September 2015, Exhibit 17; Oral evidence – Transcript 15 March 2016 at PN2440–PN2537

¹⁵⁹ Witness statement – undated, Exhibit 20; Oral evidence – Transcript 16 March 2016 at PN2586–PN2679

McArthur Management Service (MMS) for approximately 4 and a half years. While she worked for MMS, she did not receive her roster in advance; she said that she had to switch on her phone at 7.00am each morning to wait and see if she was allocated a shift for that day. Sometimes when shifts were allocated they were then cancelled on as little as 30 minutes' notice. Ms Grey said that during 2014 she had regular shifts (5 hours per shift, 4 days per week) providing inclusion support for a 5 year-old child, but even then she remained worried about her job security as the work was government funded and could be terminated at any point in time. She said she had to take time off work during school holidays and was consequently unpaid unless she was able to pick up shifts from other care centres. Another occasion Ms Grey recalls is when the child she cared for was on holidays around Christmas which meant that she was without work. It was difficult for her to plan family events because if she received insufficient shifts in one week she needed to take on as many shifts as possible in the next week. She accepted in cross-examination that, while employed as casual by MMS, she was able to decline work that was offered if she wished and if she took time off work, she did not receive less shifts or her shifts were not less favourable due to this.

John Perry

[150] Mr John Perry¹⁶⁰ was employed by Nardy House as a casual Care Support Worker commencing from 4 September 2014. He said that during the job application process he was told that he would be casual for 3 months and then placed on permanent part-time employment thereafter, but he remained a casual. For about the first year of his employment he received monthly rosters identifying the shifts he was to work, and he received at least 128 hours' work per month. In January 2015 when he applied for a loan, Nardy House's Financial Controller provided him with a letter stating that he was a full-time employee with ongoing work. Mr Perry gave evidence that on 20 August 2015 the system changed, in that on the upcoming roster he was assigned zero hours, and he received a letter stating that all casuals were now on an on-call basis and would not in future have forecast hours on the roster. On 22 August 2015 Mr Perry sent a letter to management stating that had an expectation of ongoing work and requesting to be made permanent. He received a reply letter stating that he was a casual employee and had no expectation of ongoing work. He said he had not been allocated any shifts since that time. This led to him instituting unfair dismissal proceedings which were continuing at the time he gave evidence.

Jan Paulsen

[151] Ms Jan Paulsen¹⁶¹ was a registered nurse and had been employed at the Sunshine Coast Day Surgery on a permanent part-time basis, 26 hours per week. Her evidence was that she was usually rostered to work 4 or 5 days per week, Monday to Friday, and that a typical working week for herself and other part-time employees involved 2 shifts of 4.5 hours, 2 shifts of 8 hours and one day off, but on other occasions she was required to work over 5 days. Under the Surgery's enterprise agreement, part-time employees could be rostered for a minimum of 3 hours on any shift or day. Her rosters were provided 6 days prior to the relevant working week. The Surgery required that part-time employees hold themselves to be available to work on each day of the week, and if employees advised that they were unavailable on a particular day that they might be rostered on for that day anyway. Because

¹⁶⁰ Witness statement – 19 October 2015, Exhibit 28; Oral evidence – Transcript 16 March 2016 at PN3216–PN3319

¹⁶¹ Witness statement – 13 October 2015, Exhibit 39; Oral evidence – Transcript 17 March 2016 at PN3739–PN3811

she was only employed part-time, Ms Paulsen needed additional work elsewhere to supplement her income, but this was difficult to manage because of the requirement to hold herself available for all 5 days per week. The Surgery also had casual employees, and it was not uncommon for them to be directed to leave after 3 hours even if they were scheduled for a longer shift. Ms Paulsen had eventually obtained a casual position elsewhere which became her main source of work, and which provided her with more flexibility, greater pay and hours. She continued to perform some work for the Surgery but on a casual basis.

Kyra Campbell

[152] Ms Kyra Campbell¹⁶² was a casual employee at a Ritchie's Super IGA Supermarket. She had worked there for 5 years in total. Her evidence was that for the past 12 months she had worked the same shifts every week, with only small variations in shift duration, and averaged 16–20 hours per week. Previously she had worked more hours, about 25 per week. She wanted to work more hours, and her underemployment caused her financial hardship. She said that she had requested to convert to a part-time position several times over the course of her employment, but her requests were denied on the basis that she was more flexible as a casual employee. She was unable to take holidays because she did not get paid leave entitlements. She would prefer permanent part-time employment, because certainty of hours and access to paid leave was more important to her than the casual loading.

Matthew Francis

[153] Mr Matthew Francis¹⁶³ was a diesel fitter at the Blackwater Mine Site owned by the BHP Billiton Mitsubishi Alliance (BMA). He had been working at the site in the employ of various labour hire companies since about 2008. When he first started working at the mine he worked for a company called Precision Heavy Earth Moving Equipment as a labour hire employee, and received holiday pay and sick leave. That company lost its labour hire contract in December 2009, and he lost his employment and was not paid his accrued leave entitlements as the company then went into liquidation. Shortly after this, he started working for another labour hire company at the Blackwater Mine called Down Under Mine Site Maintenance, performing the same work as before. This company lost its labour hire contract in approximately August 2013. He was then offered employment with another labour hire company, HM Group, doing the same job at the Blackwater Mine he had been doing since 2008. He was on a contract that showed he was a full-time employee and was to accrue annual and personal leave.

[154] Mr Francis gave evidence that in approximately August 2014, the Managing Director of HM Group informed him and other fellow employees that they were to become casual employees and it was on a “*take it or leave it*”¹⁶⁴ basis. He was paid out his annual leave and then continued working as a casual, although he was not paid a casual loading to compensate for the loss of his annual or sick leave, only a flat rate of \$40 per hour. He stated that he did not complain because he did not want to lose his job or would worry he would be victimised.

¹⁶² Witness statement – 30 October 2015, Exhibit 40; Oral evidence – Transcript 17 March 2016 at PN3815–PN3918

¹⁶³ Witness statement – 27 October 2015, Exhibit 77; Oral evidence – Transcript 21 March 2016 at PN6663–PN6845

¹⁶⁴ Witness statement – 27 October 2015, Exhibit 77 at para 16

[155] HM Group then lost the labour hire contract with the mine, and he moved to another labour hire company, Reserve Group, to do the same work at the mine. He was employed under an Individual Flexibility Agreement under which he was to be paid sick days, paid annual leave and given access to long service leave. In July 2015 he was required to “*change shirts*”¹⁶⁵ again as the Reserve Group were no longer allowed on the site, and went to perform the same work for Wisely Group, another labour hire company. He was employed as a casual with a flat rate of \$54 per hour and with no holidays or personal leave. He was currently filling in a BMA permanent position due to an ex-BMA employee retiring, but this might come to an end if the position he was filling was determined to be redundant.

[156] Mr Francis said he had never been informed of any right to convert to permanent employment when engaged as a casual. He did not raise questions about his employment or entitlements for fear of losing his job, but he said he would prefer permanent employment so that he could take time off when he got sick. He said he had found the work experience he had described to be very stressful and said he had been “*treated like dirt*”.¹⁶⁶

Narelle Jenks

[157] Ms Narelle Jenks¹⁶⁷ worked as a casual employee in childcare for almost 10 years, and then as a part-time Qualified Child Care Assistant at Blue Bird Child Care Centre until October 2012. She gave evidence that while she was at Blue Bird she worked part-time during the school term, and was only given full-time employment during the school holidays. She was regularly rostered to work short shifts of 2 to 3 hours, and her roster changed each week. She was also often called into Blue Bird and then sent home after only 2 or 3 hours. She said this made it difficult for her to plan ahead and it was hard to refuse her employer as she was afraid she would not be offered more shifts if she turned one down. She later changed careers to become an Early Childhood Teacher, as the hours were more predicable with advanced notice.

Sean Procter

[158] Mr Sean Procter¹⁶⁸ had worked in the automotive industry for 30 years, and was a casual customer service employee with Repco from June 2012–May 2014. He said that 6 months after he commenced this employment, he asked whether a full-time permanent position was available because he was already working full-time hours, but he was told there was not. At the time he was unaware that he could seek to convert to a permanent position in his existing role under the award. In October 2013 he was in a car accident while working and sustained back and neck injuries. He returned to work a month later and gradually increased back to full-time hours. However in March 2014 his full-time hours ceased, which he believed was because of his injuries.

[159] The ACTU called evidence from 4 officials of affiliated unions, which is summarised below.

¹⁶⁵ Witness statement – 27 October 2015, Exhibit 77 at para 28

¹⁶⁶ Witness statement – 27 October 2015, Exhibit 77 at para 48

¹⁶⁷ Witness statement – 15 October 2015, Exhibit 84; Oral evidence – Transcript 21 March 2016 at PN7335–PN7348

¹⁶⁸ Witness statement – 26 October 2015, Exhibit 72

Judith Wright

[160] Ms Judith Wright¹⁶⁹ was the Acting NSW/ACT Branch Secretary of the ASU. She gave evidence that the social and community services (SACS) industry formed the largest division of the ASU with over 7000 members. She said that the SACS industry was highly casualised and there were a growing number of casual contracts for work which were actually of a permanent nature. This had had a detrimental effect upon employees in securing predictable and regular hours of work, and employees could suffer disadvantage in securing a home loan or accommodation. Ms Wright stated that she believed that a casual conversion clause would assist members in becoming permanent part-time employees with a minimum of fuss or disputation, would cause employers to change their hiring practices for the better, and would have a positive impact on the SACS industry in terms of the recruitment and retention of employees. She said that she regularly received enquiries from members who worked on an ongoing and regular basis for their employer but found that their hours had either been reduced or taken away altogether because they were casual employees, and she gave various examples of where this had occurred. In her opinion a casual conversion clause was necessary for the SACS industry given the lack of industrial experience amongst management including voluntary management committees, the high percentage of women workers, the significant number of shiftworkers and the already high percentage of non-full-time work.

Michael Rizzo

[161] Mr Michael Rizzo¹⁷⁰ was the National Industrial Officer of the ASU. He gave evidence arising from his previous role as the Assistant Branch Secretary of the ASU Victorian Authorities and Services Branch concerning unsuccessful attempts between 1998 and 2008 to convert casual meter readers to permanent employment with various contractors of Powercor Australia. Powercor had outsourced its meter reading service in 1997, and the meter readers were employed by a succession of contractors. The employees had continually requested the ASU to restore them to permanent employment, but conciliation and legal action was not successful in achieving this objective. AMRS became the contractor in 2002, but the meter readers remained casuals until AMRS lost the contract in 2013, despite working full-time hours on regular rosters over many years of employment.

Vicky Stewart

[162] Ms Vicky Stewart¹⁷¹ was an organiser employed by the Queensland Nurses' Union of Employees (QNU), which is a branch of the ANMF, and had held this role since July 2010. Ms Stewart gave evidence that QNU members had raised issues with her around short shifts and casual employment which they were too fearful to raise with their employers or with the Commission because they feared their hours would be cut or they might lose their jobs. She said that there were instances where nurses had requested and/or had been required to undertake short shifts fairly regularly. The minimum shift length in the *Nurses Award 2010* was 3 hours, and Ms Stewart opined that if there was a minimum of 4 hours, the QNU would be much more successful in arguing to have the same minimum in enterprise agreements. Ms

¹⁶⁹ Witness statement – 18 March 2016, Exhibit 80; Oral evidence – Transcript 18 March 2016 at PN6864–PN7045

¹⁷⁰ Witness statement – 22 September 2015, Exhibit 18

¹⁷¹ Witness Statement – 16 October 2015, Exhibit 76; Oral evidence – Transcript 21 March 2016 at PN6472–PN6655

Stewart gave an example of an employee who had very short shifts over a long period at a Brisbane private hospital.

[163] Ms Stewart said that casual employment was very common in private sector health, in both general practice clinics as well as private hospitals, especially those with operating theatres. She described her experience with QNU members who had had problems with being employed casually and/or had requested, both verbally and in writing, to convert from casual employment to permanent part-time employment. By way of example, she referred to a particular hospital where the Director of Nursing was the only permanently employed nurse at the hospital. All the other nurses were casuals with no guaranteed hours of work or shift rosters, whose shifts could be cancelled at short notice. This made it difficult for them to make personal arrangements and to be able to obtain additional shifts with other employers to supplement their income.

Linda Gale

[164] Ms Linda Gale¹⁷², a Senior Industrial Officer at the NTEU, gave evidence in support of the claim to modify the casual conversion provision in clause 12.3 of the Higher Education Award. She said that a majority of university enterprise agreements provide a right for casual general staff who had crossed a service threshold to apply for conversion to ongoing employment, but these provisions typically allowed employers to refuse such an application on a number of grounds. She said that such provisions had been problematic for employees because University employers were strongly resistant to the conversion of casual staff, and the NTEU had to deal with a steady stream of disputes arising from employer refusals to convert fixed term employees, most often on the ground that there was a restructure expected in the relevant work area. Ms Gale also said that university management often took an inordinate time to deal with conversion requests, and that a number of casual workers had told her that they did not feel able to exercise their right to request conversion because of their insecurity in employment and concern that they would suffer direct or indirect adverse consequences if they made such an application.

[165] Ms Gale also gave evidence that much of the work performed by casual general staff in higher education was readily predictable and could be organised to provide for a 4 hour minimum engagement, and that where the work was more genuinely casual in nature, such as to deal with an unexpected contingency, it was rarely so short term in nature that a casual employee would be required for less than 4 hours.

3.7 AMWU witnesses

[166] In support of its claim, the AMWU called a number of its officials as witnesses, and their evidence is summarised below.

Warren Tegg

[167] Mr Warren Tegg¹⁷³ was a National Research Officer at the AMWU who analysed the Joint Employer Survey (JES) (discussed later in connection with the evidence of Mr Waugh).

¹⁷² Witness Statement – 14 October 2015, Exhibit 13; Oral evidence – Transcript 15 March 2016 at PN1743–PN2131

¹⁷³ Witness statement – 23 March 2016, Exhibit 297; Oral evidence – Transcript 17 August 2016 PN1909–PN1989

He determined that there were a number of problems with its reliability with the core problem being that the survey asked employers complex questions, without properly defining the ideas that underpinned those questions, and asked them to many respondents who (based on their previous responses) had no relevant experience on which to base their answers. He systematically examined every question of the JES and explained why in his opinion each question was found to be unreliable or irrelevant. Mr Tegg said that in the first question where respondents were asked if their business was covered by an award 361 businesses indicated that they were not covered by an award and 190 respondents indicated that they were not sure if they were covered by an award but these respondents were able to proceed with the survey despite having no information that would be relevant to the modern awards.

[168] Mr Tegg conceded in cross-examination by the Ai Group that there were some limitations on the questions that respondents could answer but stated that they were not precluded from all irrelevant questions.

Vinh Thi Yuen

[169] Mr Vinh Thi Yuen¹⁷⁴ was an organiser at the Victorian Branch of the AMWU. Mr Yuen gave evidence that he had organised 2 workplaces, Lite ‘n’ Easy and GB Galvanising, where conversations with workers about casual conversion “*stand out.*”¹⁷⁵ Mr Yuen gave evidence that at Lite ‘n’ Easy the majority of the 60–80 employees were casual workers, and some of these casual employees had worked over 6 months. He had had conversations with members who told him that Lite ‘n’ Easy had not advised them of their casual conversion rights. Mr Yuen also gave evidence that he advised members to approach the employer and that a member responded “*That is another way of us getting out the door.*”¹⁷⁶ Mr Yuen gave evidence concerning another employer, GB Galvanising, where of the 80 employees only 2 employees were permanent. He also gave evidence that many of the casual employees at GB Galvanising had been there for over 6 years, and he had been told that if a casual employee wanted to take a holiday at GB Galvanising then they were required to resign and then come back.

Heidi Kaushaul

[170] Ms Heidi Kaushaul¹⁷⁷ was the Regional Secretary of the Food and Confectionary Division of the NSW Branch of the AMWU. She had been an AMWU official since August 2014, and prior to that she had worked in food production for 12 years, including work both as a casual employee and labour hire employee. She had worked at Cerebos for a number of years, and observed that some casuals (who were employed by a labour hire business) had worked there for long periods of time, including one who worked there for at least 4 years. She described the difficulties she had experienced in having casuals converted to permanent positions at a number of worksites.

¹⁷⁴ Witness statement – 6 October 2015, Exhibit 245

¹⁷⁵ Witness statement – 6 October 2015, Exhibit 245 at para 3

¹⁷⁶ Witness statement – 6 October 2015, Exhibit 245 at para 10

¹⁷⁷ Witness statement – 14 March 2016, Exhibit 7; Oral evidence – Transcript 15 March 2016 at PN1170–PN1256; 16 March 2016 at PN3478–PN3636

Steven Murphy

[171] Mr Steven Murphy¹⁷⁸ was the Assistant Secretary of the NSW Branch of AMWU. He gave evidence concerning his experiences with casual employees at 2 businesses. The first, MRI, was an electronic recycling facility. The business previously only had a small proportion of casual employees, but now there was close to a 50:50 split between permanent employees and casual employees. There was a high turnover of casual employees. MRI's enterprise agreement had a casual conversion provision which required casuals to be notified of their conversion right after 6 months' employment. Mr Murphy said that in meetings with casual employees, they expressed concern that if they converted to permanency, other casuals might lose their jobs or MRI might begin terminating casuals before they reached 6 months service. Mr Murphy raised the conversion issue with management, and was told that 3 particular casual employees did not wish to convert because they did not want to lose the 25% loading, and that if MRI was made to convert employees it might have to review whether they were suitable or not.

[172] The second was B&D Doors. Mr Murphy said he became aware that there were 8 casuals on the site employed by a labour hire company. They had not received a wage increase for 3 years. Mr Murphy raised the issue with management, and it was eventually agreed that 3 of the labour hire casuals would be converted to direct employment with B&D Doors immediately and another 2 would be converted the following year.

Clinton Lewin

[173] Mr Clinton Lewin¹⁷⁹ was an organiser in the AMWU's Vehicle Division in the Illawarra region. He recounted that he had been approached by casual employees at Patrick Autocare in Port Kembla inquiring as to how they could become permanent employees, and that he had been told that casual employees who had sought conversion to permanency had not been called back to work or had lost their regular shifts. He also said that he often raised concerns about the unreasonable refusal by employers of a request to convert to permanent employees through the dispute resolution process under enterprise agreements such as Patrick and Prixcar. At another Patrick's site at Kembla Grange, there was up to 90% labour hire casual employment, and Mr Lewin said employees had complained to him that after requests to be made permanent employees of Patrick, their requests had been rejected and some had not been given further shifts.

[174] Mr Lewin estimated that at large employers in the area like Autonexus, Federal Mogul, Motospecs and Patrick, there was usually a minimum of 50% casual labour in their workforce, with the majority being long term casuals. Mr Lewin stated that in his experience he was only aware of approximately 10–20% of long term casual employees being made permanent employees despite the casual conversion provisions in the applicable modern award or enterprise agreement.

[175] Mr Lewin said that his approach concerning conversion of casuals was that he first had a meeting with casual employees where they were able to voice their opinions, and then he

¹⁷⁸ Witness statement – 23 September 2015, Exhibit 25; Oral evidence – Transcript 16 March 2016 at PN2937–PN2990

¹⁷⁹ Witness statements – 22 October 2015, Exhibit 26; 9 March 2016, Exhibit 27; Oral evidence – Transcript 16 March 2016 at PN2994–PN3209, PN3321–PN3443

wrote a letter to the company informing them of their obligations under the enterprise agreement or the award. He said that he often received a response to the effect that the employer constantly reviewed their labour hours and forward production schedules and based on this there was no scope for the conversion to permanency of casual employees. He also said that labour hire casual employees were more common now in the vehicle industry in NSW than before and this prevented more casual employees from becoming permanent employees. He expressed the view that the current casual conversion provision in the VMRSR Award had not worked because a large number of casual employees were not aware that the conversion provision existed under the award and because the onus was on the employee to approach an employer for conversion to convert them.

Peter Bauer

[176] Mr Peter Bauer¹⁸⁰ was the Assistant State Secretary for the Manufacturing Division of the South Australian Branch of the AMWU, and had worked for the AMWU in various capacities since 1991. As Regional Secretary of the Technical Supervisory and Administrative Division from 2010 to 2015 Mr Bauer became involved in a casual conversion issue concerning employees of Christie Tea Pty Ltd. A number of the company's casual employees had approached the company requesting a conversion from casual to permanent employment, but each request was declined on the basis of costs, disharmony and fluctuations in workload. Mr Bauer subsequently lodged an application with Fair Work Australia, as it then was, to deal with the dispute. The matter was the subject of a number of conferences, with the Commissioner dealing with the dispute issuing recommendations on 1 December 2010 and 10 February 2011, but it was not resolved. Because the AMWU was unable to reach an agreement with the company about the issue, the union then applied, successfully, for a Majority Support Determination. However subsequent negotiations for an enterprise agreement were unsuccessful. The AMWU then applied for a protected action ballot order, which was successful, but employees were ultimately unwilling to take industrial action and felt increasingly insecure in their employment during the bargaining process. Mr Bauer said that eventually the AMWU decided to cease pursuing an agreement with the company. A couple of years later, Mr Bauer said, the company closed their Adelaide operations, but there were no redundancy payments made as all the employees were engaged as casuals.

Aaron Malone

[177] Mr Aaron Malone¹⁸¹ was an organiser in the AMWU's Food Division. He gave evidence concerning some of the problems he had encountered concerning casual employees. At the Provedore Group, he said that there were employees covered by the Food and Beverage Award who had worked for 2 years as casuals prior to conversion to being permanent employees. At Preshafruit, which was covered by the same award, there were casuals who had been employed for many years but never been made permanent. Such employees had told him that, given the choice, they would prefer to be made permanent at the company and talked to him about wanting job security and permanency, and being unable to secure a home loan as a casual employee and the lack of entitlements. He said there were also casual employees working there who were employed by a labour hire agency who wanted a permanent job in the factory. Mr Malone said that he had approached Preshafruit about

¹⁸⁰ Witness statement – 8 October 2015, Exhibit 35

¹⁸¹ Witness statement – 8 October 2015, Exhibit 53; Oral evidence – Transcript 17 March 2016 at PN4824–PN4842

converting workers from employment by the labour hire company to direct company employment, but the company has not returned his calls or responded to his enquiries. He also said that he had spoken to supervisors and managers at Preshafruit who have indicated that a more permanent workforce would increase productivity.

John Herbertson

[178] Mr John Herbertson¹⁸² was a Victorian Regional Organiser of the AMWU from January 2010 until July 2015, and then became a Growth and Transition Officer for the Vehicle Division. His role as organiser involved looking after members at particular sites in the vehicle manufacturing, repair services and retail sectors in regional Victoria. He said that he had received frequent inquiries from casual employees about conversion to full-time employment, and referred to 2 specific instances of this, at APV Components Pty Ltd and Prixcar Services. In response to inquiries from casuals at APV Components, Mr Herbertson had drafted pro forma letters for the employees to request conversion to full-time employment under the existing award casual conversion provision.

[179] Mr Herbertson said that after raising the issue of casual conversion directly with employers, he found some deliberately did not inform the casual employees of the right to conversion while others were genuinely unaware that the right existed. In relation to Prixcar, there had been a dispute about the casual conversion clause in the applicable enterprise agreement. He became aware that a number of casual employees there had not been notified by the employer about their right to convert. The AMWU raised this with the company, and it acknowledged its responsibility to offer eligible casuals the right to elect to become permanent employees and subsequently did so.

[180] Mr Herbertson noted that hiring casual employees through labour hire companies was common in the vehicle industry, and labour hire employees were not usually covered by the casual conversion provisions in enterprise agreements. His opinion was that the current casual conversion clause in the award was not effective as it was not policed, was very easy for employers to ignore and, based on general conversations with casual employees, difficult to utilise for fear it would “*rock the boat*”¹⁸³ or lead to dismissal.

[181] The AMWU also called evidence from a number of currently-employed casuals, which is summarised below.

Liam Waite

[182] Mr Liam Waite¹⁸⁴ was employed by labour-hire company Concept Engineering, as a Graffiti Removal Specialist at Sydney Trains’ Flemington Maintenance Centre. Mr Waite consistently works 40 hours per week, Monday to Friday with occasional overtime paid at the relevant penalty rates. Mr Waite’s wage includes a casual loading. Mr Waite gave evidence that he became aware from the union that he could be made a permanent employee of Sydney Trains after 6 months of casual employment. He said that after 6 months of employment, and again in 2015 he raised this with management, however after 2 years he remains employed as

¹⁸² Witness statement – 26 October 2015, Exhibit 106; Oral evidence – Transcript 22 March 2016 at PN8635–PN8779

¹⁸³ Witness statement – 26 October 2015, Exhibit 106 at para 24

¹⁸⁴ Witness statement – 7 October 2015. Exhibit 311

a casual with the labour hire company. Mr Wait said that the non-permanency of his job created some difficulty in applying for a home loan, and that not having job security is particularly difficult with 5 children, including a baby. He said that he is constantly stressed because he does not know what is happening from week to week.

James Fornah

[183] Mr James Fornah¹⁸⁵ was employed as a pasteuriser/sealer at the Fresh Cheese Company. Mr Fornah commenced employment as a casual employee in September 2012 as a factory hand cutting cheese and after about 7 months became employed as a casual pasteuriser. Mr Fornah stated that as a casual employee he has worked full-time hours since commencing employment at the Fresh Cheese Company. Mr Fornah also gave evidence that in each of his roles as a factory hand, pasteuriser and working in cooking and processing at the company he has worked regular shifts. For example in his role as a pasteuriser, Mr Fornah stated that he regularly worked 12 hour shifts starting at 10.30 pm or 11.30 pm at night.

[184] Mr Fornah gave evidence that he was told in his job interview that after 6 months working as a casual he would become a permanent employee. Mr Fornah stated that he was not given a letter of offer, an employment contract or information about casual conversion in writing. Mr Fornah gave evidence that after 6 months of employment at the company he inquired about permanency and was told to wait. Mr Fornah also gave evidence that he became a permanent employee in July 2014 but was given no written confirmation of his permanency. Mr Fornah gave evidence that he is scared to take leave and has not taken any paid leave or a holiday since his employment commenced in 2012. Mr Fornah also gave evidence that as a casual employee in 2013 he requested leave to attend his mother's funeral in Ghana. According to Mr Fornah, he was told that he needed to stay as the company had no-one to do the pasteurising. Mr Fornah was not required for cross-examination.

David Kubli

[185] Mr David Kubli¹⁸⁶ was a casual employee of GB Galvanising (GB). He worked as a crane driver, forklift driver, an oxy operator and a hanger operator. From July 2011 until about March 2014 Mr Kubli worked at GB through the labour hire company, Strategy One. In 2014 Mr Kubli and a number of other workers employed by Strategy One became directly employed by GB as casual employees. Mr Kubli said that at the time at which they became employees of GB, they were told by the manager of GB that they would initially be employed on a casual basis and then made permanent in 6 months' time. This did not happen. Mr Kubli said that he was aware that some employees had approached management about converting to permanent employment, but that they have not received a response from management. He did not believe that management would do anything in respect of converting his employment from casual to permanent.

[186] Mr Kubli said that his expected hours of work are 8 hours a day, 5 days a week, 52 weeks a year, with some overtime during busy periods including around Christmas. He did not receive payment for annual leave, sick leave and personal leave. If he took sick leave, he was required by his employer to produce a medical certificate, and if he wanted to take a

¹⁸⁵ Witness statement – 12 October 2015, Exhibit 244

¹⁸⁶ Witness statement – 7 October 2015, Exhibit 30

period of leave, he had to apply for it and provide GB with 3 weeks' notice. Recently, GB had advised casual and permanent employees that if they took more than 2 weeks of leave, they would have to reapply for their jobs.

Clinton Heit

[187] In 2010 Mr Clinton Heit¹⁸⁷ was employed on a casual basis by labour hire company Haynes Mechanical, which supplied labour to the BHP Billiton Mitsubishi Alliance (BMA) mine site at Goonyella-Riverside Coal Mine Moranbah in Queensland. In February 2016, Haynes Mechanical lost the tender to supply labour to the mine. Mr Heit then became employed as a casual employee by Downunder Minesite Maintenance (DMM), the new labour hire provider to the mine, on 17 February 2017. Mr Heit said that the change of employer did not result in any change to his role or employment conditions. His rosters were and have always been set by BMA. He worked a combination of day and night shifts, with an average of between 40 to 60 hours per week depending on his roster. Due to the monthly roster cycle, Mr Heit's take-home pay varied from week-to-week. Despite being a casual employee, Mr Heit's evidence was that he did not receive a 25% casual loading, although he became aware at one point during his employment he was receiving an hourly rate which was higher than the hourly rate for permanent employees. He stated that his pay was reduced by \$3 in 2015, due to a downturn in the mining industry. Mr Heit said that when he is sent to do work related training, it takes place on his days off.

[188] Mr Heit said that in September 2014 he made a request to his then employer, Haynes Mechanical, to convert from casual to permanent employment. He was advised then, and on several subsequent occasions between September 2014 and September 2015, that the business only supplied casual labour to BMA and was consequently unable to convert his employment.

Stephen Elks

[189] Mr Stephen Elks¹⁸⁸ was employed by Pearce Omnibus Pty Ltd from 12 August 2009 as a casual bus mechanic. In late 2014 Pearce Omnibus was sold to ComfortDelGro Cabcharge (CDC) and Mr Elks became employed by CDC on the same terms and conditions as under his previous employer. Mr Elks said that at the commencement of employment as a casual he was not advised that he could convert to permanent employment. He recalled that he first raised the prospect of conversion with the Depot Manager in 2010. His belief was that because he had been working a consistent pattern of hours for some time, he might be able to convert. The Depot Manager responded that Mr Elks would have to undergo an employment medical which he might not pass due to heart problems. Mr Elks had passed the assessment prior to commencing employment and was unsure why the outcome would be different in relation to becoming a permanent employee. In 2014 Mr Elks approached the owner of Pearce Omnibus to query how to convert to permanent employment. The owner responded that it was up to the Fleet Manager, not himself.

[190] Mr Elks stated that his working hours were subject to the needs of the business, but that he had always been required to work 5 days per week. His average hours had gradually increased from 25 hours per week, to about 38 to 45 hours per week currently.

¹⁸⁷ Witness statements – 26 October 2015, Exhibit 32; 15 March 2016, Exhibit 33

¹⁸⁸ Witness statement – 26 October 2015, Exhibit 34

Simon Hynes

[191] Mr Simon Hynes¹⁸⁹ was employed at Classic Colour Screening as a Screen Printer's Assistant, and had previously been employed at Christie Tea from 16 July 2008 until 15 July 2014. Mr Hynes stated that he commenced at Christie Tea in production support as a casual, and worked 37.5 hours each week. He worked every week except during public holidays and the 2-week Christmas shut-down, when he was not paid, and was referred to at work as a "permanent full time casual".¹⁹⁰ When the applicable modern award, which contained a casual conversion clause, commenced operation in 2010, he applied for conversion to permanent employment, but the employer declined to convert him. Mr Hynes said that his experience as a casual employee made him always feel stressed, particularly over the Christmas shut-down period, and he knew that the employer could potentially ring him on any day and cancel his shift. When he was sick, he would still go to work

3.8 TCFUA witness

Elizabeth MacPherson

[192] The TCFU called evidence from Ms Elizabeth MacPherson¹⁹¹, an Organiser and Compliance officer for its Victorian Queensland Western Branch, in opposition to the Ai Group and RCSA claims as they applied to the *Textile, Clothing, Footwear and Associated Industries Award 2010*. Ms MacPherson had worked in the textile, clothing, footwear and associated industries sector in varying capacities for approximately 40 years. Ms MacPherson gave evidence that the TCF workforce was characterised by high numbers of employees from non-English speaking backgrounds and the industry was characterised by widespread non-compliance with award wages and conditions. She said that the number of casual employees compared to permanent employees in the TCF industry was increasing (although she was unable to identify the percentage of casual employment in the sector) and that disputes relating to casual employment were common, including disputes about the failure of employers to comply with the casual conversion process in the award. She believed the removal of the employer's obligation to advise employees of their eligibility to seek conversion would significantly weaken the clause overall, result in fewer casual employees being successfully converted and defeat its purpose because casual employees were commonly not aware of their rights under the award.

3.9 Ai Group witnesses

[193] The Ai Group's witnesses gave evidence both in opposition to the ACTU/AMWU claims and in support of its own claim.

¹⁸⁹ Witness statement – 12 October 2015, Exhibit 91

¹⁹⁰ Witness statement – 12 October 2015, Exhibit 91 at para 18

¹⁹¹ Witness statement – 26 February 2016, Exhibit 107; Oral evidence – Transcript 22 March 2016 at PN8800–PN8836

Mark Goodsell

[194] Mr Mark Goodsell¹⁹² was the Director of Manufacturing for the Ai Group, with responsibilities which included engaging with manufacturing members nationally to understand the structural, technological and other changes acting upon Australian manufacturing. Mr Goodsell had worked for the Ai Group, and its predecessor, the Metal Trades Industry Association, since 1985 in various roles associated with its manufacturing, engineering and construction members. He said that most manufacturers recognised that Australia was a high wage place in which to operate and accordingly expected productivity and flexibility as a trade-off for the high wages. In relation to the AMWU casual conversion claim, he said “*Just calling an employee permanent does not mean the work is there on an ongoing basis*”¹⁹³, and described how many manufacturers had difficulty forecasting workload beyond the very short term and that the flexibility provided through casual employment helped manufacturers get the mix right for long term sustainability.¹⁹⁴ In cross-examination he accepted that most manufacturing businesses would undertake projections for their productions for at least a year ahead, and would traditionally try and plan their production processes as far out as was prudent, but said that the ability to forecast production in advance had been severely compromised and that it had become difficult to properly forecast even a quarter ahead. He said that it would be highly disruptive for manufacturing workplaces, and not at all conducive to smart workplaces, to force manufacturing employers to convert casual employees to permanent in circumstances where they would then likely find themselves in the position of having to reduce the hours of permanent staff or make permanent staff redundant when the workload decreased.

Paula Colquhoun

[195] Ms Paula Colquhoun¹⁹⁵ was the Human Resources Manager for the Mitolo Group and had been employed in this position for 7 years. The Mitolo Group was a business that grew potatoes and onions for sale to major supermarket chains and produce markets, and had 300 regional growing sites, many of which were 20–30 kms or more from the nearest town. At the time she gave evidence the Mitolo Group employed 345 employees with 76 full-time employees, 197 part-time employees and 72 casual employees. Ms Colquhoun said that the Mitolo Group did not use labour hire companies. She said that number of employees varied throughout the year depending on harvesting, and the Mitolo Group employed casual staff to meet its short term labour needs with the number of casual employees increasing during the harvest season by between 25–30% for an average of 3–6 months. The casual workforce consisted of 43.25% who had been employed for less than 3 months, 5.4% for more than 3 months but less than 6 months, and 51.35% for more than 6 months. On average casual employees worked over 34 hours a week, and of the 85 casual employees employed over the last 7 months (July 2015–Feb 2016) 26% had averaged greater than 38 hours per week, with shifts fluctuating depending on temperature and conditions. Casual employees were engaged primarily for 2 purposes, firstly for the harvest which consisted of 3–6 months’ work, and secondly for land management and planning which usually involved more than 6 but less than 12 months’ work.

¹⁹² Witness statement – 26 February 2016, Exhibit 4; Oral evidence – Transcript 14 March 2016 at PN885–PN1014

¹⁹³ Witness statement – 26 February 2016, Exhibit 4 at para 12

¹⁹⁴ Exhibit 4 at para 19

¹⁹⁵ Witness statement – 26 February 2016, Exhibit 22; Oral evidence – Transcript 16 March 2016 at PN2690–PN2871

[196] Ms Colquhoun said that approximately 26% of the Mitolo Group's employees were on working holiday visas and although there were no limitations on their daily or weekly working hours, they were limited to working for one employer for only 6 months. She said that 82% of employees were covered by 3 enterprise agreements while 23% were covered by the Horticulture Award. The 3 enterprise agreements did not contain casual conversion clauses. Ms Colquhoun said the Mitolo Group did not have work for all 12 months of the year due to planting and harvesting schedules, and the nature of horticultural work meant that it was unable to predict a pattern of work for any casual employee. In relation to minimum engagements, there were circumstances where harvesting on a day ceased due to weather conditions which could force the engagement hours to be less than the ACTU's proposed 4 hour minimum engagement.

[197] Ms Colquhoun also gave evidence concerning the AWU's claim for casual overtime provisions in the Horticulture Award. This evidence is discussed in Chapter 7.

Kay Neill

[198] Ms Kay Neill¹⁹⁶ was the Chief Executive Officer for Corporate Health Group Pty Ltd (CHG) which wholly owned Corporate Health Group Defence Pty Ltd (CHG Defence), and has been employed by CHG for approximately 29 years. CHG operates 3 clinics in South Australia, and CHG Defence operates 16 recruiting centres across Australia for the Australian Defence Force. Ms Neill stated that CHG and CHG Defence were a one-stop shop for workplace health services to diverse businesses. As at 2 February 2016 CHG employed 232 employees in a range of medical and health disciplines, and their service lengths depended on who the client was and what service provision they required from CHG. She said that approximately 45% of the 232 employees were casual employees, and approximately 95% of those casual employees had been employed for greater than 6 months. A significant amount of work at CHG was seasonal and/or client driven, so that casual employees could be used to "ramp up"¹⁹⁷ staffing needs. Female employees generally outnumbered male employees by 2 to one, and people who were casual employees had chosen the work due to their family commitments, or for transitioning into retirement or whilst studying for a profession. Ms Neill states that 18% of CHG employees were permanent part-time, and this was also because they had responsibilities outside the workplace.

[199] CHG operated primarily under the *Nurses Award 2010* and the *Health Professionals and Support Services Award 2010*, and approximately 75% of all casual employees and part-time employees were covered by these awards. Ms Neill said that the ACTU claim would have a negative impact upon CHG, because its business needs were fluid and changing, and it could not always guarantee the same hours and on-going employment for casual employees, including those who have been employed for more than 6 months. If CHG was required to convert casual employees after 6 months to permanent employment, then this would have a detrimental impact on the business' ability to respond to clients and make their services affordable. Ms Neill also said that if the CHG was required to accept permanent employment requests, there would be fewer employees, and casual employees would have to be terminated at the end of every season, which would prevent them from accruing long service leave. She

¹⁹⁶ Witness statement – 24 February 2016, Exhibit 24; Oral evidence – Transcript 16 March 2016 at PN2875–PN2931

¹⁹⁷ Witness statement – 24 February 2016, Exhibit 24 at para 22

also believed that granting the claim would add an administrative burden in the areas of payroll, training and human resources.

[200] In response to offering any additional hours to existing casual and part-time employees who work less than 38 hours per week, Ms Neill states that in most instances CHG was already doing this, but it was opposed to making this an obligation as it was costly and impracticable and the employee might not have the relevant skills for the tasks related to the additional hours. Ms Neill also said that many staff had elected to be casual or part-time for their own personal reasons. In regards to a minimum 4 hour engagement period, CHG regularly provided a minimum of 4 hour shifts to its casual and part-time employees, but in some cases such as on-site services for clients, employees were often engaged for less than 4 hours, and CHG did not wish to pay staff for hours for which they could not generate revenue. Lastly, in regard to providing each casual on engagement with certain information in writing, including the likely number of hours the casual would work each week, the classification level and rate of pay, CHG already provided the classification level and rate of pay to casuals, but a requirement to inform casuals of their expected hours each week was a contradiction of casual employment. If this was to be applied, CHG would end up having to adjust and change hours through monthly rosters.

Benjamin Norman

[201] Mr Benjamin Norman¹⁹⁸ was the Director of Human Resources, Australia and New Zealand, for the Viterra Group of companies (Viterra). Viterra operated a grain storage and handling network and grain packing and processing facilities. Mr Norman gave evidence that the time and volume of grain received from growers could not always be accurately planned in advance, meaning that the days and times that storage locations were open during harvest is a major issue. The harvest (a 10–12 week period in October–January) was Viterra’s peak employment period, and Viterra’s workforce could double in size during this period. Viterra employed approximately 1000 employees outside of harvest and approximately 2500 employees during harvest. At the end of harvest, Viterra terminated the employment of the majority of casual employees engaged for the harvest. Viterra engaged casual employees throughout all areas of the business during the year, and their hours and number varied significantly.

[202] Mr Norman said that some casual employees, over a period of several months, might be engaged in a way that could be considered regular or systematic, but this occurred virtually by coincidence, and Viterra was unable to know in advance the hours that a casual would be required to work or whether there would be on-going work in the future. The difficulty in predicting the number of hours required was reflected in Viterra’s current enterprise award and enterprise agreements, under which part-time employees were guaranteed a minimum annual income and Viterra was allowed to vary a part-time employee’s hours day to day. Mr Norman gave evidence that where possible an available permanent position would be offered to a casual but that in his experience, an offer of conversion to a permanent position would be refused.

[203] He said that the insertion of a clause prohibiting an increase in the number of casual or part-time employees without first asking existing casual or part-time employees of a similar

¹⁹⁸ Witness statement – 22 February 2016, Exhibit 57; Oral evidence – Transcript 18 March 2017 at PN5110–PN5216

skill set to increase their normal working hours might be inconsistent with Viterra's fatigue management policy, would undermine productivity and was not possible in situations where employees needed to work side-by-side to ensure work was performed on time. Mr Norman agreed, under cross-examination by the ACTU, that a majority of casuals engaged for the harvest were not likely to be anything other than irregular casuals or employed for less than 6 months.

Benjamin Waugh

[204] For the purposes of these proceedings, Ai Group, ACCI and other employer groups conducted a Joint Employer Survey (JES) of employers about part-time and casual employment which was attached to Mr Benjamin Waugh's¹⁹⁹ witness statement, filed by Ai Group. He described the process of conducting the survey in his witness statement stating that the JES asked respondents a series of closed, numeric and open-ended questions about their employment practices and sought their views about the impact of the ACTU's claims. He gave evidence that there were 3,161 completed responses of small, medium and large enterprises who collectively employ 466,002 employees.

[205] Some of the important findings of the JES were:

- the average proportion of an organisation's employees that were employed on a casual basis varied considerably;
- the use of casual employment was more pronounced in the hospitality industry, the retail industry, the food, beverage and tobacco manufacturing industry, the restaurant industry, the fast food industry, the live performance industry and the horticulture industry, meaning the impact of the ACTU's claims would be particularly profound in those industries;
- the majority of casual employees employed by a business on a regular basis had been engaged for more than 6 months;
- employers stated different reasons for wanting casual employees; for example Aged Care employers repeatedly referred to the need to cater for their clients' needs which could be unpredictable and variable, while businesses covered by the Fast Food Award spoke of the impact of having a younger workforce on their hiring practices, and the availability of their employees necessarily required their engagement on a casual basis;
- 19.61% of respondents indicated that their organisation engaged labour hire employees, and one of the reasons for this was to avoid award structures including casual conversion and other forms of regulation;
- less than 20% of all respondents confirmed that they have received at least one request from an eligible casual employee to convert to permanent employment pursuant to a modern award;

¹⁹⁹ Witness statement – 22 February 2016, Exhibit 58; Oral evidence – Transcript 18 March 2017 at PN5225–PN5595

- respondents believed that they would be hurt badly by casual conversion requirements and would alter their employment practices including by ceasing to engage casual employees or hiring fewer casual employees and increasing the use of labour hire companies;
- regarding allocating any additional hours of work to existing employees, 33.83% stated that they already always do, 23.26% stated that they often do, 25.85% stated that they sometimes do and 7.33% reported that they do not.

[206] In cross-examination by the ACTU, Mr Waugh conceded that 950 respondents said that they did not know if their organisations were covered by an award but later on in the JES gave evidence regarding whether any casual employees had requested to convert under an award clause. In cross-examination by the SDA, Mr Waugh also accepted that the JES sheds little or no light on the number or percentage of regular casual employees who would be eligible to convert after a period of 12 months for the purpose of the Retail Award.

Kerry Allday

[207] Ms Kerry Allday²⁰⁰ was the Managing Director of Data Response Pty Ltd, a business she founded in 1989. Data Response provides third party contact centre and logistics services. Ms Allday gave evidence that the industry in which her business operated was hugely competitive. A major challenge was competing with services offered by companies offshore, which led to competitive pricing and a decline in market rates. As at 5 February 2016, Data Response employed 26 casual employees, and all were covered by either the *Clerks – Private Sector Award 2010* or the *Contract Call Centres Award 2010*. She said that Data Response used casual employees to cater to the fluctuating week to week requirements of clients. Forty employees may be needed during its busiest period and 4 in its slowest period. Ms Allday noted that clients engaged its services in a volatile and fluctuating way, and forecasting provision of services usually happened no more than a few weeks in advance.

[208] Ms Allday believed the ACTU's claims would have a detrimental impact on her business to the extent it would not be suited to the Australian workforce environment. She said the business would become unviable if the claims were granted due to the fixed costs associated with increased permanent employment when compared to the business's variable revenue, and operational difficulties would occur due to the environment of unpredictable hours and workloads.

Robert Blanche

[209] Mr Robert Blanche²⁰¹ was the Director and Chief Executive Officer for Bayside B.W.E Pty Ltd (Bayside), a business which provided recruitment and employment services to businesses, with specialised recruitment brands targeted at specific industries and/or occupations. Bayside employed approximately 180 permanent staff in its offices around Australia. About 15% of its permanent office staff was part-time, which was generally at the employee's request. Bayside employed up to 2000 on-hired casuals on any given day and employed 6000 individuals on a casual basis over the last year, resulting in approximately

²⁰⁰ Witness statement – 19 February 2016, Exhibit 73

²⁰¹ Witness statement – 23 February 2016, Exhibit 63; Oral evidence – Transcript 18 March 2017 at PN5664–PN5790

90% of its workforce being casual employees. Only about 11 on-hired employees were full-time, and this was at the request of the client. The average period of service for casual employees was around 9 months. Bayside offered its on-hire employees, including casuals, assistance and benefits, including access to home loans via the Bank of Queensland, subsidised health insurance packages and other discounts. Bayside worked with clients and the employees to transition casual employees to permanent work by identifying opportunities regarding their career and potential to becoming permanent. During 2014–2015, 125 casuals were offered full-time employment with the client.

[210] Mr Blanche gave evidence that he would be unable to run his business if casuals were given the right to convert to permanent full-time or part-time employment after 6 months without a right to review. He said this was because Bayside had limited or no control over the work or length of client assignments, and that the vast majority of work placements of on-hire employees were of a temporary nature. Mr Blanche said the business ran an exercise 2 years ago where over 550 casual workers, employed by one client, were offered a chance to become fixed term employees. Of the 550 initially offered fixed term employment, around 14 local staff took up the offer. Only 10 local staff now remained on fixed term contracts, the rest having converted back to casuals.

[211] Bayside filled a need for both employers and employees for flexible short term work and it would not be able to effectively provide this service if the “*severely restrictive*”²⁰² clauses proposed by the ACTU were implemented. Mr Blanche said many casual employees did work a minimum of 4 hours either because the client demanded a shift longer than 4 hours in duration, or the relevant award required a 4 hour minimum shift. However Mr Blanche said that the *Social, Community, Home Care and Disability Services Industry Award 2010* currently had a one hour minimum for home care employees. The one hour minimum assisted the industry to provide the services required by patient and meet government expectations for home care health. Any changes to the one hour minimum under this award would have a significant impact on the services provided to vulnerable people.

Krista Limbrey

[212] Ms Krista Limbrey²⁰³ was the HR Business Partner NSW/ACT for McDonald’s Australia Limited (McDonald’s). McDonald’s operated restaurants directly (through company-owned restaurants sometimes called McOpCo restaurants) and indirectly (through franchisees) and, as of 19 May 2015, there were 943 McDonald’s restaurants in operation with 165 McOpCo restaurants and 778 franchised restaurants. McDonald’s operated 2 categories of restaurants – “*free-stander*”²⁰⁴ restaurants and “*food court/in-store*”²⁰⁵ restaurants. As of 2 October 2015 there were 737 free-stander restaurants and 207 food-court and in-store restaurants. Ms Limbrey stated that the 125 food-court restaurants did not trade 24/7, and very few in-store restaurants traded 24/7. Many of the restaurants were subject to restricted hours of trade which applied to the building in which they were located, such as shopping centres, which might allow later hours on a Thursday for late-night shopping.

²⁰² Witness statement – 23 February 2016, Exhibit 63 at para 30

²⁰³ Witness statements – 12 October 2015, Exhibit 81; 24 February 2016, Exhibit 82; Oral evidence – Transcript 21 March 2016 at PN7056–PN7330

²⁰⁴ Witness statement – 12 October 2015, Exhibit 81 at para 6

²⁰⁵ Witness statement – 12 October 2015, Exhibit 81 at para 6

[213] As of 2 October 2015, McDonald’s food court and in-store restaurants employed approximately 12,808 employees, of whom 9,516 were casual employees with 4,627 being under the age of 17 and likely to be school students. Ms Limbrey stated that employee shifts were varied throughout the day depending on operational requirements and the expected sales during each period. Employees were likely to work a shift that covered at least one of the peak periods, being breakfast, lunch and dinner. McDonald’s operated a learning and engagement computer software program known as “*metime*”²⁰⁶ (metime system) that used data from its company owned stores and its franchised operated stores. The metime system had a profile for each employee which was updated on a needs basis.

[214] The metime system showed that, as at 19 May 2015, the total number of people who were employed by McDonald’s both in-store and franchised was 98,911 (not including corporate employees). Of these approximately 52% were female and 48% were male employees. McDonald’s employed directly 15,953 casual employees, 3,507 part-time employees and 1,299 full-time employees; and the franchises employed 59,995 casual employees, 12,601 part-time employees and 5,556 full-time employees. McDonald’s employed directly 8,899 employees aged 14, 15 and 16, which was 42.87% of the total number of the employees employed directly. The franchises employed 30,110 employees aged 14, 15 and 16 years, which was 38.64% of all the employees of franchises. Ms Limbrey said she has inferred from these statistics that most McDonald’s employees were at school or undertaking some kind of study. In relation to length of service, most employees have not worked at McDonald’s for more than 3 years (only 11% at direct stores and 13.51% at franchised stores), and over 50% have been employed for less than one year. In regards to the amount of hours worked by each employee, the data showed that most employees worked under 10 hours per week, with approximately 30% working between 10–20 hours and only approximately 20% working more than 20 hours per week.

[215] McDonald’s also operated a computer system known as “*myRestaurant*”²⁰⁷ (myRestaurant system) which allowed employees to record their hours of availability and preference to work. Ms Limbrey provided a preference report of 73,443 employees at 852 restaurants which showed that for 14–18 year olds, employees were mostly available on the weekends and after school. Employees who were older than 18 were much more available during the week and less available at night or on weekends than their younger counterparts.

3.10 ACCI witnesses

Andrew Hill

[216] Mr Andrew Hill²⁰⁸ was the Human Resources Manager at Outback Stores Pty Ltd (OBS), which promoted the health, employment and economic development of remote indigenous communities by managing quality, sustainable retail stores. It managed 36 Indigenous outback stores across the Northern Territory, Western Australia and South Australia. Some of the stores were small and have only 1–2 employees, while larger stores might employ up to 30 people. The majority of staff employed in the stores were covered by

²⁰⁶ Witness statement – 12 October 2015, Exhibit 81 at para 19

²⁰⁷ Witness statement – 12 October 2015, Exhibit 81 at para 49

²⁰⁸ Witness statement – 22 February 2016, Exhibit 3; Oral evidence – Transcript 14 March 2016 at PN859–PN881

the Retail Award and were employed on a permanent part-time or casual basis. Mr Hill said working only part-time hours was the preference of many of the employees. In response to the ACTU claim regarding a 4 hour minimum engagement, Mr Hill said that this would have a material impact on the stores managed by OBS. He said that the current 3 hour minimum engagement suited the stores' operating hours as it allowed for and did not impede shorter opening hours. The ACTU's proposed requirement to offer existing employees any additional hours before hiring new staff, would run counter to OBS's mission to trying to provide work and vocational opportunities to as many people as possible and to ensure that the economic benefit of employment was distributed equitably amongst the community, rather than simply benefitting a few individuals and leaving others unemployed.

Lauren Logue

[217] Ms Lauren Logue²⁰⁹ was the Human Services Manager at BridgeClimb in Sydney, which was a business that provides guided tours over the Sydney Harbour Bridge. (BridgeClimb). The business was privately owned and employed approximately 250 people, of whom approximately 120 were employed as tour guides. Employees were predominantly engaged on a part-time basis, and the majority of employees are covered by the *BridgeClimb Enterprise Agreement 2015*. The agreement contained a 3 hour minimum engagement for both casual and part-time employees. Ms Logue's evidence was that the majority of employees were young (on average between 20–30 years old) and were pursuing other activities outside of work (e.g. tertiary studies, artistic pursuits, etc.) and were therefore looking for part-time or casual work rather than full-time work. She said that the composition of BridgeClimb's workforce reflected the nature of the tourism industry and the fluctuations in demand that were experienced including the seasonality of customer demand, weather conditions, festivals and events. Ms Logue said that increased demand could not be met by a full-time workforce working overtime hours, and that a part-time and casual workforce allowed the opportunity to engage additional headcount as required by demand.

Robert Blanchard

[218] Mr Robert Blanchard²¹⁰ was the Executive Officer of Herb Blanchard Haulage, where he has been employed for around 20 years. The business operated in the road transport industry and employed about 33 staff, the majority of whom were covered by the *Road Transport and Distribution Award 2010*, the *Road Transport (Long Distance Operations) Award 2010* or the *Clerks Private Sector Award 2010*. He said the business engaged casual employees who were school-aged, generally working on Saturday mornings washing trucks. This was not a career path for most of them, since most of them pursued further study or employment in another field after they finished school. He said 2 casual employees had requested full-time and part-time work because they were interested in going into the transport industry, and on both occasions they had been given those opportunities. No other casual employees had wanted to continue with the business or change their employment status. The business also employed one permanent part-time employee, who worked that arrangement by choice. Mr Blanchard said that the business and its employees/prospective employees wanted these flexible working arrangements.

²⁰⁹ Witness statement – 22 February 2016, Exhibit 6; Oral evidence – Transcript 15 March 2016 at PN1102–PN1165

²¹⁰ Witness statement – 16 February 2016, Exhibit 100

3.11 ABI witnesses

Richard Roberts

[219] Mr Richard Roberts²¹¹ was the Divisional Manager of AgriExchange Pty Ltd, a supplier of citrus fruits. Mr Roberts gave evidence that during the height of the harvest, the company employed more than 1000 workers, and during rest of the season there were approximately 200 workers. Mr Roberts gave evidence that the majority of the company's workers were employed under the Horticulture Award: 40–50 casual workers, 800 casual pieceworkers during the harvest, and 100–200 casual packhouse workers during harvest. Approximately 100 permanent full-time employees had their conditions governed by common law agreements, while 100 casual packhouse workers are governed by one or more enterprise agreements. The company also has 100–200 casual packhouse workers supplied by one or more labour hire businesses during the harvest.

[220] Mr Roberts said that over a 12 month period, pieceworkers might work from one week to 6 months. The company employed up to 2500 pieceworkers from the beginning to the end of a harvest. Pieceworkers were paid by piece of fruit processed and were able to earn at least 15% above a worker paid ordinary hourly rates. They could choose when they began and ended their working day, how long they worked each day and how hard they worked. Mr Roberts gave evidence that some casual workers have demonstrated a preference for working Sundays to better accommodate study, but the vast majority of these casuals were pieceworkers who derived no additional penalty or loading from Sunday work. The business had never contemplated converting casual seasonal workers to permanent workers (in the same role) due to the realities of seasonal work. However, over the years there had been occasions when there have been conversions from casual positions to permanent positions from a junior to a senior role, and from time to time, the company advertised permanent roles. In these circumstances, where an existing casual worker applied, they would often be made permanent.

[221] Mr Roberts said that minimum engagement periods for casual staff were particularly unsuited to the industry, as weather played a large role in determining when work can be done, and to set a starting time for hundreds of casual pieceworkers on any given day would be an administrative and logistical nightmare that would undermine the very nature of pieceworking. A 4 hour minimum engagement period would lead to a reduction of workers being employed on many days where a fixed amount of work exists. The business favoured spreading work out to allow everyone to perform some work and earn some income. Mr Roberts also said that increased costs as a result of minimum engagement periods would be passed onto consumers.

[222] Mr Roberts gave evidence that if the ACTU's casual to permanent employment proposal was implemented, up to 500 pieceworkers who had worked regular and systematic hours for 6 months over the course of a harvest, could qualify for permanent work that does not exist. To require the company to first offer additional hours of work to existing part-time or casual workers before employing others would be an enormous burden, administratively and logistically and would be impossible to satisfy. The exigencies of the harvest precluded accurate assessment of work hours day to day, especially when it rained.

²¹¹ Witness statement – 22 February 2016, Exhibit 176

Peter McPherson

[223] Mr Peter McPherson²¹² was the General Manager of the Berry Category at Costa Exchange Ltd, at Corindi in NSW, since 1986. His role was to oversee the operation of the company, including the growing and harvesting of fruit for domestic and international markets. He was also the Treasurer of the Australian Blueberry Growers Association and Treasurer of the International Blueberry Organisation. Mr McPherson gave evidence that during the peak of the harvest season Costa Group had 6000 people working across its 5 farms. All workers other than senior management are engaged under the *Costa (Berry Category) Enterprise Agreement 2015–2019* (the Agreement). As at the date of his statement, the company employed 4258 workers in the 2016 financial year: 66 full-time workers, 3 part-time workers, 939 casual workers and 3250 casual pieceworkers. Mr McPherson gave evidence that the company required short periods of intense labour activity at harvest time, but far less activity for the remainder of the year while berry bushes produced fruit. The demand for workers fluctuated day to day during harvest periods, and dissipated immediately after because fruit had to be picked once ripe (within hours) and transported to cool rooms. Scheduling of work was also complicated by weather.

[224] Casual pieceworkers worked anywhere from about 3 weeks to 6 months in a 12 month period, and the more pieceworkers employed the quicker the harvest was completed. He stated that pieceworkers could choose their own hours, take as many breaks as they saw fit, work at their own pace, and earn at least 15% more than a minimum wage worker in an ordinary hour, depending on their skill. Mr McPherson gave evidence that there was very limited opportunity in the company for casual conversion to permanent labour because outside of harvest season the company already had permanent staff performing maintenance of fruit bushes work. He stated that if such a requirement was imposed on the company, hundreds of thousands of pieceworkers who worked for more than 6 months in a harvest season would become permanent workers when there would be no further work to perform, which would become economically ruinous to the company as well as posing great administrative costs.

[225] Mr McPherson gave evidence that if the ACTU's proposal of introducing a minimum engagement period for casuals was adopted, this would directly affect pieceworkers' capacity to manage their own productivity and income generation. The proposal to require employers to first offer additional hours of work to existing part-time or casual employees would be entirely unworkable in his company due to the impossibility of predicting the hours of work required at harvest.

3.12 National Out of School Hours Services Association witness

Kylie-Anne Brannelly

[226] Ms Kylie-Anne Brannelly²¹³ was the CEO of the Queensland Children's Activities Network (QCAN), a position she has held since 2005. She has over 25 years' experience in

²¹² Witness statement – 22 February 2016, Exhibit 188; Oral evidence – Transcript 11 July 2016 at PN1205–PN1267

²¹³ Witness statement – 22 February 2016, Exhibit 5, Oral evidence – Transcript 14 March 2016 at PN1023–PN1067

the “*outside school hours care*”²¹⁴ (OSHC) sector of the childcare industry. QCAN is an independent, not-for-profit organisation established to provide training, resources, information and support to the OSHC sector in Queensland and the Northern Territory. She says that a high percentage of the OSHC workforce is employed on a casual or part-time basis, and that there was a high turnover rate of staff. With many of the young employees who worked in the OSHC sector being attracted to the industry because it allowed them to fit paid work in around their study timetables. She described OSHC services as typically involving 2 sessions, a morning session starting about 6.30 am to 7.00 am and finishing between 8.30 am to 9.00 am, and an afternoon session commencing at about 2.30 pm to 3.00 pm and finishing between 6.00 pm to 6.30 pm. She said that increasing the minimum engagement of casual and part-time employees to 4 hours would have major detrimental effects on both employers and employees in the OSHC sector throughout the country, and said that associated increases in staffing costs could force these businesses to close and/or pass the costs on to the families using their service.

3.13 Australian Childcare Association witness

Paul Mondo

[227] Mr Paul Mondo²¹⁵ was the owner and operator of 2 day care centres in Melbourne’s North West, and had worked in the childcare industry for 25 years. He was also the National Secretary of the Australian Childcare Alliance (ACA), which represented 70% of long day care owners and operators in Australia. He described the issues which ACA members had in meeting ratio guidelines of staff to children (which differed from state to state), and said a degree of flexibility was needed in the workforce to meet these obligations on any given day. This meant that childcare centres benefitted from engaging casual employees or being able to send casual employees home at short notice. This was especially the case where inclusion support carers were needed for children who were subsidised for this purpose, because if the child who received the subsidy did not turn up because of illness or holidays or arrived late, the centre bore the cost of the subsidy shortfall. That meant the centres needed to be able to disengage casual employees on short notice.

[228] Mr Mondo said that casuals were often used to relieve permanent staff during their lunch breaks, with the required coverage being from 1–4 hours. If the minimum engagement was extended to 4 hours, centres would have to find other duties for casuals in the spare hours of their shift and the centre would then be overstaffed when compared to the regulations, which would result in an increased cost that would be passed on to families. The ACTU’s proposed casual conversion clause would put Mr Mondo in a position where he was placing casuals on permanent work before they were ready for the responsibility, since their total period of employment over a 6 month period might only amount to 25 days full-time employment. He was unable to provide fixed term contracts to inclusion support workers because it did not provide the employer with the flexibility and viability of casual employment.

²¹⁴ Witness statement – 22 February 2016, Exhibit 5 at para5

²¹⁵ Witness statement – 24 February 2016, Exhibit 99; Oral evidence – Transcript 22 March 2016 at PN8305–PN8334, PN8359–PN8611

[229] Mr Mondo identified examples of casual employees who preferred casual to permanent employment. One casual had been employed for 3 years had done so as they preferred this working arrangement compared to permanent part-time, and another preferred to work a 1.5 hour shift in the morning in order to get to study commitments. Mr Mondo also explained that casuals were drawn upon to fill gaps during lunchtimes, unscheduled leave such as sick leave and rostered days off. When there were no casuals available he engaged the services of an external company to get temporary workers.

3.14 Stevedoring Employers' witnesses

[230] The Stevedoring Employers' 2 witnesses gave evidence specifically directed at the ACTU claim as it would affect employers operating under the *Stevedoring Industry Award 2010*.

Greg Nugent

[231] Mr Greg Nugent²¹⁶ was employed by Qube Ports Pty Ltd (Qube) as the State Manager – Queensland and Northern Territory. He had worked in the stevedoring industry for approximately 45 years. He said that stevedoring operations sometimes involved periods of intense activity, and the rosters and working arrangements were designed to meet this need for business flexibility. Shipping arrivals dictated the allocation of labour on a daily basis. The estimated time of arrival determined when relevant employees needed to commence work the following day, whereas the type and quantity of cargo determined the labour and skill required. Qube was regularly required to revise its labour requirements up until 1.5 hours before employees were allocated their work for the next day. Supplementary staff were used to help meet intermittent work demands, and were allocated work where there were insufficient numbers of other employees or skills available to work the relevant shifts or to fill vacant positions. Supplementaries could work reasonably intensively or regularly during the particular period that they were required, but not outside that period. There was an incentive to limit the engagement of supplementaries as the training cost per employee was approximately \$3,000. Supplementaries were not guaranteed a set number of work hours per week and generally went off and did another job elsewhere.

[232] Mr Nugent understood that the ACTU's casual conversion claim would confer conversion rights on supplementary employees. He expressed the concern that a casual conversion provision would be likely to create an expectation amongst supplementaries that they were entitled to convert to full-time or part-time employment after having served a particular timeframe. This would lead to time-consuming and distracting disputes about whether and when particular supplementary employees were entitled to convert to some other employment status and would also impose significant cost liabilities on Qube, as it would be in a position where it would have more "*Guaranteed Wage Employees*" than required.

Greg Muscat

[233] Mr Greg Muscat²¹⁷ was the Human Resources Manager at DP World's Brisbane operations, and has worked in the stevedoring industry since 1979. He said that due to

²¹⁶ Witness statement – 22 February 2016, Exhibit 41; Oral evidence – Transcript 17 March 2016 at PN3931–PN3979

²¹⁷ Witness statement – 22 February 2016, Exhibit 42; Oral evidence – Transcript 17 March 2016 at PN3990–PN4045

constant changes in labour pool requirements, DP World needed a pool of casual employees. DP World allocated work to permanent employees in preference to casuals and did not engage casual employees to avoid hiring more permanent employees. Each of DP World's 4 enterprise agreements contained provisions facilitating casual conversion, which included requirements for eligibility. Mr Muscat gave evidence that the provisions allowed DP World to assess if an employee was suitable to work in the industry and if sufficient work was available to justify engaging more permanent staff. He was not aware that the MUA has ever made a claim to remove or dispute the requirements for casual conversion or expressed concerns about the manner in which DP World uses casual employees. He said that the ACTU's proposed provisions would place additional costs on the business and might require it to employ permanently employees who were not suitable for the business. He believed the proposed provisions were inappropriate and inconsistent with the realities of the stevedoring industry, however in cross-examination he conceded that DP World's casuals were irregular casuals and thus the ACTU's claimed casual conversion clause would not affect the company.

3.15 RCSA witnesses

[234] The RCSA called several witnesses in opposition to the ACTU and AMWU claims and in support of its own claim.

Melissa Evans

[235] Ms Melissa Evans²¹⁸ was the Team Leader of the Construction, Property and Engineering Division at Randstad's Newcastle Branch. Randstad was a recruitment business specialising in staffing solutions for businesses. Ms Evans gave evidence that Randstad places on-hire workers for Patrick Autocare. The number of on-hire workers placed on a particular day is contingent upon the volume of vehicles being moved on that day and this can fluctuate daily. On-hire workers employed by Randstad are employed on a casual basis to allow it to mobilise skilled on-hire workers at short notice to meet Patricks' changing operational requirements. Notice provided to on-hire employees, Ms Evans said, was usually no longer than 18 hours. Ms Evans gave evidence that the hours of one employee ranged from 7.5 to 48.25 per week.

Amy Wolverson

[236] Ms Amy Wolverson²¹⁹ was the QA and HR Coordinator at McArthur, which provided recruitment and temporary staff placement solutions to client businesses. She had been engaged in the recruitment and labour hire industry for approximately 13 years, and was responsible for overseeing McArthur's compliance and human resources practices including assisting consultants in the interpretation of modern award provisions and the application of correct entitlements. McArthur had approximately 6000 temporary employees working on assignment with clients. She said that in her experience, labour hire workers actively sought labour hire placements because the industry offered flexibility, on the job training and experience, and higher casual rates amongst other things. She further stated that, in her experience, if casual labour hire employees were provided with the opportunity to convert to permanent employment, there would only be a very low percentage of employees that would

²¹⁸ Witness statement – 28 July 2016, Exhibit 310

²¹⁹ Witness statement – 29 February 2016, Exhibit 62; Oral evidence – Transcript 18 March 2016 at PN5635–PN5659

actually wish to convert. In relation to the ACTU claim to include casual conversion clauses in awards which did not have them, Ms Wolverson said that McArthur did not currently have the capacity to manage a system for identifying casual employees who achieve 6 months in an assignment and who would be eligible under the ACTU application to be made an offer of employment.

[237] In relation to the RCSA's claim, Ms Wolverson said that this approach would not place the same administrative burden upon McArthur's staff but would still give employees the option to convert if they wished to do so. In response to the evidence of Ms Grey, one of the ACTU witnesses, Ms Wolverson said that she has been a casual employee of McArthur, and McArthur had supported her application to become a part-time employee with one of their clients by waiving the usual fee to the client for the introduction.

Wendy Mead

[238] Ms Wendy Mead²²⁰ was the founder and Managing Director of Pinnacle People, a business which recruits and places casual and permanent employees with business clients in hospitality or customer service roles. It employed 45 staff, with approximately 5000 casual employees working on assignment with clients. Ms Mead's role involved overseeing all aspects of the commercial and strategic operations of the company. She said that as at 16 February 2016 the casual labour hire employees worked under the following modern awards: the Aged Care Award (3%); the *Amusement, Events and Recreation Award 2010* (3%) and the Hospitality Award (72%). The other 22% were paid in accordance with the rates in an enterprise agreement applicable to the client's workplace. Ms Mead estimated that 50% of assignments were scheduled with very short notice to cover unexpected demand, sickness absence or a client's unsuccessful recruiting attempts. She said that clients utilised Pinnacle People's casual labour hire employees because it was more efficient and faster at recruiting and mobilising the number of staff with the requisite skills and training. She cited the Australian Open, and events for businesses located in regional Australia such as Kalgoorlie or Bathurst as examples.

[239] Ms Mead gave evidence that her casual staff indicated that they decided to work in the labour hire sector for reasons including the flexibility to accept or decline work and to access more than one work assignment at a time, increased training and development, greater working hours and higher take home wages. She said that in her discussions with casual labour hire employees, losing flexibility and fear of a reduction of take-home pay due to the removal of their casual loading were cited as reasons why employees chose not to undertake permanent employment.

[240] Ms Mead said that a requirement to notify all casual employees of their right to elect to become permanent employees would place significant administrative burdens on the company. She estimated that it would require 26.3 days of work each year to satisfy these obligations. Ms Mead also said that an increased minimum engagement period would be untenable for employees in aged care, events and hospitality working for short assignments. Current minimum engagement periods enabled staff to work across multiple events in a particular day, and any increase to the minimum engagement of casuals would result in a significant reduction in employee numbers. Further, the ACTU's claim to prohibit an

²²⁰ Witness statement – 29 February 2016, Exhibit 66; Oral evidence – Transcript 18 March 2016 at PN5830–PN5852

employer from increasing the number of casual or part-time employees without first allowing an existing casual or part-time employee an opportunity to increase their normal working hours by agreement could not be complied with without significantly damaging the business, and for assignments scheduled on very short notice, this requirement would pose too large an administrative burden and result in lost business opportunities due to time delays.

Adele Last

[241] Ms Adele Last²²¹ was the General Manager of Horner Recruitment Systems Pty Ltd – Victoria, which was one of Melbourne’s longest running, privately owned permanent and temporary recruitment consultancies. Horner employed labour hire employees in Victoria only. She has worked for 18 years in the labour hire industry, and is responsible for overseeing all of the operational, commercial and financial functions of the Horner business. She said that Horner met its current casual conversion obligations by setting a calendar reminder for each quarter which prompted the Industrial Relations Manager to produce a report of casual labour employees employed for 6 or 12 months. The report was cross-referenced against the relevant modern award to ensure that those employees were notified of the right to request permanent employment. Letters were distributed to the relevant employee and saved to the employee’s file.

[242] Ms Last indicated that employees’ main concern about conversion was having their pay reduced upon accepting permanent employment, despite the prospect of additional entitlements. A total of 52 staff (corrected in cross-examination to 82²²²) had been notified of the conversion right since 1 January 2010 of which only 2 employees made the election to convert to permanent employment. Given the very low take-up rate, the business elected to no longer proceed with that process. Apart from the physical resources required to implement the process, more significant was the time required to dedicate to the process. This process could take up to 32 hours per year which represented almost a full week of time for the relevant manager. Given the process resulted in only 2 casuals converting to permanent employment in more than 5 years, Ms Last indicated that she did not find this to be an effective or efficient use of resources.

Stephen Noble

[243] Mr Stephen Noble²²³ was the Managing Director of Australia Wide Personnel Pty Ltd, which specialised in recruitment and labour employee services, employing approximately 250 labour employees. He said there were 7 awards which covered Australia Wide’s labour hire employees that contained a casual conversion clause.²²⁴ The process implemented by Australia Wide to manage the conversion clauses included setting an alert for the 6 month point of an employee’s employment, reviewing the regularity of employment at that time and,

²²¹ Witness statement – 6 October 2015, Exhibit 67; Oral evidence – Transcript 18 March 2016 at PN5855–PN6057

²²² Transcript 18 March 2016 at PN5860

²²³ Witness statement – 7 October 2015, Exhibit 69; Oral evidence – Transcript 18 March 2016 at PN6071–PN6218

²²⁴ *Food, Beverage and Tobacco Manufacturing Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Plumbing and Fire Sprinklers Award 2010; Timber Industry Award 2010; Electrical, Electronic and Communications Contracting Award 2010; Graphic Arts, Printing and Publishing Award 2010; and the Vehicle Manufacturing Repair and Services Retail Award 2010* – see Exhibit 69 at paras 6, 11; Transcript 18 March 2016 at PN6066–PN6067, PN6159–PN6164

if eligible, sending a letter notifying the employee of their entitlement and directing them to engage in a discussion with a consultant. Mr Noble stated that the most common queries from these employees concerned pay rates. Once informed that their rate of pay would reduce but they would be entitled to leave and public holidays, most employees did not want to proceed with discussions. Mr Noble stated that the administrative aspect of the process took around 15 minutes per employee and the discussions between a consultant and employee took from 5 to 15 minutes. An audit, performed quarterly, took around one to 2 hours to complete. Only 2 employees had requested permanency since the introduction of modern awards, and these requests were denied because Australia Wide did not control the amount of work available, which was totally dependent upon the client's requirements, and the 2 employees' hours varied greatly. In cross-examination Mr Noble said the 2 employees were engaged under the Food and Beverage Award. He gave evidence he was not aware that clause 30.5 of that award enabled rosters which could be agreed with individual workers over a 3 to 12 month cycle. He agreed that sending a template letter to employees advising them of their conversion rights was not particularly onerous.

Stephen Shepherd

[244] Mr Stephen Shepherd²²⁵ was a board member of the International Confederation of Private Employment Agencies, and had been professionally involved in the recruitment and hire sector for over 28 years. He said that he expected that the ACTU's claim would have a significant adverse impact on employers in the sector. The proposed conversion provisions would add administrative costs to employers because they would need to record work data and analyse it to determine if a casual employee was eligible for permanent employment. Mr Shepherd outlined his concerns that the conversion provisions would not result in an increase in employment security for labour hire employees because the employment type did not affect a client's decision to continue or end an assignment. In relation to the proposed requirement to allocate additional work to existing part-time and casual employees ahead of engaging new employees, he said that it would simply be untenable to expect a labour hire business to contact all existing casual and part-time employees prior to placing new labour workers, and such a requirement would result in significant delay and inefficiencies which would also lead to the reduced employment, training and development of labour workers.

Kathryn MacMillan

[245] Ms Kathryn MacMillan²²⁶ was the Managing Director of Nine2Three Employment Solutions Pty Limited, a business which offers core services and recruitment for SME and Corporate businesses as well as providing HR management solutions and candidate solutions for small businesses and individuals. Ms MacMillan gave evidence that the business charges clients an hourly rate for each hour worked by a labour hire employee at the client's business while on assignment, and all labour hire employees are engaged on a casual basis, working off a timesheet. The business currently had 4 permanent employees and a further 4 casual employees engaged directly in providing the permanent recruitment, temporary staffing and contracting solutions to clients. In the financial year of 2015, the business issued a total of 58 group tax certificates to temporary labour hire workers and 4 to permanent employees, and anticipated similar numbers of labour hire workers in the 2016 financial year. All of the

²²⁵ Witness statement – 29 February 2016, Exhibit 71; Oral evidence – Transcript 18 March 2016 at PN6240–PN6283

²²⁶ Witness statement – 29 February 2016, Exhibit 75; Oral evidence – Transcript 21 March 2016 at PN6392–PN6450

casual labour hire employees were engaged under the *Nine2Three Employment Solutions Pty Limited Employee Collective Agreement 2007*, which ensures that all labour hire employees were paid an hourly rate that was higher than the rate for the appropriate classification under the corresponding award. Ms MacMillan gave evidence that Nine2Three provided work to individuals who were either looking at returning to the workforce or required a role with inherent flexibility due to their lifestyle or personal commitments, who might be students or mothers who had carer's responsibilities.

[246] In regards to the ACTU application, Ms MacMillan said that there would be added administration costs in informing employees if they wanted to change to permanent employment, and that the majority of her employees sought the flexibility which the current system offered them. She was concerned that it would be very unlikely that Nine2Three could sustain permanent employment for any labour hire employee, if that employment meant providing a guarantee of minimum hours and only increasing those hours by agreement or incurring an overtime payment, which she could not pass onto her clients. Ms MacMillan believed that no employees, or only a very minimal number of employees, would actually take up the offer of a permanent role due to the loss of the casual loading. In regards to the ACTU clause that would require an on-hire employee working less than 38 hours to be first offered any new work, she said that this already happened within Nine2Three, but sometimes the existing person did not have the requisite skills for the job.

Carly Fordred

[247] Ms Carly Fordred²²⁷ was employed as Marketing and Communications Manager by the Recruitment and Consulting Services Association (RSCA). She said that in 2015 the RSCA conducted a survey of its members regarding the use and application of casual conversion clauses in various modern awards, and of the 28 respondents who participated in the survey, 25 employed labour hire employees as casual employees. Five out of 8 respondents said that upon being sent a letter advising of their right to convert from casual to permanent employment, no employee formally elected to convert, with the reason overwhelmingly given being that employees did not wish to give up their casual loading (63%), followed by employees enjoying the flexibility of casual employment (38%). The average amount of time businesses spent on managing the process of casual conversion including preparing, sending and responding to letters per quarter ranged from 2 to 12 hours. 75% of businesses were aware of the punitive ramifications for failing to comply with the casual conversion provisions in the awards. Overwhelmingly, businesses felt that they would experience a significant impact if laws prevent them from employing additional casual employees until existing casual employees were given the right to take on that additional work, with the majority stating that this would be unworkable as businesses were constantly matching casual employees to appropriate assignments with limited time. Other reasons with a high response included that this would prevent the business from quickly addressing shortfalls in labour and that there would be an inability to increase casual labour required on a short term basis only.

²²⁷ Witness statement – 9 October 2015, Exhibit 78

3.16 Group of 8 Universities' witnesses

[248] The Group of 8 Universities called 4 witnesses concerning the ACTU/NTEU claim to vary the *Higher Education Industry—General Staff—Award 2010* (Higher Education Award).

Steven Smith

[249] Mr Steven Smith²²⁸ was the Manager, Workplace Relations (Operations) at Monash University, Australia's largest University. He gave evidence that the University's operations were varied due to its operating cycles, which resulted in a significant need to employ casual professional staff. Mr Smith detailed that in 2014, the level of casual employment for professional staff as a percentage of professional staff FTE was 12.4%. He said that the current casual conversion clause in the Higher Education Award had been developed according to the particular characteristics of the higher education sector.

[250] Addressing the ACTU's claim, Mr Smith said that it would have a significant detrimental effect on casual student employment, impact on exam invigilators, have a substantial cost impact, require the re-organisation of work, and would result in casuals being deemed permanent where there was no ongoing need for the work they were performing.

David Ward

[251] Mr David Ward²²⁹ was the Vice-President, Human Resources at the University of New South Wales (UNSW). He said that UNSW professional staff were employed in a wide variety of functions to support the teaching and research of the UNSW, to provide administration and to support on-campus facilities and services. There was a strong operational need for the use of casual professional staff due to the structure of the academic calendar dictating fluctuating staffing needs, the diversity in university operations and that positions were often tied to external research grants.

[252] Mr Ward gave evidence that in a number of cases staff might be engaged in a casual role for a period of 6 months or more but were not required on an ongoing or indefinite basis. He said that approximately 50% of casual professional staff at UNSW were also UNSW students, and that the flexibility of casual employment was ideal for students. UNSW's enterprise agreement contained casual conversion provisions for regular and systematic casual employees, and that this clause was based on the casual conversion clause in the pre-reform award applicable to university general staff. He said that the current conversion clause and casual minimum engagement provisions in the Higher Education Award were both relevant to operations of universities and reflect the industrial regulation of casual conversion that had substantially been in place for the last 13 years. He said that there were no issues with the delayed processing of casual conversion applications and that 25 of the 27 applications for casual conversion since 2010 had been approved. However a deeming provision after 6 months of employment such as that proposed by the ACTU/NTEU would result in many staff being deemed to be continuing when the work that they performed was not required on an ongoing basis.

²²⁸ Witness statement – 25 February 2016, Exhibit 43; Oral evidence – Transcript 17 March 2016 at PN4077–PN4297

²²⁹ Witness statement – 25 February 2016, Exhibit 44; Oral evidence – Transcript 17 March 2016 at PN4309–PN4441

[253] Mr Ward said that it was common for universities to engage casual professional staff to perform work of less than 4 hours duration and that the associated work was unpredictable and could not be organised to provide a 4 hour minimum engagement. A 4 hour minimum engagement was also unsuitable for students and likely to result in students not being offered or being unable to accept work.

Bronwyn Shields

[254] Ms Bronwyn Shields²³⁰ was the General Manager of the Faculty of Engineering and the Faculty of Information Technology at Monash University. She had been employed by Monash University for approximately 27 years. She said that the proposed deeming clause would “*have a chilling effect*”²³¹ on employment opportunities. Additionally, she believed that staff who would be converted would be allocated to work in areas in which they did not have the relevant skills and experience. Her view was that the ACTU’s proposed clause requiring the offer of additional hours to existing casual and part-time employees prior to engaging new casuals would be unworkable due to Monash University’s large size. In cross-examination she confirmed that administrative and other various categories of work performed by casuals were broadly the same across faculties, and that she had not analysed the workforce planning options that could be implemented if the claims were granted.

Diana Dalton

[255] Ms Diana Dalton²³² was the Executive Director of the Faculty of Business and Economics at the University of Melbourne. She gave evidence that casual employment assisted the University to manage its operational requirements, including fluctuating and uncertain needs and long term and unplanned staff absences, and facilitated student employment. The University’s employees (including casuals) were covered by an enterprise agreement which contained a casual conversion provision. She was not aware of any dispute at the University related to casual conversion of a professional employee, including any dispute about refusal to convert. The contract of employment for all casual staff advised them of the right to apply for conversion to continuing employment. Ms Dalton said that her Faculty had had very limited inquiries and applications.

[256] Addressing the ACTU’s claim, Ms Dalton said the proposed provisions would not work at the University because they did not reflect the operational requirements of the University and might reduce workforce participation, particularly for students, and there would be significant costs in administering them. In cross-examination Ms Dalton acknowledged that, depending on the circumstances, employees who were converted to permanency might be able to work across a number of roles for which casual professionals were commonly employed by the University. Ms Dalton conceded that she had not done an impact analysis of the imposition of a 4 hour minimum engagement period.

²³⁰ Witness statement – 25 February 2016, Exhibit 45; Oral evidence – Transcript 17 March 2016 at PN4459–PN4544

²³¹ Witness statement – 25 February 2016, Exhibit 45 at para 33

²³² Witness statement – 25 February 2016, Exhibit 48; Oral evidence – Transcript 17 March 2016 at PN4559–PN4652

3.17 AHEIA witnesses

[257] AHEIA's witnesses also gave evidence specifically addressing the ACTU/NTEU claim to vary the Higher Education Award.

Stuart Andrews

[258] Mr Stuart Andrews²³³ was the Executive Director of the AHEIA, and has worked in workplace relations in the higher education sector for over 25 years. He had previously been the lead negotiator for 5 rounds of enterprise bargaining at the University of Tasmania (UTAS). The casual conversion clause in the UTAS enterprise agreement had been introduced following the variation of the *Higher Education General and Salaried Staff (Interim) Award 1989* to add a casual conversion clause in 2004. Mr Andrews said that this clause was replicated in subsequent general staff agreements that he negotiated, and that the current UTAS enterprise agreement includes a similar provision. He had no recollection of unions seeking to negotiate arrangements that were more restrictive in relation to casual conversion between 2005 and 2011, and in particular no claim had been advanced for a deeming provision of the type now claimed by the ACTU/NTEU.

[259] Mr Andrews said that he did not recall any disputes concerning the casual conversion provision in the UTAS enterprise agreement between 2005 and 2011. He also gave evidence that, according to AHEI's records, the AHEI had only been asked to provide advice to a member university following the university's refusal of a request for conversion. Mr Andrews also gave evidence that a majority of member universities had notified him that there had been no disputes concerning casual conversion through university dispute resolution procedures.

[260] Mr Andrews also gave evidence that the current 3 hour minimum engagement provision found in the current Higher Education Award and enterprise agreements in the sector originated from the pre-modern award variation in 2004. He said that there were currently exceptions to the minimum engagement requirement, including that university students who attended the university in their capacity as a student on the day of their engagement have a one hour minimum engagement.

Mark Gladigau

[261] Mr Mark Gladigau²³⁴ was the Manager, Workplace Strategy at the University of South Australia (UniSA), and had been employed at UniSA since March 2003 in various positions. He said that the operational requirements of UniSA meant that professional staff were often required to work less than 4 hours on each occasion for which they were engaged. Mr Gladigau also gave evidence that between July to December 2015, there were 3,833 occasions when casual professional staff worked less than 4 hours at a time, totalling 9,666 hours of work. The major categories of professional staff that worked less than 4 hours at a time included academic assistants, student ambassadors and buddies, research assistants and disability services note takers. The nature of these professional staff occupational categories meant that the university did not require staff to be engaged for 4 hours at a time. Mr Gladigau also said that requiring UniSA to engage casual professional staff for 4 hours would

²³³ Witness statement – undated, Exhibit 49

²³⁴ Witness statement – 25 February 2016, Exhibit 50; Oral evidence – Transcript 17 March 2016 at PN4676–PN4735

be impractical and likely result in additional costs for UniSA and unnecessary disruption to students and timetables. Further, if UniSA was required to pay staff in these categories a minimum of 4 hours on each occasion that they were required to work, UniSA would be paying for 34,000 unproductive hours over that year.

[262] In cross-examination, Mr Gladigau agreed that there was no operational reason preventing the engagement of the student buddy category for a 4 hour minimum engagement.

Ken Greedy

[263] Mr Ken Greedy²³⁵ was the Associate Director, Employee Relations and HR Business Partners at Griffith University. Mr Greedy had held this and similar roles with the University since 2009. He gave evidence that general staff of the University were covered by an enterprise agreement which provided for a minimum engagement of casual employees of 3 hours, subject to some exceptions. One of those exceptions was for a one hour minimum engagement for employees who were students and those with a primary occupation elsewhere or with the University. He said students were typically engaged as casual staff for less than 4 hours in roles such as supporting international students, student ambassador work, note-taking for students with disability, library work and food services. The enterprise agreement's provisions as described allowed the University to maximise the opportunities available to its students to learn new skills and earn money while they were studying. Mr Greedy expressed his opinion that without the flexibility the provisions provided, such opportunities would be severely limited. He disagreed with the proposition that student ambassador duties performed by casual student employees could be scheduled in 4 hour blocks, but agreed that information sessions and social events could "theoretically"²³⁶ be scheduled in 4 hour blocks, although this would not be easy in practice.

3.18 HABA witnesses

[264] The HABA tendered 5 witness statements addressing the effect of the ACTU's claim for a 4 hour minimum engagement on employers covered by the *Hair and Beauty Industry Award 2010*, which currently has a 3 hour minimum engagement, and also the claimed casual conversion provision. The probative value of those witness statements was diminished by the fact the statements were in virtually identical form.

Sarkis Akle

[265] Mr Sarkis Akle²³⁷ was the Director of 2 salons in Sydney, which employed approximately 20 team members inclusive of full-time, part-time and casual employees. He said that his business struggled to compete with low price competitors. He currently had 2 casual receptionists who undertook work in a job-share arrangement. He had previously offered them permanent part-time employment after a 3 month probation period but they declined and opted to remain casuals. Mr Akle had been operating under the belief that under the *Hair and Beauty Industry Award 2010* he was already required to offer permanent

²³⁵ Witness statement – undated, Exhibit 51; Oral evidence – Transcript 17 March 2016 at PN4737–PN4769

²³⁶ Transcript 17 March 2016 at PN4765

²³⁷ Witness statement – undated, Exhibit 116; Oral evidence – Transcript 23 March 2016 at PN9226–PN9450

employment to casuals working regular hours. He was concerned about the additional costs and the lack of flexibility that a 4 hour minimum engagement would bring.

Maureen Harding

[266] Ms Maureen Harding²³⁸ was the director of a salon, and had previously managed 3 salons in the Sydney region, all of which were located in shopping strips. She was also the National President of the HABA. Her salon employed 20 team members in full-time, part-time and casual positions. She stated that part-time and casual employment was generally granted at the request of the employee. She found it difficult to compete at a profitable level with many low cost competitors in the market. She said that a provision which allowed casual employees to convert to permanent status after 6 months would be an imposition on business, but accepted in cross-examination that the casuals she employed were engaged on an irregular basis and would not be eligible for conversion.

Graham Thatcher

[267] Mr Graham Thatcher²³⁹ was a Director of Ella Bache Brisbane, and managed 3 salons in Brisbane shopping centres employing 25 full-time, part-time and casual employees. He was opposed to an increase in the minimum daily engagement for casuals and rejected the inclusion of a casual conversion clause in the award. He said that as business costs from labour and superannuation had grown business profits had decreased with low-cost competitors taking customers, and that the award rostering provisions for part-time employees were insufficiently flexible for his business needs if casuals were converted to part-time employment.

Helen Golisano

[268] Ms Helen Golisano²⁴⁰ was the owner of 4 salons in Perth which employed approximately 28 team members inclusive of full-time, part-time and casual employees. She was likewise opposed to an increase in the minimum engagement and any casual conversion provision. She noted that casuals often required flexibility to achieve work/life balance and enjoyed the higher rate of pay, and that a 4 hour minimum engagement would cause a problem for employees with caring responsibilities who currently work 6.00 pm to 9.00 pm, as they would not be able to work anymore because they could not get to work by 5.00 pm.

Wendy Michetti

[269] Ms Wendy Michetti²⁴¹ was the director of a hairdressing salon and beauty spa in Mount Lawley, Western Australia. Ms Michetti employs 25–30 team members inclusive of full-time, part-time and casual employees. She supported the HABA's position that the minimum engagement period for casuals should remain as 3 hours and there should be no automatic right to casual conversion after 6 months. Ms Michetti stated that business costs had already increased and they struggled to compete with low cost competitors.

²³⁸ Witness statement – undated, Exhibit 118; Oral evidence – Transcript 23 March 2016 at PN9916–PN10012

²³⁹ Witness statement – undated, Exhibit 119; Oral evidence – Transcript 23 March 2016 at PN10017–PN10070

²⁴⁰ Witness statement – undated, Exhibit 120; Oral evidence – Transcript 23 March 2016 at PN10105–PN10149

²⁴¹ Witness statement – undated, Exhibit 121

3.19 Motor Traders Associations' witnesses

[270] The Motor Traders Associations called 3 witnesses in relation to the ACTU/AMWU claims as they affected employers covered by the VMRSR Award.

Maria Meilak

[271] Ms Maria Meilak²⁴² was the Office Manager at Melita Auto Electrical Services Pty Ltd (Melita), where she had worked for over 18 years. Melita was a small business which has 7 employees. Ms Meilak stated that Melita has for several years employed junior employees on a casual basis during after school hours to gain experience in the automotive industry, and she believes that this was crucial in establishing a career path for young students in automotive repair and maintenance. Ms Meilak gave evidence that a minimum engagement of 4 hours would not permit the employment of juniors on this basis because there were insufficient after-school working hours available.

Ross Kealy

[272] Mr Ross Kealy²⁴³ was the Group Human Resources Manager with the Jefferson Automotive Group (Jefferson). Mr Kealy said that Jefferson's primary focus was to employ permanent staff working on a full-time basis, and it was very difficult to fill roles in operating areas with casual employees or part-time employees as there needed to be continuity in dealings with customers. There were however casual employees and part-time employees employed in the clerical/administration area of the business, and Jefferson currently employs 17 casual employees. They were generally not engaged for long periods of time, and were generally filling in for absences or were for short-time assignments due to peak workloads. There were 5 longer-term casual employees at Jefferson, they had been offered permanency but chose to remain as casual employees. Mr Kealy stated that Jefferson also employed 31 part-time employees who had a preference for working on that basis because of the reduced hours. They were sometimes offered increased hours, but generally they tended to be satisfied with their existing hours and work arrangements.

[273] Mr Kealy's evidence was that Jefferson's casual and part-time employees already worked more than 4 hours on each shift, the business would not be affected by this aspect of the ACTU claim. In relation to the ACTU claim to first give work to existing casual employees who are working under 38 hours per week, Mr Kealy believed that it would present administrative and logistical problems for an otherwise well organised system of recruitment and employment which could also work as a barrier to current full-time employees wanting to change to part-time employment or casual employment.

Glen DeClase

[274] Mr Glen DeClase²⁴⁴ was the National Manager of HR/IR and Payroll with Prixcar Services, and has been working for Prixcar since 2003. The Prixcar workforce was comprised

²⁴² Witness statement – 22 February 2016, Exhibit 83; Oral evidence – Transcript 21 March 2016 at PN7349–PN7431

²⁴³ Witness statement – 18 February 2016, Exhibit 85; Oral evidence – Transcript 21 March 2016 at PN7575–PN7632

²⁴⁴ Witness statement – 19 February 2016, Exhibit 87; Oral evidence – Transcript 21 March 2016 at PN7644–PN7734

of 550 permanent award-covered employees, 119 salaried employees and 212 casual employees. The Prixcar Vehicle Processing Centres was also comprised of 244 permanent award-covered employees, 141 salaried employees and 67 casual employees.

[275] Mr DeClase said that on a monthly basis, a report was generated by the business's payroll section which showed when casual employees had reached their 6 months' service at Prixcar. If any such casual employee is considered a regular casual, they are offered permanent part-time or full-time employment with a casual conversion letter. This letter advises the employee of their right to convert as well as the loss of casual loading and the entitlement to leave benefits should they elect to become a permanent employee. The employee is required to return to Prixcar a notice of election indicating whether they would like to remain casually employed or become permanent. Mr DeClase said that he believed that the current casual conversion provision in the award operated effectively, and the automatic deeming provision proposed by the AMWU would only create an added administrative burden on businesses in the automotive industry. In cross-examination, Mr DeClase denied that there were a number of casual employees who had been engaged for longer than 6 months who had not been given the opportunity to elect to convert to permanent employment.

3.20 AMIC witnesses

Garry Johnston

[276] Mr Garry Johnston²⁴⁵ was the in-house counsel for the Australian Meat Industry Council (AMIC), and had been employed by the AMIC since 1996. Mr Johnston explained that the meat industry used daily hire employment extensively in the meat processing sector of the industry. He estimated that over 40% of meat processing establishments used only daily hire and casual labour. He did not believe there was a great demand for conversion to permanent employment in the industry. Labour hire arrangements were common and part-time employment was used sparingly. Meat processing was impacted by often unpredictable seasonal factors and product availability, which created a fluctuating need for labour and a need for flexibility. Meat manufacturing plants and the wholesale retail establishments did not have access under the *Meat Industry Award 2010* to daily hire arrangements so they tended to use casuals. However some employers had more stable work, such as a manufacturer supplying Coles Supermarket, and so did not use casual employees.

[277] AMIC had conducted an employer survey to demonstrate how the meat industry was unique. The employers' comments include that the industry was unpredictable so labour needed to be flexible, that many employees would not want to convert to permanent employment because they wanted the flexibility of casual work, and that 6 months was not long enough to determine whether there would be ongoing employment opportunities. Mr Johnston also observed that if the ACTU casual conversion claim was successful and a casual was converted to permanent employment, clause 11.4 of the *Meat Industry Award 2010* as it currently stood allowed the employer in a meat processing establishment to then transfer an employee from full-time employment to daily hire employment.

²⁴⁵ Witness statement – 24 February 2016, Exhibit 94; Oral evidence – Transcript 22 March 2016 at PN8011–PN8143

Ken McKell

[278] Mr Ken McKell²⁴⁶ was the HR/IR Manager of the AMIC. He gave evidence on the basis of his experience dealing with numerous members in retail and/or wholesale operations that having a flexible workforce was necessary in an industry responding to the supply of product and the requirements of their customers. He said that he has advised one of the larger meat retail establishments in NSW for many years, and that casual employees represented their largest employment category. He gave evidence that the operation's stock was sourced from a processing establishment in Victoria, and that if there were shortfalls in livestock at the processing establishment that this often required an adjustment to the numbers and type of staff required in the retail business, with the retailer having little control over these fluctuations.

[279] Mr McKell also gave evidence that he was aware of a processor that only employed daily hire and casual employees to accommodate fluctuations in workload. He said that retailers and wholesalers purposely employed a percentage of their staff on a casual basis due to operational reasons, and that a common pattern was the engagement of a core group of employees full-time, with casual employees supplementing this group when necessary. Some AMIC members had asked about transferring employees from casual to full-time and vice-versa, but part-time employment was not prominent in the industry. Mr McKell said that a casual conversion clause would be detrimental to the business but also to the employees and would result in a reduction in employment and employment opportunities.

Kevin Cottrill

[280] Mr Kevin Cottrill²⁴⁷ was the CEO of the AMIC. He gave evidence that the meat industry consisted of processors, manufacturers, wholesaler and retail establishments, but there was often no clear line between these sectors, as many businesses were vertically integrated. The starting point of the whole industry was the procurement of livestock, and the availability, timing and quality of livestock dictated the pace and volume of the production chain. The volatility of the supply of livestock flowed through all sectors of the industry and has implications on labour supply and planning. If the number of stock was reduced, then the number of workers required to process them in the expected hours also had to be reduced. Mr Cottrill said that such workers had to be stood aside temporarily, but kept available for future production. In more severe cases a whole plant might need to be temporarily closed, and that it would be financially ruinous to maintain a paid workforce in such a situation. Mr Cottrill said that balancing overstaffing with the need to have trained staff available when they are required, in a volatile supply environment, was a difficult task, and this was traditionally managed by engaging the majority of employees as daily hires supplemented by casual employees. Mr Cottrill gave evidence that this method of labour planning is essential and unavoidable to meet the structural problem of the volatile production environment in meat processing.

[281] Mr Cottrill gave evidence that in his opinion a casual conversion clause would limit the capacity to organise and plan labour supply, and that allowing casual employees to become permanent had the capacity to remove those employees from the class of casual

²⁴⁶ Witness statement – 21 March 2016, Exhibit 95; Oral evidence – Transcript 22 March 2016 at PN8215–PN8268

²⁴⁷ Witness statement – 25 February 2016, Exhibit 97

employees who are retained for a more occasional type of work. It could also result in significant unfairness and discontent as daily hire employees might be displaced. There was a possibility that if after 6 months of casual employment there was conversion to permanency, employers may treat casual employment as a risk to their business and that casual employment may be phased out in favour of daily hire.

Ben Thomas

[282] Mr Ben Thomas²⁴⁸ was the Manager of the Market Information Team of Meat & Livestock Australia Limited (MLA), which was the declared industry marketing body and the industry research coder under ss.60(1) and (2) of the *Australian Meat and Live-stock Industry Act 1997* (Cth). MLA was funded by the Commonwealth Government through levies on sheep, cattle and goat producers. The Market Information Team provided producers with market information based on saleyard prices, over-the hook price indicators, feeder cattle price indicators, sheep skin price indicators and indicative slaughter numbers. His primary responsibility was to lead the delivery of market insights for the red meat industry including reporting on 70 sheep and cattle saleyards each week, a weekly newsletter and the quarterly cattle and triannual sheep industry projections. The MLA's 2016 cattle industry projections were anticipating a 16% year on year decline in cattle slaughter for 2016 – that is, 7.6 million head, down from 9 million in 2015. This larger than usual variation was due to an estimated 20 year low in the national herd as a result of extensive drought. However it was commonplace for the annual number of cattle processed to change each year based on the weather influences.

3.21 NFF witnesses

[283] NFF called a number of witnesses in opposition to the AWU claim concerning the overtime provisions of the Horticulture Award (which is dealt with later in this decision) who also gave evidence that the introduction of a 4 hour casual minimum engagement period in the Horticulture Award would have a damaging impact on labour costs in the horticulture industry. These witnesses were John Dollisson, Brock Sutton, Donna Mogg, Kylie Collins, Rhonda Jurgens, Clint Edwards, Chris Fullerton, Brendan Miller, Stephen Pace and Andreas Rehberger. Their full evidence is summarised in greater detail in Chapter 6. Their evidence was that a 4 hour minimum engagement period was impractical in their industry because they relied so heavily on casual employees for harvesting, and the weather events completely out of their control could affect the harvesting process and prevent 4 hours' work being performed. Ms Jurgens said for example that if she were to engage 40 employees to pick who were then unable to work due to rainfall she would have to find over \$4000 to pay the 4 hour minimum.²⁴⁹

3.22 AHA/MIMA/AAA witnesses

[284] The AHA, MIMA and AAA (collectively the Hospitality Associations) called 4 witnesses in opposition to the ACTU claims as they affected the *Hospitality Industry (General) Award 2010* (Hospitality Award). These witnesses also gave evidence in support of the Hospitality Associations' claim to vary the part-time time employment provisions of the

²⁴⁸ Witness statement – 23 February 2016, Exhibit 98

²⁴⁹ Exhibit 161 at para 9

Hospitality Award, and this aspect of their evidence is discussed separately in Chapter 4 of this decision.

Joanna Blair

[285] Ms Joanna Blair²⁵⁰ was the director of 3 hotels in NSW, and had owned hotels for 25 years, with a total of 30 years' experience in the industry. She said that the ACTU's proposed restriction on the employment of new staff until existing staff had been offered more hours would be cumbersome and would add to the administrative burden. The number of casual employees she engaged was motivated by the trading requirements at a specific time of day, and provided the example that she might need additional casual employees to run food for 2 hours during a function. She also said that she regularly employed casuals for the current minimum of 2 hours and has not received any complaints about this. She gave a range of scenarios where she might need to employ casuals for short periods including during raffles, for lunch service at the bistro, during functions, and for maintenance. If the minimum period of engagement was increased she would utilise management employees and reduce the number of casual employees. If she had no other option but to engage a casual when there was not 4 hours' worth of work, she would try to redeploy them to another area of the hotel to make up the difference, but this would be difficult because it would reduce the hours of other employees by a commensurate amount, the employee might not be skilled or qualified to work in those other areas; and the employees might be juniors working the bistro who were legally not allowed to enter some other parts of the venues such as gaming or in the bar.

Darren Brown

[286] Mr Darren Brown²⁵¹ was the General Manager of the Shoreline Hotel in Tasmania, and had held that position for 15 years. He was responsible for the hotel's strategic operations including hiring and dismissing employees. The hotel operated 7 days a week and has 65 employees, 64 of who were covered by the Hospitality Award. He said that the ACTU's proposed requirement that existing casual and part-time employees' hours be increased prior to increasing the number of casual or part-time employees was not practical because there were particular days or times when he needed additional people working rather than one person working for a longer period. He also said that if he had to roster his employees for a minimum of 4 hours, he would reduce the number of employees engaged for each shift, and the ability to assign employees work in other areas to make up 4 hours' work is limited. He said many of his casual workers were university students, and around half of his employees had worked there for longer than 12 months. The shorter shifts at his hotel accommodated his employee's flexibilities: "*there are single mums that don't want to be employed all night ... there are others that can't start early ... because they're waiting for their husband to get home*".²⁵² On more than one occasion he could not accommodate employees' requests for part-time work as it did not suit the needs of the business.

²⁵⁰ Witness statements – 11 October 2015, Exhibit 122; 14 March 2016, Exhibit 123; Oral evidence – Transcript 23 March 2016 at PN10163–PN10411

²⁵¹ Witness statements – 9 October 2015, Exhibit 126; 23 February 2016, Exhibit 127; Oral evidence – Transcript 23 March 2016 at PN10421–PN10524

²⁵² Transcript 23 March 2016 at PN10479

Paul Stocks

[287] Mr Paul Stocks²⁵³ was the General Managing Director of New Bon Pty Ltd, which operated Kelly's Motor Club Hotel in Cranbourne, Victoria. He was responsible for recruitment of employees, and had over 30 years' experience in the hospitality industry. He said that the hotel traded 7 days a week, and as at 23 February 2016 employed 67 employees, 65 of which were covered by the Hospitality Award. There were 11 full-time employees, 54 casual employees and no part-time employees. Mr Stocks gave evidence that it was not always possible for him to offer additional hours to existing employees because those employees were either working, or not available, at the times when additional employees were needed. He said that an increase of the minimum engagement period to 4 hours would lead him to reduce his employee numbers.

[288] Mr Stocks was cross-examined by the ACTU and confirmed that there was an almost 24 hour need for labour at his hotel due to its opening hours. Mr Stocks confirmed that he had 10 full-time staff on annualised salaries, who could be directed to work on weekends by prior arrangement. Mr Stocks confirmed that during his time at the hotel he had never had a request from a casual staff with more than 12 months' service to convert to a permanent position; but that it would not be onerous to include in an employee's letter of employment that if they worked at the hotel for more than 12 months they had capacity to convert their employment into permanent work. He said in cross-examination that he would not use a greater proportion of permanent labour because "*my staff are employees employed on a casual basis as they are either parents or students and they ... like the flexibility*".²⁵⁴

Sharni King

[289] Ms Sharni King²⁵⁵ was the Human Resources Manager for a company called 1834 Hotels, which managed 20 venues in the Northern Territory, South Australia and Western Australia and employed approximately 700 employees. The company engaged some casuals for 2 hour shifts to assist with meal service and servicing rooms. Ms King said that increasing the minimum engagement to 4 hours would mean the number of casuals engaged would be reduced, or that the working hours of others would be reduced. It would also affect the employment of juniors, since they could not work 4 hours at a time after school.

3.23 APTIA witnesses

[290] The APTIA called 2 witnesses in opposition to the ACTU's claim as it would apply to casual bus drivers under the *Passenger Vehicle Transportation Award 2010* (Bus Award).

Mark Driver

[291] Mr Mark Driver²⁵⁶ was the Managing Director of the Driver Group Australia (DGA), which operated sightseeing day tours and charters, and school bus services. He said 62.5% of

²⁵³ Witness statements – 10 October 2015, Exhibit 128; 23 February 2016, Exhibit 129; Oral evidence – Transcript 23 March 2016 at PN10532–PN10629

²⁵⁴ Transcript 23 March 2016 at PN10614

²⁵⁵ Witness statement – undated, Exhibit 132; Oral evidence – Transcript 23 March 2016 PN10637–PN10692

²⁵⁶ Witness statement – 18 February 2016, Exhibit 141; Oral evidence – Transcript 24 March 2016 at PN11499–PN11546

the DGA's employees were casuals, and casual employment was critical to the flexibility of DGA's workforce. School and tourism work was seasonal, with school work limited to a maximum of 200 days a year, which resulted in an inability to guarantee work for permanent part-time employees all year round. He gave evidence that if the minimum engagement for casuals was increased, DGA would not be able to maintain its current pricing for school runs and viability issues would arise. He believed that DGA would have to implement redundancies and offer less work, and that the ACTU's proposed requirement to offer extra hours to existing casuals would be completely impractical and would impact upon the viability of DGA. In cross-examination by the ACTU, Mr Driver acknowledged that if he could distribute a 4 hour minimum engagement over morning and afternoon school runs, his concern would be reduced. Mr Driver disagreed that an employee working a variable work pattern would not be likely to qualify for conversion under the proposed clause. He confirmed that DGA employed some permanent full-time employees doing school bus work, who were required to take leave or allocated a limited amount of other work where possible during school holidays.

Geoffrey Ferris

[292] Mr Geoffrey Ferris²⁵⁷ was the Group Operations Manager for Buslines Group, a position which he had held for 14 years. The Buslines Group operated services in 12 rural towns across New South Wales, and employed 15.12% permanent employees, 0.23% part-time and 84.65% casuals. The business was covered by 12 enterprise agreements, with a separate agreement applying at each of the depots. The agreements provided that the company could only guarantee an agreed amount of hours for 40 weeks of the school year and not the other 12 weeks during school holidays. Mr Ferris said that that every employee started as a casual and to become a part-time employee they needed to convert from casual to part-time, and that employees could come to the employer and asked to be converted from casual to permanent part-time if they desired. He said that when Buslines was covered by the NSW State Bus Award in 2006, which contained a casual conversion clause, employees were asked whether they wanted to convert but no employees opted for this.

3.24 ACTU submissions

[293] The ACTU²⁵⁸ submitted that “*permanent casuals*”²⁵⁹ were a class of worker engaged in regular work from whom basic safety net entitlements and basic employment security were withheld. The consequences of casual employment status for such employees include reduced income, lack of access to leave and other basic entitlements, diminished security in employment, minimal training and workplace development, and associated effects on welfare at work. The deprivations of casual employment weighed particularly heavily upon working women and exacerbated gender related disadvantage.

[294] The ACTU did not contend that casual employment was illegitimate *per se*. It accepted that there was a legitimate need for casual workers available to deal with short term, irregular and unpredictable spikes in work. It also accepted that casual work was preferred by some workers. In respect of a significant portion of the workforce, however, the casual label

²⁵⁷ Witness statement – 18 February 2016, Exhibit 142; Oral evidence – Transcript 24 March 2016 at PN11548–PN11673

²⁵⁸ Final submission – 20 June 2016

²⁵⁹ Final submission – 20 June 2016 at para 11

was deployed with the objective and effect of depriving workers of basic safety net conditions. The ACTU application was addressed to the circumstances of those workers.

[295] The ACTU submitted that the appropriate conclusions as to the implications of increased casual employment were as follows:

- Casual employment was associated with reduced levels of workplace training and workplace development, especially in occupations and industries where training is likely to be important.
- Reduced levels of training, innovation and commitment might detract from functional flexibility and labour mobility, thereby negatively impacting productivity. There was otherwise no clearly identifiable relationship between levels of casual employment and productivity.
- There was no identifiable relationship between increased casual employment and unemployment.
- Increased casual employment did not improve participation. To the contrary empirical data suggested increases in casual employment stymied improvements in participation.²⁶⁰

[296] The ACTU said that there was a large logical contradiction contained within the employer evidence. On the one hand, the statements with few exceptions emphasised the variability of the work, but on the other hand, the statements emphasised that the ACTU claim would impact severely on their operations. In order to demonstrate that the ACTU claim would have a serious impact, it was necessary for an employer to show that there was a substantial category of casual employees who worked regularly and systematically for 6 months, but for whom there is no ongoing work. With the possible exception of one employer in the agricultural industry, no employer demonstrated the existence of such a category. The ACTU submitted that the absence of that evidence precluded any finding that the ACTU claim would have a serious impact on employers.

[297] The ACTU further submitted that the evidence demonstrated that there were 2 factors which lead employer to engage casuals. The first was actual or perceived cost saving. The second was ease of management. The proposition that granting the ACTU claim might result in an increase in the labour costs for some employers assumed that the employer would take no steps to adapt to the changed award obligations. Having regard to the critical deficiencies in the employer evidence, the only finding available on the evidence was that the grant of the claim might increase costs in some cases, assuming the grant of the claim did not precipitate any change in workforce planning or organisation. However there was no basis for any finding that:

- the cost of the grant of the claim would be substantial;
- any costs caused by the introduction of the conversion clause were unable to be avoided by adjustments in workforce planning or organisation;

²⁶⁰ Final submission – 20 June 2016 at para 74

- the viability of any employer was jeopardised by the grant of the claim.

[298] The ACTU submitted that the appropriate factual conclusions to be drawn from the evidence were as follows:

(1) An incident of the labelling of employment as “*casual*” was the withholding of basic safety net entitlements. It followed that use of casual employment necessarily had the effect of undermining the fairness and relevance of the safety net.

(2) Casual employment had significant disadvantages for many, although not all, employees, including:

- reduced income;
 - unavailability of basic safety net entitlements including in respect of leave;
 - insecurity of employment and income;
 - reduced levels of workplace training and workplace development;
 - consequential increases in stress and anxiety and reductions in employee welfare; and
- exacerbation of gender-based differences.

(3) It had not been demonstrated that the ACTU claim would have prejudicial effects on the efficient and productive performance of work.

(4) There was some basis for a finding that a reduction in casual employment would increase the efficient and productive performance of work, principally by improvements in functional flexibility and labour mobility.

(5) It had not been demonstrated that the grant of the ACTU claim would result in any serious increase in employment costs or the regulatory burden.

(6) There was no evidence that increased casual employment improved participation rates, and there was some basis for a finding that increases in casual employment stymied improvements in participation.

(7) Employers recognised that permanent employment supported higher skills and service levels and more reliable, productive employees with lower staff turnover.

(8) Many employers were engaging casual employees out of a perceived need for flexibility and not all of that flexibility might be required, as demonstrated by a proportion of ongoing work that could be undertaken by a permanent employee.

[299] Specifically in relation to the minimum engagement claim, it was submitted that there was a distinction between variability in demand and short spikes in demand on the one hand and variability in shift length and short shifts on the other; that is, the former need not

necessitate the latter. The impact of a 4 hour minimum engagement on an employer's ability to meet variable demand could be mitigated by:

- overlapping start and finish times to provide extra staff for peak demand periods of less than 4 hours;
- aggregating short jobs into longer shifts.
- redeploying any underutilised labour in other parts of the business or organisation; and/or
- utilising the stand down provisions in s.524(1) of the FW Act if necessary in the case of *unforeseen* inclement weather or equipment breakdown for which an employer cannot reasonably be held responsible.²⁶¹

[300] In relation to claim advanced by the Ai Group and the RCSA, the ACTU²⁶² submitted that the survey evidence confirmed what was self-evident: that the notification of a right of conversion was likely to increase the frequency of conversion requests and ensure that long-term casuals were casual through choice rather than ignorance. The ACTU further submitted that the Commission would require evidence of very serious disadvantages (administrative or otherwise) before it removed a clause designed to promote compliance. No such evidence had been produced; to the contrary, the evidence suggested only a minor administrative burden associated with notification. Conclusory assertions unsupported by evidence to the effect that the provisions were irrelevant, overtaken by technological changes or unduly burdensome were an insufficient basis for the proposed variation, and it should not be made.

3.25 AMWU submissions

[301] The AMWU²⁶³ submitted that its claim was not centred on employees for whom casual employment suited their stage of life requirements, but rather those who did not have a choice other than to be casually engaged. It said that the evidence was strongly in favour of the claim, and that the concerns of the Ai Group were overstated, without evidence or based on a misunderstanding of the claim itself. Similarly to the ACTU the AMWU submitted that being casually employed could result in negative consequences at and outside of work. The AMWU's case supported the provision of an effective safety net for casual employees who worked in "*permanent jobs*" who wished to become permanent. The evidence showed that the current conversion clause in the awards the subject of its claim were not operating to discourage the trend toward the use of permanent casuals, as had been predicted by the Full Bench in the *Metals Casuals Case*²⁶⁴, given that proportion of casual employees in manufacturing had increased from 14.1% in 2000 to 16.9% in November 2013. The evidence also showed that for many employees the nature of casual employment was precarious, and therefore a conversion clause based on employee election was unsuitable in circumstances where the employee felt at risk of negative consequences arising from election requests, such as not being required for further shifts. The current clause was also unsuitable as the evidence

²⁶¹ Submission concerning July 2016 hearings – 22 July 2016 at para 3

²⁶² Submission in Response – 5 August 2016

²⁶³ AMWU Submissions 13 October 2015, 17 June 2016

²⁶⁴ (2000) 110 IR 247; Print T4991

showed that many employers did not meet the award obligation to inform casual employees of their right to convert and/or refused employee election, regardless of whether such refusal was reasonable or otherwise.

[302] The AMWU submitted that the definition of casual employment was a live issue that needed to be clarified, and the current provisions lacked clarity regarding the distinction between long-term, regular casual work and permanent work. It characterised the Ai Group’s concern over the cost of their claim as “*hysterical*”, and said the only cases where it would present a major cost was when an employee had been casually engaged in a regular manner for many years, which made it difficult to fathom how that relationship could be truly a casual relationship in the traditional sense. It submitted that while many employees sought flexibility, they did not seek insecurity and reiterated that their claims would not affect those who chose to remain casually engaged.

[303] In relation to the claims of the Ai Group and the RCSA, the AMWU²⁶⁵ adopted the ACTU submissions, and submitted that further efforts should be made to ensure the process of converting to permanent employment was made easier rather than harder for the significant number of casual employees who wished to convert. The evidence demonstrated that the administrative cost of the notification requirement was low (\$1.22 per employee on the basis of Ms Last’s evidence and \$1.90 per employee on the basis of Ms Mead’s evidence), and the evidence concerning the administrative burden of notification was drawn exclusively from labour hire companies which made up less than 1% of all employed people in Australia and 5% of casual employees and was not representative of employers generally.

3.26 Ai Group submissions

[304] The Ai Group submitted²⁶⁶ that there was currently a great deal of diversity in the award provisions dealing with casual and part-time employees and this was necessary and appropriate to meet the needs and characteristics of the industries and occupations, and in that context the ACTU and the AMWU had not demonstrated how their claims were necessary to meet the modern awards objectives. The claims sought “*sweeping*”²⁶⁷ changes to award provisions in circumstances where there was a great deal of diversity amongst the casual and part-time provisions of the modern awards which could not be standardised. The ACTU’s claims would mean that many industries lost critical existing flexibility, resulting in higher costs, and reduced productivity, reduced competitiveness and reduced customer service levels. The Ai Group’s closing submission reiterated the importance of flexibility in the labour market, as it was fundamental to the improved productivity that was important to Australia’s national competitiveness and the capacity to improve the Australian standard of living. It was noted that with the rise of the “*shared economy*”²⁶⁸ and increasing use of automation and artificial intelligence, the imposition of restrictions on engaging casuals and part-time employees would slow down businesses and destroy jobs.

[305] Ai Group submitted that Australia’s participation rate had to increase if Australia was to avoid falling living standards as the population aged over the years ahead. It was important

²⁶⁵ Response to Final Submission – 5 August 2015

²⁶⁶ Final Reply Submission – 9 August 2016

²⁶⁷ Final Reply Submission – 9 August 2016 at para 2

²⁶⁸ Final Reply Submission – 9 August 2016 at paras 51–52

that casual and part-time employment remained accessible to persons seeking to enter into, or remain within, the labour market. Parents (in particular women), older workers, carers, workers with a disability, students and others often viewed casual and part-time work as desirable or essential, as these forms of employment enabled a level of flexibility not available to full-time workers. Casual and part-time employment should not be seen as a secondary or less desirable form of employment. Ai Group submitted that the unions' claims, if granted by the Commission, would limit the opportunities for employers' to make casual and part-time employment available, thereby imposing unnecessary barriers to employment and workforce participation.

[306] The Ai Group contended that if the ACTU's claims were accepted, it would have a harsh impact on labour hire firms (which had a high proportion of casuals), as client companies would use their services less if flexibility was lost. The Ai Group scrutinised and systematically analysed the ACTU and the AMWU's expert reports, each of their lay witnesses and their surveys and stated that they were either not relevant, incorrect or should not be given any weight. In relation to the ACTU's casual conversion claim, the Ai Group said that it was not opposed to industry-specific considerations of casual conversion provisions, but the ACTU's deeming proposal was unjustified and would have negative consequences. The proposed clauses assumed that a regular casual would meet the definition of either full-time or part-time employment, and this did not take into account the possibility that employees may be engaged on irregular work patterns.

[307] In relation to the ACTU claim concerning minimum engagement/payment provisions, it was submitted that it was not appropriate to implement a one-size-fits-all approach for all or most modern awards, and this would have serious operational and financial implications for thousands of employers. In regards to the insertion of a provision requiring that the employer first allow an existing casual or part-time employee an opportunity to increase their normal working hours before the engagement of further casuals, the Ai Group submitted that the ACTU did not understand the practical consequences that would flow from the implementation of the clause, which would result in a large administrative burden. The ACTU claim to require employers to provide certain information to casual employees was also opposed as it would impose a greater regulatory burden on employers.

[308] In regards to the AMWU claim, the Ai Group submitted that the AMWU had not established that there had been any change in circumstances to change the award, and said they "*struggle[d] to understand the AMWU's concern*"²⁶⁹, there was no direct witness evidence to support the claim, and it should not be granted.

[309] In relation to its own claim and that of the RCSA, the Ai Group²⁷⁰ submitted it was no longer necessary to achieve the modern awards objective for notification requirements for casual conversion to be imposed on employers, and accordingly, the provision should be removed. Further, the regulatory burden imposed by the notification requirement on employers was significant, particularly for employers who engaged large numbers of casual employees, such as larger and medium-size on-hire employers. Payroll software could adequately assess whether or not casual employees were eligible for employer notification,

²⁶⁹ Final Reply Submission – 9 August 2016 at para 1120

²⁷⁰ Submission – 13 June 2016 at paras 35–36

based on commencement date, the employee's pattern of work, and whether or not the employee is an irregular casual.

3.27 ACCI submissions

[310] The ACCI²⁷¹ submitted that the “*one size fits all*” approach inherent in the ACTU's claim should be rejected because it did not consider the very specific demands of each industry, which had their own unique conditions relevant to non-full-time employment. The claim had to be assessed on an award by award basis in order to satisfy the statutory obligation for the Commission to review each award in its own right. The ACCI further submitted that the material supporting the ACTU claim was not sufficient to justify the granting of the claim. The casual conversion provisions sought applied only to casuals employed on a regular and systematic basis, when such employees were already protected from unfair dismissal, had predictable hours, and were already paid a loading instead of receiving paid annual leave.

[311] The ACTU's claim for increasing or inserting a minimum engagement of 4 hours was predicated on the notion that casual employees should be better off than receiving the Newstart weekly allowance, regardless of whether there was 4 hours of work to do. This argument was inconsistent with the principle of being paid for work performed and would not be consistent with maintaining a fair and relevant safety net. The ACCI stated that the ACTU's claim that existing employees should be offered extra work before engaging additional employees was not well supported by sufficient industry specific evidence, and the witness statements tendered were limited to personal preferences and situations which could not be taken to reflect the views of an entire industry.

[312] The ACCI was critical of the conclusion sought to be drawn from the reports of Professor Markey, and urged consideration of the evidence of their own expert witness, Professor Withers, who stated “*casual employment is an essential component of the organisation of work*”²⁷² and that additional labour market regulation would result in unemployment because of the increased cost to employers. The ACTU's claim would not encourage enterprise bargaining or promote social inclusion, while the claim would directly undermine the need to promote flexible work arrangements and add to the cost and regulatory burden on employers. Greater levels of regulation were likely to adversely affect the economy, and the employer evidence demonstrated the ACTU's claim would have a negative effect on business through costs and regulatory burden. It would also result in additional complexities when reading the awards. ACCI concluded that casual employment does not fundamentally disadvantage employees, and that the ACTU had not advanced a sufficient evidentiary case to support the claim and it should be dismissed.

3.28 RCSA submissions

[313] The RCSA²⁷³ supported the submission of the Ai Group concerning their applications to remove the employer notification requirements in existing casual conversion clauses. It submitted that there was unchallenged evidence that only a very small percentage of eligible

²⁷¹ Closing Submission – 8 August 2016

²⁷² Closing Submission – 8 August 2016 at para 13.8

²⁷³ Final submission – 17 June 2016

employees had ever sought to be redeployed into a permanent role pursuant to existing casual conversion clauses. This evidence showed that employees did not want to lose the additional casual loading and employees liked the flexibility of casual employment. The evidence of employers was that identifying which casual employees might be eligible for conversion created a financial and administrative burden. In relation to the ACTU's claim, the ACTU did not adduce probative evidence that any modern award was not currently meeting the modern awards objective. It referred to the evidence of Professor Markey, who accepted that past employment does not always give an indication of future job security, and as a consequence this was not a sound basis to support conversion from casual to permanent.

3.29 NFF submissions

[314] The NFF²⁷⁴ made a joint submission with the Voice of Horticulture in response to the ACTU common claim. The NFF submitted that the agricultural sector was highly vulnerable to seasonality, exposure to the elements and market forces. Weather variability and natural disasters, seasonality of produce, variation in exchange rates, changes in production costs including irrigation and feed prices, declining margins and the demands of the customer base dominated by only a few large retailers meant that flexibility was required, which the ACTU common claims did not provide. In regards to the casual conversion claim, the NFF submitted that the evidence provided had limited relevance, and the Commission should avoid double-dipping for both casual and permanent employee rights. Regarding the minimum engagement claim, the NFF said the evidence supported a proposition that lowering the minimum engagement period for casual employment could encourage job creation, and that there were many scenarios where flexibility in relation to the minimum engagement period was required. A 4 hour minimum engagement period would stifle employment growth, increase employment costs, undermine flexible, modern work practices and prevent the efficient and productive performance of work. The NFF submitted that the ACTU common claims did not address the modern awards objective and were likely to have adverse consequences for the living standards and needs of the low paid.

3.30 SAWIA closing submissions

[315] The SAWIA²⁷⁵ submitted that Australia did not have a problem with job security or casualisation of the workforce, and the ACTU's claims in regards to the *Wine Industry Award 2010* should be rejected. Contrary to the claims made by the ACTU, there had not been any substantial changes in the extent of casual employment to warrant any increases to the casual minimum engagement, or for the qualifying period for casual conversion to be reduced from 12 months to 6 months. The SAWIA stated that wine industry employers had reported that when offered the opportunity to convert to part-time employment, casual employees elected to remain casual, as they valued the 25% loading and the work flexibility of casual work. The SAWIA believed that current part-time provisions operated effectively and provided part-time employees with guaranteed pattern of work in writing without the imposition of excessive and impractical administrative requirements. The ACTU claim wrongly assumed that most jobs performed by casual employees could be converted to permanent positions, and this would not be feasible given the uncertainty and unpredictability in work. The SAWIA concludes that

²⁷⁴ Joint Supplementary Submission – 5 August 2016

²⁷⁵ Final submission in reply – 5 August 2016

the ACTU did not bring any witnesses who worked in the wine industry, had failed to make out a probative evidentiary case, and its claims should be dismissed.

3.31 Hospitality Associations submissions

[316] The Hospitality Associations²⁷⁶ submitted that it was readily apparent from the ACTU final submissions²⁷⁷ that its claims were premised on the prevalence of the supposed “*permanent casual*” employee across a broad range of industries and its alleged negative consequences. The ACTU’s evidence in this respect was either highly problematic in regards to the hospitality industry or no direct evidence was advanced. The Hospitality Associations rejected the ACTU’s contention that casual employment on a regular and systematic basis in the hospitality industry was not a form of legitimate employment, that employers were employing casual employees with the objective of depriving them of safety net conditions, and that the employment of a casual employee involved nothing more than an election of an employer to replace the safety net of award terms and conditions with a casual loading. The ACTU failed to take into consideration the clause 12.6 of the Hospitality Award which deemed those employees who did not meet the definition of part-time employment and were not full-time employees are casuals. In regards to the casual conversion claim advanced by the ACTU, the Hospitality Associations submitted that an employer might not have the flexibility on a week to week basis to accommodate conversion to permanency, and thus the claim should be rejected. The Hospitality Associations opposed the claim of a minimum 4 hour engagement period as it was detrimental to both employers and employees. There was no direct evidence that casual employees or part-time employees were unreasonably refused additional hours within the hospitality industry, nor was there any level of industrial dispute which would indicate this, and there was no evidence that employees were not being informed of the terms of their engagement.

3.32 RCI submissions

[317] RCI²⁷⁸ submitted that the ACTU’s common claims in regard to the *Restaurant Industry Award 2010* (Restaurant Award) and the Hospitality Award should be rejected as they would not bring about a greater sense of security in the workplace and enhance career prospects. RCI submitted that if the claim was accepted, it would undoubtedly impose further strain, particularly for small business operators, who would ultimately need to consider the long term viability of their businesses. In regards to the ACTU’s casual conversion claim, RCI submitted it should be a matter for enterprise bargaining, as the variants were large between what was appropriate for each business model at the enterprise level. RCI also submitted it could not lightly be assumed that the engagement of employees on a part-time basis would be suitable for those currently engaged as casual employees. In regards to employer notification, RCI submitted that removing the requirement for employers to notify employees of their rights to casual conversion would not render a casual conversion clause pointless, providing all relevant information about an individual’s employment was given to them at the commencement of their employment, and in the digital age, information was easily accessible. Regarding the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the

²⁷⁶ Final submissions in reply – 5 August 2016

²⁷⁷ ACTU Final Submissions – 20 June 2016

²⁷⁸ Final submission – 5 August 2016

opportunity to increase their hours, RCI opposed the claim as the distribution of available work was essentially a matter of management discretion and an employer should retain the right to select the appropriate employees to perform available work. In respect of the 4 hour minimum engagement claim, RCI submits that there is no reason to vary the current award.

3.33 Group of 8 Universities submissions

[318] The Group of 8 Universities²⁷⁹ submitted that the Higher Education Award already contains a detailed casual conversion clause and provisions for minimum engagement periods which were tailored to the sector, with significant industrial history. The Award entitled an employee who had been employed on a regular basis for 12 months for 50% of hours or for 24 months, regardless of hours, to apply for conversion to full-time employment and if rejected, the employer must provide reasons. The award also provided staff a minimum engagement period of 3 hours, with exceptions (1 hour minimum engagement for students, and employees who have a primary occupation elsewhere or with the University). The Group of 8 submitted that the existing provisions in the award meet the modern awards objective and should be maintained. The Group of 8 Universities submitted that the ACTU's approach to the onus of proof was incorrect, as it casted a presumption against the existing casual provisions in the award and shifted the onus to the employers to defend the existing clauses and demonstrate why the ACTU clause should not be adopted. The Group of 8 Universities submitted that the ACTU's evidence related to industries other than Higher Education and was not relevant to the award. The evidence showed that casual employment of general university staff was low, and also comprised large numbers of university students, which was in contrast to the evidence showing the otherwise high levels of casual employment in Australia compared to other OECD countries.

3.34 Australian Higher Education Industrial Association submissions

[319] The AHEIA²⁸⁰ submitted that there was insufficient probative evidence presented by the ACTU to justify its claim as the Higher Education Award already contained industry-specific provisions for casual minimum engagement and casual conversion which were reached by consent during negotiations. The AHEIA also anticipated that if the claims were granted, the NTEU would seek to have the new provisions flow on to enterprise agreements.

3.35 Australian Childcare Association submissions

[320] The ACA²⁸¹ submitted that the ACTU's claim failed to consider the nature of the childcare industry. A requirement to convert casual employees to part-time employment would be difficult because of fluctuating childcare needs. A 4 hour minimum engagement period would not be appropriate, and a provision restricting the engagement of additional employees did not take into account the qualification requirements of the industry. The ACA submitted that there had been no evidentiary case made for any variation to the *Educational Services (Teachers) Award 2010*, the ACTU claim had not been supported by evidence, and would not provide for a fair and relevant minimum safety net for the industry, and so should be dismissed.

²⁷⁹ Submission in reply – 8 August 2016

²⁸⁰ Submission – 5 August 2016

²⁸¹ Final submission – 8 August 2016

3.36 National Out of School Hours Services Association submissions

[321] The NOSHSA²⁸² submitted that the ACTU's claim should fail in relation to both the *Children's Services Award 2010* and the *Educational Services (Schools) General Staff Award 2010*. The NOSHSA argued that the ACTU's witness in this area, Ms Jenks, added little weight to the argument that casual employees in the childcare industry needed longer shifts and permanency and her evidence should be balanced against that of the employer witnesses, Mr Mondo and Ms Brannelly. NOSHSA stated that these witnesses identified how the ACTU's claim did not take into account the industry's hours of operation (2–3 hours before or after school) and the requirement for teacher-student ratios and particular qualifications. NOSHSA submitted that no evidentiary case had been made out in respect of the two awards.

3.37 Australian Public Transport Industrial Association submissions

[322] The APTIA²⁸³ submitted that the ACTU common claims should not apply to the Bus Award because the ACTU had not provided cogent and probative evidence in support of its claim, and the variations sought did not meet the modern awards objective because they would not promote flexibility or social inclusion and promoted unequal pay for the same work undertaken. The APTIA saw no need for minimum engagements where historically industries did not have them already. Nor did the APTIA support the absolute right to conversion, and they were cautious about making the conversion process too prescriptive and costly. They submitted that given that casuals or converted part-time employees often undertook specific tasks, and because any replacements would also be undertaking similar tasks, it was totally impractical and unworkable to suggest that casual work is always offered to existing employees first.

3.38 Textile, Clothing and Footwear Union of Australia closing submissions

[323] The TCFUA²⁸⁴ opposed the Ai Group and RCSA submission to remove the employer notification requirement of an employee's right to casual conversion. The TCFUA submitted that the Ai Group and RCSA evidence was of no probative value and should be given limited weight as it was "*speculative, self-serving and/or based on flawed survey results and/or incomplete internal data relating to casual conversion*".²⁸⁵ The TCFUA submitted that the witness evidence of the ACTU and other unions illustrated the necessity for casual conversion provisions at the safety net level remains directly relevant in transitioning eligible casual employees to permanent work. The TCFUA refuted the Ai Group's contention that the notice requirement was a disproportionate burden on employers and submitted that the largely migrant and non-English speaking background of workers in the TCF industry limited their ability to understand and apply for casual conversion without notification.

²⁸² Final submissions – 8 August 2016

²⁸³ Submission in reply – 5 August 2016

²⁸⁴ Submission in reply – 8 August 2016

²⁸⁵ Submission in reply – 8 August 2016 at para 4.9

3.39 Qube Ports, Qube Bulk and DP World Group closing submissions

[324] Qube Ports, Qube Bulk and DP World Group (Qube)²⁸⁶ submitted that the ACTU led no evidence as to the actual effect of its proposed variations in the *Stevedoring Industry Award 2010*. They stated that neither the ACTU nor the MUA led any evidence from employees who worked as casual stevedores or union officials who dealt with issues of casual employment in the industry. They argued that the ACTU's proposals would create uncertainty, potentially increase costs, and limit the flexibility which was absolutely necessary on the stevedoring industry. The stevedoring industry worked under dramatically different arrangements and terms and conditions, and used casual employment in vastly different ways which were not necessarily well-suited to a "*one size fits all*" approach. The inclusion of a casual conversion clause in the Stevedoring Award was not appropriate.

3.40 Costa Group/ABI/NSWBC closing submissions

[325] The Costa Group, ABI and the NSWBC²⁸⁷ submitted that the claims made by the ACTU, insofar as they applied to the Horticulture Award, were not supported by probative evidence such as to warrant the Full Bench exercising its discretion pursuant to s.139 of the FW Act; were not consistent with the modern awards objective in s.134 of the FW Act; and were not terms that the Full Bench was permitted or required to include within the scope of s.138 of the FW Act. They submitted that the evidence in support of the ACTU claims was "*manifestly inadequate*"²⁸⁸ and the 3 statements that were filed relating the Horticulture Award did not contain material or evidence in support of the casual conversion claim, minimum engagement claim, compliance claim or commencement information claim.

[326] In regards to the casual conversion claim, they submitted that the ACTU appeared to argue that casual conversion would have little practical effect in relation to the Horticulture Award given that it would not apply to harvest workers, overseas workers or those casual employees who elect to stay casual. Regarding the minimum engagement claim, they submitted that it was not practical or workable for the horticulture industry, particularly as unexpected events such as weather often required employees to be stood down at short notice. The labour requirements in the industry were not scalable in the same way as manufacturing or service industries. The economic performance of an industry could be determinative of the adoption of a proposed variation in the 4 Yearly Review, and it was simply not sufficient to assert that "*business is good*"²⁸⁹ to justify the grant of the ACTU claims.

3.41 Australian Meat Industry Council submissions

[327] The AMIC²⁹⁰ submitted that the evidence to support the ACTU claims insofar as they related to the Meat Industry was sparse to non-existent. No attempt had been made to call any evidence from any person who worked in the industry, and no persuasive case had been made out by the ACTU to impose on any industry as a matter of general award prescription a conversion clause of any sort. In regard to the casual conversion claim, the AMIC submitted

²⁸⁶ Submission in reply – 5 August 2016

²⁸⁷ Submission in reply – 8 August 2016

²⁸⁸ Submission in reply – 8 August 2016 at para 6.1

²⁸⁹ Submission in reply – 8 August 2016 at para 11.3

²⁹⁰ Submission in reply – 5 August 2016

that the concept that the ACTU claim was advancing was a major interference in contractual arrangements, and “*forcibly removing the mutuality of a contract in this way, should of itself dictate that the concept should be rejected.*”²⁹¹ The AMIC submitted that the decision about whether to engage someone as part-time or casual should be left to each enterprise to determine based on its circumstances. The ACTU’s proposal would undermine existing employment contracts and the process of enterprise bargaining, and would not consider individual circumstances when determining whether a person is eligible to convert employment categories.

[328] The AMIC was critical of the way the ACTU presented a “*scattergun*”²⁹² approach to their claim rather than considering the needs of individual industries and reiterated that the use of casual employment in the meat industry was a longstanding practice due to the unpredictability of the supply chain of livestock in the industry, which meant that casual employment was the predominant employment category in meat processing establishments in Australia. The AMIC argued that the ACTU falsely suggested that employers used casual employment as a way of avoiding safety net conditions. The AMIC acknowledged that the unpredictable work and income might not be ideal for many people, but the ACTU’s claim was not a solution. The AMIC submitted that work cannot be classified by the length of time the arrangement has lasted, but was about the nature of the engagement.

3.42 Housing Industry Association closing submissions

[329] The HIA²⁹³ made a submission opposing the ACTU’s common claims regarding the *Timber Industry Award 2010*, and adopted ACCI’s submissions. The HIA submitted that casual employment was a legitimate form of employment that should not be limited, and that the Timber Award already contained a casual conversion clause. The HIA asserted that no evidence was presented by the ACTU about the operation of the existing clause or any employee concerns about non-compliance with the current award provisions or a need to increase the minimum engagement.

[330] In regards to minimum engagement period for casual employees, the Timber Award already had a 4 hour minimum engagement period, so no change was necessary. The HIA submitted that the ACTU’s claim to require employers to offer work to employees did not consider the practical implications, went beyond the scope of providing a fair and relevant safety net and seriously impacted managerial prerogative. The ACTU’s claim undermined the modern awards objective because it would reduce the availability of casual employment, distort the employer-employee relationship, reduce productivity and competitiveness, limit capacity to respond to external economic factors and threaten the employment of current casual employees.

²⁹¹ Submission in reply – 5 August 2016 at para 6

²⁹² Submission in reply – 5 August 2016 at para 21

²⁹³ Closing Submission – 5 August 2016

3.43 Submissions of Birch Carroll and Coyle Limited and other cinema industry employers

[331] A group comprising the majority of employers in the cinema exhibition industry (cinema employers)²⁹⁴ opposed the ACTU proposal to insert a casual conversion clause into the *Broadcasting and Recorded Entertainment Award 2010*. The cinema employers submitted that this award already complied with the modern awards objective, and submitted that the ACTU's proposal is for a significant change and does not meet the requirements set by the Full Bench in its *Preliminary Jurisdictional Issues Decision*.²⁹⁵

3.44 Private Hospital Industry Employer Association submissions

[332] The PHIEA²⁹⁶ submitted that it opposed any change to the existing provisions in either the *Nurses Award 2010* or Health Professionals and Service Support Awards as the current provisions provided both an adequate safety net for employees and sufficient flexibility for employers to manage fluctuating staffing demands. There was no historical precedent for casual conversion clauses or 4 hour minimum engagement periods for part-time and casual employees in the industry and there were no exceptional circumstances which had occurred since the awards were established to justify such a change. The PHIEA concluded that if the ACTU's claims were granted, they would impose extra costs, reduce productivity, reduce flexibility and increase the regulatory burden on employers, and therefore would be contrary to the modern awards objective.

3.45 Consideration – casual conversion

History of casual conversion provisions

[333] The first casual conversion provision in an award was granted by the South Australian Industrial Relations Commission (the SAIRC) (Stevens DP) in *Clerks (South Australia) Award*.²⁹⁷ In that matter the ASU had applied to vary the relevant award to redefine a casual employee as one who was “*an hourly paid employee engaged to work on a spasmodic or irregular basis with no expectation of ongoing employment*”²⁹⁸, so that any employee who did not fit within that definition was required to be engaged as a weekly full-time or part-time employee. The SAIRC rejected that application, but instead determined to vary the award to provide casual employees with the opportunity to elect to convert to full-time or part-time employment. In support of this conclusion the SAIRC made a number of findings which included the following:

- “2 The Commission considers that the current casual, part time and full time definitions and categories in the Award are, although not without their defects, reasonably well understood by employers and employees in the industry. I think it is generally understood that any employer and employee may ‘choose’ to enter into ‘an express contract to the contrary’, notwithstanding that the true

²⁹⁴ Submission – 4 August 2016

²⁹⁵ [2014] FWCFB 1788 at [60]

²⁹⁶ Submission in reply – 5 August 2016

²⁹⁷ [2000] SAIRComm 41

²⁹⁸ [2000] SAIRComm 41 at [2]

nature of the contract is for full time employment or part time employment, and to call that contract one of casual hiring by the hour.

- 3 The Commission is of the opinion, and makes a finding to that effect, that the current provisions for casual, part time and full time employment as they are being applied, have led to a significant use of the casual employment provision, notwithstanding that the true nature of the contract may be for regular part time or full time employment. The evidence suggests that true casual employment in this industry (other than labour hire firms) where the employee is engaged on an intermittent or irregular basis, with no expectation of ongoing or continuous employment is the exception rather than the rule. Yet the evidence also suggests that those employees who have regular and systematic employment which is ongoing and continuous in nature, are more likely than not to be paid as casuals and not as permanent part time employees. The existing definitions, properly applied on the basis of the primacy of weekly hire, should not have led to this situation occurring.
- 4 The Commission does not consider that the Union's proposed definitions and categories of casual and part time and full time employment will be clearly understood in the industry, with the result that they are unlikely to be properly applied in some instances. Terms such as 'spasmodic', 'irregular', and 'no expectation of ongoing employment' are fraught with difficulty, as the case law amply demonstrates. Whilst I acknowledge there will be difficulty in some cases where it is a reasonably debatable question about whether the work is casual or regular, I think it is far preferable to redefine if necessary what constitutes full time and part time employment, which are reasonably well understood terms, and which should be capable of strict definition.
- 5 In the Commission's opinion, casual employees who have ongoing and continuous employment should have an avenue of access to full time or part time employment with all of the benefits those categories bring, **other than** with the agreement of the employer.

I have been left in no doubt by the approach of the respondents at this hearing that employers of clerks (other than most full time clerks) have a distinct preference for engaging such clerks as casuals, and for maintaining that status for the duration of the employment, no matter how long such employment lasts. If I should be wrong about that understanding, then it is because I received absolutely no evidence from employers (other than in a limited sense from Mr Cannon) that they utilise the part time employment category whenever possible and practicable, and that they are pro-active in converting casual contracts to permanent part time contracts when the opportunity arises. In no way can this situation be said to be 'fair and equitable to **both** employers and employees' (s 3(f) of the Act). I also acknowledge that some, perhaps many, casual employees have a preference for casual employment and a 20 per cent casual loading. What I am concerned about is those casuals who wish to access the benefits of weekly hired employment but are either unable to articulate that position, or unwilling to do so for fear of possible reprisal, or unaware that they may have a right to seek that position, or have requested it and been refused by their employer.

In my opinion after a period of 12 months ongoing and regular employment in the service of an employer, a casual employee should have the right to access the part time or full time provisions of the Award, and thereby to access paid leave entitlements and other benefits which the Award provides for weekly hired employees.

I say 12 months because that is the period of time which surely in most, if not all cases, would be sufficient to enable an employer to define and refine his ongoing requirements for the services of the employee. The administration cost of converting the contract and providing for records of entitlement to be kept thereafter would surely be minimal.

- 6 The Award should be varied accordingly to give such persons the right to choose to have their contracts redefined on the basis of the true nature of their employment, that is to say, the right to access what is legitimately theirs.
- 7 I think it would be possible to make a finding that females who are employed as casuals under this Award may suffer a form of indirect discrimination by virtue of the existing provisions of the Award, insofar as they are unable to attain the full time or part time categories of employment. It is understood that the greater proportion of persons employed under the Award are females, and by far the greater proportion of casual employees are females. They may be unable to access the maternity leave provisions, and carer's leave provisions, for example, by virtue of their casual status. Insofar as the objects of the Act at s 3(m) set out to 'help prevent and eliminate discrimination in employment in accordance with State and Commonwealth law', and at s 3(n) set out to 'encourage and assist employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers', I would suggest access to part time or full time employment may well assist in those situations.
- 8 To enable greater access to the part time provisions of the Award, it would be desirable if the existing restrictions were relaxed to some extent. Unfortunately the respondents opposed this part of the claim as well, although they were unable to say why that was so.

After reflecting further upon the evidence that was given I consider that the existing minimum hours regime should be maintained. It still provides a degree of flexibility to a minimum of 7.6 hours per week if agreed.

I have decided that there is no good reason for the existing maximum of 30 hours per week to be retained. The Union's claim in this respect will be granted. An employer will thus be able to engage a part time employee for up to 37.5 hours per week, where the usual full time hours are 38.

However, I do not consider it appropriate that the existing maximum number of hours should be retained for part time employees who were employed prior to the date of the Award variation occurring. In this way all part time

employees will then be on a level playing field with respect to the payment of overtime rates.

- 9 The greater use of part time and full time provisions in the Award should theoretically enhance the job security of those employees, using the term ‘job security’ in its wider sense. Employees should however realise that so called permanent part time and permanent full time employment is not in itself a guarantee of job security.”²⁹⁹

[334] The decision of Stevens DP was quashed on appeal by a Full Bench of the SAIRC in *Clerks (South Australia) Award Casual Provisions Appeal Case*³⁰⁰. The Full Bench summarised its reason for finding that the decision was subject to appealable error as follows:

- “106 In summary, we accept that there was sufficient evidence placed before the Commission to indicate that the extensive and increasing use of casual employment in the clerical industry was an issue worthy of the Commission’s consideration that might have led it to conclude that the Award needed changing. However, the variation that grants a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without granting the employer any right to object, no matter what its circumstances are, is in our view, unjust. The learned Deputy President’s apparent rejection of the notion that the existing dispute resolution process or something like it could deal with such disputes and disputes about the alleged wrongful categorisation of permanent clerks as casual clerks is not explained. His failure to deal with the evidence regarding the potential adverse affects of the proposed variation leaves us in the position where we do not know whether he rejected it, gave it little weight, or failed to take it into account. Some of the criteria upon which the right to elect is based are either unworkable or may lead to unnecessary disputation. All of these matters fall within the range of circumstances identified at the outset of these reasons in our citation of the *Clerks (SA) Award-Trade Union Training Leave (Appeal Case)* as warranting our interference.”

[335] Subsequently the Full Bench re-determined the matter in a further decision³⁰¹ and awarded a casual conversion clause which addressed the concerns it had identified in its earlier decision. The Full Bench said:

- “26 We have considered all of the evidence touching upon the application before us and we have done so noting that the proposed variation now under consideration has dealt with a number of the concerns cited by the Full Commission. In particular, the concept of a unilateral right for the casual employee to elect to convert their employment to weekly hired employment, has been replaced with a process whereby such an election is to be subject to the right of the employer to resist that outcome. This change does not mean that the Commission does not need to consider the raft of negative

²⁹⁹ Ibid at [196]

³⁰⁰ [2001] SAIRComm 7

Section 2.01 ³⁰¹ *Clerks (South Australia) Award Casual Provisions Appeal Case (2)* [2002] SAIRComm 39

consequences as alleged by the employers, but rather, sets the context for such to now be assessed.

- 27 There is little doubt that any Award variation of the type now being considered would mean that employers would need to reconsider some of their employment practices in relation to casual employees and to maintain records of their utilisation. In addition, some reduction of flexibility in the use of casual employees may result, however we are satisfied that such will be relatively minimal. These factors and the potential that the process to be established by the proposed variation may create some differences of views within the workplace, are issues to be seriously considered by this Full Commission.
- 28 However, we are satisfied on the evidence that some further regulation concerning the employment of casuals under this Award is warranted and that the existing arrangements are not satisfactory. This includes the capacity for the existing dispute resolution procedure to deal with disputes about the ‘incorrect classification of employees’ as referred to by the parties in this matter. In our view the evidence now before the Commission does illustrate that there are valid concerns with this avenue including the need for some better definition as to the rights and obligations of the parties concerning casual employment. In terms of flexibility, it should also be borne in mind that under the concept now being considered, should any employee not make an election as provided, or should such an election be successfully resisted by the employer, the capacity to continue with on-going casual employment would be legitimised beyond the present Award arrangements as we have found them to be.
- 29 We have also considered the needs and concerns of the employers as demonstrated by the evidence. Such concerns include the administration and consequential requirements for small business and the circumstances facing the labour hire industry. In our view, some of the concerns are overstated and not justified on the evidence, and of those that genuinely do exist, can by and large be accommodated by the provisions that we propose to insert. The need for record keeping is one such factor. However, following the insertion of Parental Leave for casuals (Parental Leave (Casual Employees) Award Case [2002] SAIRComm 2), and the potential impact of other existing laws such as the *Long Service Leave Act 1987* and the record keeping requirements of this Act (see s 102 as an example), the additional requirements would be minimal. In any event, these concerns are to be balanced along with the needs of the employees and the concepts of flexibility, goodwill, fairness and equity (amongst others) are all raised by the objects of the Act and must be taken into account.
- 30 We would also indicate that the class of casual employee who would be eligible to make an election will limit the practical impact of the proposed provision and importantly will in our view recognise that for such employees, some additional rights are appropriate. That is, casual employees who have been employed on a regular basis with a particular employer over a twelve month period **and** whose employment is consistent with full-time or part-time

employment, will represent a relatively small, but important proportion of casual clerks. We leave aside for the moment the precise definitions that would operate in that context.

- 31 We note also that the existence of a right for the employer to contest an election will have some limiting effect and given that such a right will take into account the nature of the employment and the requirement for future regular work falling within the scope of the full-time or part-time definitions, we are satisfied that the concept as proposed is workable in the context of this Award and is an appropriate exercise of the Commission's discretion. We are also satisfied that provided the provision is applied in the manner that we envisage, including as part of the package of provisions that would accompany its introduction, the negative employment consequences as alleged by the employers are wildly overstated and not justified on the evidence.
- 32 In terms of the labour hire industry, we consider that the same general rules in this area are capable of application. There may be some circumstances whereby the uncertainty in the relationship is such that a refusal to accept the casual employee's election would be reasonable. However, we are not satisfied that the evidence demonstrates that the requirements that the proposed provision will make are unworkable or inappropriate in terms of that industry per se. It must be borne in mind that the class of casual who would be eligible to make such an election will not be found in the labour hire industry very often, however where such are found, there is in our view good reason why their continuing status as a casual should be reviewed in the manner as proposed.
- 33 We have also considered the concerns raised by the employers regarding the fact that the process as now proposed would create circumstances where an employer was required to explain the reasons for refusing the election as made by the casual employee. This may, as alleged, create a difference of view and this is not presently a feature of those relationships. However, having regard to the nature of employment that would create a right to seek such an election, and the obvious requirements for procedural fairness in the exercise of the employer's discretion in that regard, we are satisfied that this aspect is outweighed by the benefits and fairness afforded to the casual employees concerned."

[336] After the initial decision of Stevens DP, but before the first appeal decision, a Full Bench of the Australian Industrial Relations Commissions (Munro J, Polites SDP and Lawson C) issued its decision in *Re Metal, Engineering and Associated Industries Award, 1998 - Part I*³⁰² in which it undertook a comprehensive review of the casual employment provisions of the Metals Award and, among other things, awarded the first casual conversion clause in the federal industrial relations jurisdiction. That review was undertaken in response to a claim by the AMWU to vary the Metals Award to insert a new casual employment clause which, relevantly, provided that casual employees could only be engaged to meet short term work needs, to carry out work in emergency circumstances or to perform work unable to be

³⁰² (2000) 110 IR 247; Print T4991

practicably rostered to permanent employees, and that after 4 consecutive weeks of employment on a regular pattern of hours (or 8 weeks with the agreement of a majority of the workforce) any further employment had to be on a permanent basis.

[337] The Full Bench rejected the AMWU's claim for restrictions on the use of casual employees. Its reasoning included the following (footnote omitted):

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

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

...

[102] We are not persuaded that restrictions of that kind should be made either a part of the definition of the type of employment, or a condition of its use. The proposed conditions would be difficult to apply with any real precision in the circumstances of the manufacturing and production industries. We accept that it may be desirable that casual employment should usually be restricted to such circumstances. However, strong considerations militate against imposing such a condition. The first is the breadth of existing use of that type of employment in the industry. Another is the strength and variety of the basis on which respondent employers assert interests and preferences supportive of free access to casual employment on demand. Similar interests have been catered for in this award's prescription since at least 1937. It is far too late to reverse that acceptance. The third is the not inconsiderable body of

evidence indicating that for some employees the casual employment and loaded rate regime is not unsatisfactory to their needs.”

[338] The Full Bench went on to express provisional support for the imposition of a temporal limitation on the use of casual employees, and said (footnote omitted):

“[106] We consider that there is considerable force in the considerations raised by the AMWU in support of some time limit being put on engagement as a casual. We have rejected in Sections 7 and 8 of this decision the contentions that the Award should be read or should now be converted to minimise free access to casual employment. However, those conclusions do not extend to justify a unilateral extension of a casual engagement nominally based on hourly employment over indefinite periods, in some cases for years. The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.

[107] The main point made in the passage quoted from Mr Buchanan’s evidence was to the effect that the category of the *permanent casual* is founded upon an entrenched diminution of workers’ rights. That construction was supportable from other evidence and constitutes a strongly persuasive consideration. In relation to that emerging phenomenon in Australian patterns of employment, Creighton and Stewart have observed:

[7.28] ... the term ‘casual’ really embraces two different classes of worker. The first - ‘true’ casuals - work under arrangements characterised by ‘informality, uncertainty and irregularity’. The second category consists of persons who may be treated as casuals for some purposes (notably the application of a relevant award or agreement), yet in fact have quite regular and stable employment. The prevalence of this latter kind of worker helps to explain the remarkable statistic, drawn from AWIRS 95 data, that the average job tenure of a casual is over three years (Wooden 1998a: ...). It is especially important to bear this consideration in mind when looking at figures that appear to show that Australia has an abnormally high incidence of ‘temporary’ employment by international standards. Many casuals do indeed have temporary jobs; but there are a lot of others for whom the application ‘permanent casual’ is far from a contradiction in terms.

[7.29] The phenomenon of casual employment has important implications for regulatory policy, especially in light of the ease with which workers can come to be classified as casuals. In theory, the loading is meant to discourage employers from hiring casuals. However, even if the loading does constitute adequate compensation for the full value of the non-wage benefits foregone, most employers seem happy to pay the additional amount in return for what they perceive as the flexibility of being able to hire and fire at will. For some workers too, the loading may seem an attractive substitute for benefits they are unlikely to access, or whose true value they do not appreciate. For many though, the question of choice is simply irrelevant when the only alternative to accepting casual work is unemployment. In light of these factors, it should hardly be surprising that the number of people in casual employment has increased dramatically in recent years. According to ABS data, casuals now

make up around 27% of the workforce, up from 19% in 1988 9ABS (1999b). While it is possible that these figures overstate the incidence of casual employment, the trend is clear.’ ”

[339] The Full Bench referred to a number of other provisions in manufacturing and related industry awards which then provided for time limitations upon the engagement of casuals, and referred specifically to a decision of Marsh SDP in relation to the *Graphic Arts - General - Interim Award 1995*³⁰³ in which a previous award provision which required casuals to be made permanent after 2 weeks' employment was replaced by a new provision which limited the engagement of casual employees on a continuous basis to a period of 12 weeks, extendable by a further 12 weeks by agreement. The Full Bench considered that a provision of that nature had not adequately been canvassed in the proceedings and did not take that matter further, and then turned its attention to a casual conversion provision of the type Stevens DP had awarded in *Clerks (SA) Award*.³⁰⁴ It expressed the view that it was satisfied that it should award a provision based on that determined by Stevens DP, and set out the provision it proposed to award, which involved the capacity for a casual employee to elect to convert to full-time or part-time employment after engagement “*on a regular and systematic basis for a sequence of periods of employment during a period of six months*” subject to the employer having the right to consent to or refuse the election, but not to refuse unreasonably, with any dispute about a refusal to be dealt with in accordance with the dispute settlement procedure in the award.³⁰⁵ The Full Bench said in support of this conclusion:

“[115] We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals. We have determined in favour of a process requiring election rather than one of setting a maximum limit to engagements. Such process should create room for the individual employee's perception of the best option to operate. It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.

[116] We acknowledge the force in the points made for and against a maximum time limit of any particular duration. As an exercise of judgment, we have adopted a six month period for election, extendable to 12 months. There has not been an award provision for a maximum engagement in this industry. We acknowledge the existence of relevant precedents for shorter maximum periods of engagement of casuals. We would expect, on the basis of the statistical material, that a high proportion of casual engagements are completed within four to eight weeks. However, in selecting six months, we take into account what we consider to be the potential adverse impact on younger and less advantaged employees of having a lower limit. On balance, we favour an approach which builds time and an opportunity to consider and discuss into the conversion process. In our view, a provision of the kind is the best compromise between the competing interests and considerations arrayed in the argument about the AMWU's claim. We have matched, in part, the wording of subregulation 30B(3) for the purpose of identifying *a regular and systematic sequence of periods of employment*. We may not by ourselves have arrived at or chosen that wording for a

³⁰³ Print R7898

³⁰⁴ [2000] SAIRComm 41

³⁰⁵ Ibid at [114]

test. Common wording would appear however to have longer term advantages in promoting a consistency of approach. We envisage that the variation would take effect from a prospective date some three months after the date of the order.”

[340] In the years following this decision, applications for casual conversion provisions to be placed in a number of other federal awards were made and determined. Many of those applications were granted by consent, and in a number of cases the conversion provision awarded departed from the terms of the clause the Full Bench determined for the *Metal, Engineering and Associated Industries Award 1998*. The most common departure was to extend the qualifying period for the exercise of the election to convert from 6 months to 12 months.

[341] In the New South Wales industrial relations jurisdiction, a Full Bench of the Industrial Relations Commission of NSW in the *Secure Employment Test Case*³⁰⁶ in 2006 awarded a casual conversion clause as a “test case” standard provision for NSW awards (except those applicable where the employment was regulated by the *Public Sector Employment and Management Act 2002* (NSW) or the *Local Government Act 1993* (NSW)). The Full Bench’s reasons for this decision were as follows:

“227 As earlier stated, the evidence presented in this matter demonstrates that casual employment in New South Wales has experienced significant change in recent years, both in terms of the nature and incidence of casual engagements. It is those changes, and the consequent implications for casual employees, which are at the heart of our decision to grant Unions NSW’s application with respect to casual conversion. Our reasons are threefold.

228 Firstly, whilst there are some employees who fit the traditional definition of casual employment, the changing nature of casual employment has resulted in an increasing number of casual employees working regular hours in long term positions. Many of those employees experience significant adverse consequences as a result of having been shifted out of permanent employment.

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

230 Thirdly, whilst employers have benefited in varying degrees from the increases in, and changes to, casual employment, the evidence is ambiguous as to whether the same flexibilities could not be achieved by other forms of engagement. More significantly, evidence called by Employers First as to the perceived difficulties associated with the claimed casual conversion clause did not sustain testing under cross-examination. When the true effect of the clause was understood, most genuinely held objections dissolved. It is important to emphasise that the claim is not directed at true casuals: it only operates where an employee elects to transit to permanent employment.

³⁰⁶ (2006) 150 IR 1

231 The concept of a ‘casual’ which has emerged through historical employment practice and industrial jurisprudence and which has now long been defined and regulated in awards in this State is essentially one in which: the employee has a short term engagement; shifts are irregular and unpredictable; the employee is not obliged to accept an offer to work a particular shift; the employee's employment technically commences at the beginning of a particular shift and ceases at the end of that shift; the employee is paid a loading as compensation for, amongst other things, annual leave and other benefits ‘accrued’ during each shift worked; and the employee has no expectation of being rostered for another shift.

232 Awards recognise a distinction between casual work and full-time or part-time work, and prescribe levels of remuneration and conditions accordingly. The awards of this State have created and maintained a dichotomy between permanent and non-permanent employment. What the evidence in this matter has revealed is a significant shift towards engaging employees as ‘casuals’ (merely by the label being affixed to the position or by the characterisation of the employment by contract or otherwise) in circumstances where those employees do not, on any reasonable basis, fit the conceptual and legal model so described. This change has occurred without a review by the Commission as to whether the changes are consistent with the existing award model or are appropriate when judged against the requirements of s 10 of the Act and other relevant statutory provisions. The application by Unions NSW represents the first modern opportunity to review the new arrangement. This is significant as it is clear from the evidence that the changed employment patterns which have created something akin to a ‘permanent casual’ (in contrast to the ‘true casual’) significantly altered the work arrangements (often adversely) of a large number of employees.

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

234 There was no shortage of evidence in this matter, some of which is extracted earlier, to demonstrate the way in which the features of casual employment have, in many instances, changed from short term and unpredictable to long term and regular. The storeperson engaged by Bonds Industries Pty Limited is a clear illustration: the employee has been engaged for over six years, working a 38 hour week on regular morning shifts, yet was labelled and paid as a casual employee. We do not consider such long term casual engagements to be isolated incidents, but rather reflect the increasing trend.

235 Evidence was presented to illustrate those trends. Unions NSW relied on data such as the Household Income and Labour Dynamics in Australia Survey (the HILDA Survey) and the Forms of Employment Survey conducted by the Australian Bureau of Statistics. We are satisfied from that evidence that:

(1) The overall incidence of casual employment has increased. Unpublished data from the Australian Bureau of Statistics revealed an increase in casual employment in Australia from 16 per cent in 1985 to 27 per cent in 2002. That trend was mirrored in New South Wales: the HILDA Survey reported that in 2001, 25.9 per cent of employees in New South Wales were engaged on a casual basis. We note the evidence given by Professor Wooden in relation to those statistics that most of this growth occurred prior to 1996, with quite modest increases between 1996 and 2002.

(2) There has been a particular increase in the number of people working in 'full-time' casual positions, from 4.6 per cent of all casual engagements in 1988 to 8.4 per cent in 2000.

(3) Casual employment amongst men has grown faster than amongst women, increasing from below 10 per cent in 1985 to about 23 per cent in 2002.

(4) The average length of casual engagements has increased. It was Professor Wooden's evidence that, notwithstanding the increased casualisation of the workforce, 'the proportion of short-term jobs in the workforce has not increased and average job duration is not any shorter (indeed, it appears to be slightly longer when compared to 1975)'. When cross-examined, Professor Wooden gave the following evidence:

Take a look at the average length of time people have jobs for: job tenure. So casual workers typically have jobs that don't last as long as permanent workers. Casual employment has increased but the average tenure of jobs in Australia has not declined. The reason for that is because the average tenure of a casual employee has in fact increased and in fact the average tenure of a non-casual employee has also increased but because the share of casual employment has increased average tenure hasn't changed much, in fact it has got slightly longer, but a small change.

236 Unions NSW recognised, correctly in our view, that the need for casual employment remains varied, and that 'in some cases, employers will have little if any legitimate need for casual employees, while at the other extreme, there are some employers whose businesses have very wide fluctuations in their demand for labour and consequently may need a significant proportion of their workforce to be engaged on a casual basis'. We have no doubt that in some industries in particular, such as agriculture, the use of casual employment is crucial to filling seasonal vacancies.

237 Accordingly, notwithstanding the apparent evolution in casual employment, there remains a substantial number of employees in New South Wales who fit the traditional model of a casual employee. This application is not directed at those employees, and we have no intention of disturbing the legal basis for those arrangements.

238 Similarly, we acknowledge that there exists a section of the casual workforce who are satisfied with long term casual employment, and who prefer that arrangement. It is unsurprising that younger people, particularly students, who have no pressing family

commitments, prefer the higher rates of pay associated with casual employment without needing the security and benefits of permanent employment.

239 However, there have been significant adverse consequences for a substantial number of employees, who have relied on and prefer permanent employment, but who have experienced a reconstruction of their terms of employment by a forced shift from permanent employment to long term casual employment. There has over time been not only a casualisation of full-time positions, but a significant shift in the terms of that casual engagement. We agree with Unions NSW that for these employees, casual employment may be undesirable. Again, the evidence (including statistical evidence) demonstrates that: adverse consequences have arisen from long term casual employment (as opposed to true casual employment) for certain classes of employees which include the following:

- (1) in many cases the lack of leave entitlements poses a significant disadvantage, for instance for those employees who need access to sick leave to care for sick children;
- (2) a casual employee may experience greater difficulty obtaining finance due to the stricter lending criteria adopted by most financial institutions for casual employees seeking finance compared to permanent employees,
- (3) casual employees have less opportunity for training and career development.

240 In our view, principles of fairness and equity demand that some protection be afforded to long term casual employees to minimise those adverse consequences where the employees concerned have, in essence, been forced by a shift in employer practices and policies to that form of engagement, and when the evidence demonstrates that the economic cost to employers of converting casual employees to permanent, if they so elect, is modest. There is a pressing need, in our view, for a safety net to be instituted for those employees for whom long term casual employment is not only disadvantageous, but an impediment to their ability to obtain and remain in paid work. Working mothers make up a significant component of that group. In those circumstances, we consider that there are strong social and industrial bases for granting Unions NSW's application with respect to casual conversion.

241 We wish to emphasise that, under the proposed clause, conversion to permanent employment is neither automatic nor compulsory. Those employees who prefer to remain employed on a casual basis, including those who have been working regular hours over a lengthy period of time, may continue to do so.

242 The increasing use of long term casual employment in place of permanent employment has significant implications for the regulation of employment conditions in industrial awards.

243 The evidence presented by Unions NSW was that 62 per cent of casual employees in New South Wales are covered by State industrial instruments, 58 per cent of those being covered by common rule awards. As well as establishing the framework for engaging employees in a specified industry, an award provides a safety net for those

employees by setting minimum terms and conditions of employment. An employee who is effectively performing the work of a permanent employee but who is engaged, pursuant to an award, on a casual basis, may be denied award entitlements, which would otherwise apply, had the employee's engagement been correctly characterised as permanent. This undermines the integrity of awards which are designed to treat casual employment in the particular way we have earlier discussed. It was submitted for Unions NSW that developments in the labour market and changes in employment practices have effectively removed many or all of the basic rights of employees, and specifically that:

[There has been] significant growth in the proportion of the workforce which is employed casually. This is to a large degree caused not by growth in casual work - that is, work which is intermittent, irregular and short-term in nature - but by the use of employers of casual employment provisions in awards to remunerate employees who are performing regular, ongoing work. That is, employers are, by the payment of a casual loading, simply opting out of the conditions of permanent employment which contain so many of the incidents of secure employment.

244 We agree with Unions NSW that there is an increasing use - or misuse - of the casual employment provisions in awards. It is important that industrial awards keep pace with broader changes in the workforce, and that employees do not slip through holes in the safety net by having been engaged in a manner that is not contemplated by the relevant award. We are satisfied that the casual conversion provision proposed by Unions NSW adequately addresses the relevant issues relating to the management of permanent and casual employment.

245 We note the reasons advanced by Employers First in opposition to the proposed casual conversion clause. However, we do not consider those arguments sufficiently compelling to refuse Unions NSW's application. Specifically:

(1) we do not consider that granting a long term casual employee the right to elect to become permanent interferes with an employer's merit selection process. It is incongruous to suggest that an employer loses the ability to recruit 'the best person for the job' if a casual employee elects to become permanent. A casual employee who has been employed in a position for six months should be suitable for the job (indeed the evidence showed casuals are in fact retained for much longer engagements). An employer who allows an unsuitable casual employee (without adequate training or review) to remain in a position for that length of time has failed to properly manage its human resources.

(2) Whilst casual employment may not be a 'dead-end' for some classes of casual employees, such as students who take on casual employment as part of a progression to higher paying permanent employment, it remains the case, acknowledged by Employers First, that casual employment provides little training and fewer career prospects than permanent positions. For those employees seeking career progression, casual employment is real disadvantage.

(3) Whilst some casual employees may enjoy the flexibility of being able to take time off on a more flexible basis than permanent employees, there is

nevertheless a significant number of employees who do not want or need that flexibility, and/or who in reality do not have that flexibility because of the virtual permanency of their position. For these employees, casual employment has very little benefit in terms of flexibility.

(4) The suggestion that casual employees benefit from the payment of 'accrued' sick leave whether the employee is sick or not, compared to permanent employees who only receive sick leave when they are sick, misses the point entirely. For many employees, the benefits to be gained from working are not solely financial. A long term casual employee, confronted with the dilemma of needing to care for a sick child, in circumstances where they have no entitlement to sick leave, is in an invidious position. The payment of a loading does not guarantee job security for that employee who is unable to attend work.

(5) We are not satisfied on the evidence that the impact of a casual conversion clause would be great in terms of the number of employees affected, or that the rate of casual conversion would be high. In any event, the evidence indicates that the economic impact of casual conversion on the proposed model would be modest.

(6) Finally, there remains a real question as to why employers should be able to retain the benefits of long term casual employment, where such engagements are frequently undesirable for employees, and by a process of 'work place creep' have resulted in work practices which are contrary to the spirit, purpose and intent of awards of this State (which do not envisage casual employment being used as a mechanism for regular, ongoing employment, and consequently are inadequate to regulate such engagements).

246 Further, we note with some concern that employers are increasingly using casual employment for reasons other than to meet short term operational needs. Unions NSW presented evidence, discussed earlier, of employers using casual employment either as an entry level stepping stone from which progression to a permanent position may be achieved, and/or as an ongoing probationary period. Casual employment is not a panacea for inadequate human resource management.

247 We do not consider that the actual or perceived flexibilities associated with casual employment should be protected at all costs. In our view, the disadvantages of long term casual employment for employees far outweigh the advantages to be gained by employers who wish to persist in using casual employment as a vehicle for virtual permanent employment, whatever their reason for doing so may be. Further, we have seen little coherent evidence that those same advantages cannot be obtained through other forms of employment.

248 We conclude that the application by Unions NSW should succeed with the exception that consideration of conversion to part-time employment be preceded by casual employment consistent with the part-time provision of the relevant industrial instrument or be capable of expression in a part-time agreement pursuant to Part 5 of the Act."

[342] Further consideration of casual conversion clauses by the AIRC and the State industrial relations tribunals was, shortly after the *Secure Employment Test Case* decision, overtaken by the commencement of the operation of the substantial part of the amendments to the WR Act effected by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (the Work Choices Act) on 27 March 2006. Section 515(1)(b) of the WR Act after that date provided “conversion from casual employment to another type of employment” was not an “allowable award matter”, that is, a matter that could be the subject of an award term, and s.525(1) provided that after that date terms of awards which were not allowable award matters ceased to have effect (subject to certain exceptions which were not applicable to casual conversion clauses). To the extent that the WR Act as amended extended the operation of the federal industrial relations system to most private sectors by use of the corporations power in s.51(xx) of the Commonwealth Constitution, State awards applicable to those employers became “notional agreements preserving State awards” (NAPSAs) under Schedule 8 of the WR Act. Casual conversion clauses in State awards carried over into NAPSAs were not invalidated by the Work Choices Act amendments.

[343] The issue of casual conversion clauses arose again when the Commission came to conduct the award modernisation process required by Part 10A of the WR Act (by this time amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) in 2008–09. This issue was addressed in the *Full Bench Award Modernisation Decision* of 19 December 2008³⁰⁷ as follows (footnote omitted):

“[51] An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances. This provision has its genesis in the Full Bench decision already mentioned in connection with the fixation of the casual loading of 25 per cent in the Metal industry award. The Bench made it clear that it had formulated the casual conversion provision based on the circumstances of the industry covered by the award and that there had been no evidence concerning other industries. Section 515(1)(b) of the WR Act identifies casual conversion provisions as matters which cannot be included in awards. Section 525 provides that such terms have no effect. These sections were part of the Work Choices amendments. It appears, however, that casual conversion provisions in NAPSAs were not invalidated. Modern awards can contain a casual conversion provision. In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute an industry standard, but we shall only extend them in exceptional circumstances. The modern awards reflect this approach. We note in particular that we have decided to include a casual conversion provision in the *Textile, Clothing, Footwear and Allied Industries Award 2010* (the Textile industry award) against the opposition of employers. We have done so taking into account the nature of the industry and the reduction in the casual loading from 33⅓ per cent to 25 per cent in part of the industry covered by the award.”

[344] As part of the award modernisation process, casual conversion clauses were, in a small number of cases, placed in modern awards the predecessor awards of which had not contained such clauses. These included the *Textile, Clothing, Footwear and Allied Industries Award*

³⁰⁷ [2008] AIRCFB 1000

2010 (referred to in the above passage), the *Cotton Ginning Award 2010*³⁰⁸, the *Mobile Crane Hiring Award 2010*³⁰⁹, the *Building and Construction Industry General On-site Award 2010*, the *Electrical, Electronic and Communications Contracting Industry Award 2010* and the *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010*³¹⁰ where the clauses were added in substitution for pre-existing temporal restrictions upon the engagement of casuals. In some other cases the casual conversion clause which existed in predecessor awards was modified; for example in the *Wine Industry Award 2010* the qualifying period for the election was extended to 12 months because of the seasonal nature of the industry.³¹¹

[345] Prior to the current proceedings, no modern award has been varied to add a casual conversion clause since the modern awards took effect on 1 January 2010. Of the current total of 122 non-enterprise modern awards, the 28 awards which contain a casual conversion clause are listed in Attachment F.

[346] Some general conclusions may be drawn from this industrial history:

- (1) The initial development of the casual conversion clause in the federal, South Australian and New South Wales jurisdictions was a response to the phenomenon of the engagement of casual employees over long periods of time on a regular and systematic basis.
- (2) The fundamental justification for a casual conversion entitlement was that long-term regular and systematic employment on a casual basis was characterised as undermining the integrity of fundamental employment standards including those pertaining to annual leave, public holidays, sick and personal leave, and potentially carried with it other detriments including a lack of access to training and career development at the workplace and difficulty in obtaining finance from financial institutions.
- (3) As a concept, casual conversion was preferred over proposals for restrictions on the use of casuals based on the circumstances in which they could be used or the period over which they could be engaged.
- (4) Insofar as the casual conversion entitlement created was exercisable at the election of the employee, this was on the basis that the employee was in the best position to assess whether the continuation of employment on a casual basis was detrimental to the employee's interests.
- (5) Casual conversion clauses were not intended to interfere with the capacity of employers to engage casual employees to perform irregular and intermittent work.
- (6) There has never been systematic consideration given to the merit of a casual conversion entitlement becoming a standard feature of the award safety net in the

³⁰⁸ [2009] AIRCFB 345 at [61]–[62]

³⁰⁹ *Ibid* at [115]

³¹⁰ [2009] AIRCFB 50 at [40]

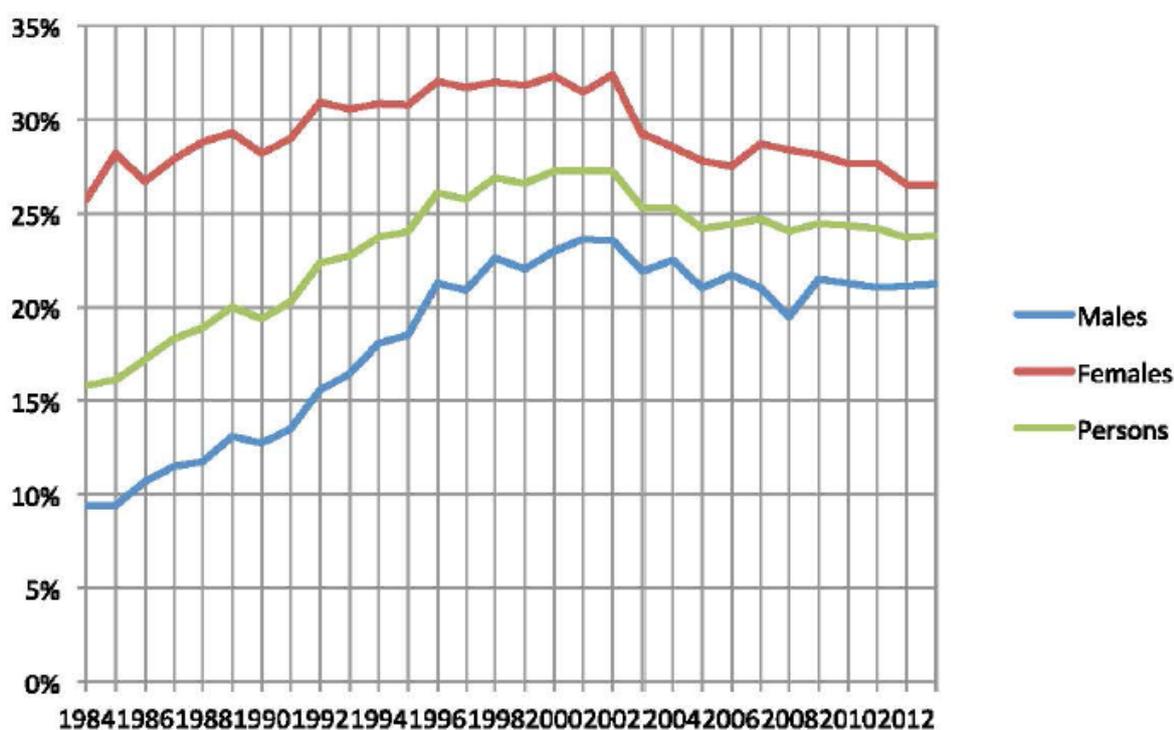
³¹¹ [2009] AIRCFB 826 at [148]

federal industrial relations system. Casual conversion provisions have been placed in federal awards on an ad hoc basis in response to individual applications made by unions from time to time. The award modernisation process, with some exceptions, largely preserved the position which existed prior to the commencement of the Work Choices Act.

Findings re the use of casual employees in the Australian labour market

[347] It is clear from the expert evidence that the proportion of casual workers increased rapidly in the period from about 1984 to 2003, peaking at about 27%, and since then has stabilised at around 24%. The following figure illustrates these trends:

Figure 1: The proportion of casual employment in Australia, by gender, 1984–2013



Source: Second Markey Report, p. 7; Simpson, Dawkins and Madden (1997) for data 1984-1987, based on ABS, *Employment Benefits, Australia*, cat. no. 6334.0; ABS, *Weekly Earnings of Employees (Distribution)*, cat. no. 6310.0, 1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, 1998-2013; ABS, *Trade Union Members, Australia*, cat. no. 6325.0, 1996.

[348] It is important to note, as was observed in the Withers Report, that the growth in casual employment did not however come at the expense of the share of the population engaged in permanent employment, which has remained stable. The rise in the labour force participation rate and growth in casual employment have been associated with higher female labour force participation.

[349] The characteristics of casual employment, from the perspective of both the employer and the employee, are highly heterogeneous in a number of important respects. First, the number of hours worked by casual employees varies greatly, with HILDA data showing that 29% of casual employees work full-time hours, however the average weekly hours worked of part-time casual employees was 16.1. That is demonstrative of a wide range in the weekly hours being worked.

[350] Second, the length and regularity of casual employment also varies greatly, with a significant proportion of casual employees having worked in that capacity for a single employer regularly for a long period of time. The HILDA data showed that 60% of casual employees had worked regular shifts for 6 months or more with their current employer (although defining what constitutes regular shifts is problematic), 73% of casuals had worked for their current employer for 6 months or more (regardless of the regularity of their work schedule), and 28% of casuals had worked for their current employer for 3 years or more.

[351] Thus whilst it is undoubtedly the case that that many casuals are engaged by their employers on an intermittent and irregular basis, many others are not. Further, casual employees may be engaged over long periods of time, whether their employment is regular or irregular. Amongst the ACTU and AMWU witnesses, Mr Aiton, Mr Fisher, Mr Kubli, Mr Proctor and Mr Hynes were examples of long-term casuals working wholly regular, full-time hours for many years; Ms Paulsen, Mr Campbell and Mr Elks were examples of casuals working reasonably regular part-time hours over a number of years; and Ms Rackstraw, Mr Quinn, Ms Minervini and Ms Jenks were examples of casuals working highly variable hours for the one employer over a number of years. The position is further complicated by the fact that the lack of any guarantee of working hours which is a fundamental characteristic of casual employment means that the regularity of hours may change during the course of a period of long-term employment, with Ms Grey being an example of this.

[352] From the employer perspective, the variety in the way in which casual employment was used arises from a range of different business circumstances. For example:

- (1) Some businesses service a client demand which is highly intermittent and/or irregular, or face other external operational constraints which impose intermittency and/or irregularity, and for that reason seek to have a high degree of flexibility in the supply of their labour so they can closely match it to client demand or the external constraints which they face. Ms Logue's description of the BridgeClimb business was an example of this, where the business used casual employment as well as a highly flexible form of part-time employment to meet a highly variable demand for its services. Another example was some businesses in the meat processing and retail industry, as described by Mr Johnston, Mr McKell and Mr Cottrill, where the volatile supply of livestock impacted on the capacity of businesses to operate. These businesses depended on casual labour and/or daily hire labour (a model of labour permitted under the *Meat Industry Award 2010* under which employees are hired by the day as required, but retain continuity of employment and receive NES leave and other entitlements).
- (2) Seasonal factors affecting the operation of a business may mean that the business requires a regular supply of labour, perhaps on a full-time basis, but for only particular parts of the year. The Mitolo Group business described in the evidence of Mr Colquhoun is an example of this. It has a particular requirement for additional staff during the harvesting season for its potato and onion products, and meets this by engaging large numbers of additional casual employees for a period of 3–6 months each year, who worked close to full-time hours whilst engaged.

- (3) Within a business which has largely stable operations and engages a predominantly permanent workforce, there may be discrete work functions which are only performed intermittently, or might be performed regularly but only for a small number of hours. For example, the day care centre business described in the evidence of Mr Mondo used casual employees both intermittently to cover for unscheduled leave taken by permanent employees, and regularly to cover for the lunchbreaks of permanent employees for a period of 1–4 hours each day. Mr Blanchard described a road transport company which employed juniors on a casual basis regularly to wash trucks on Saturday mornings.
- (4) Temporary surges in demand might require a business to use a casual workforce to supplement its permanent workforce. For example, Mr Nugent’s evidence concerning the Qube Ports business explained that shipping arrivals generated intense but limited periods of work activity, and that “*supplementary employees*”³¹² (in substance, casual employees) were used to meet these intermittent work demands.

[353] The above, we emphasise, are examples only and not intended to describe exhaustively the varying ways in which businesses use casual employees to meet their operational needs. Additionally, the evidence has made it clear that some businesses engage casual employees not because there are any relevant circumstances which compel or favour their use, but merely because they (apparently) prefer the casual employment model to permanent employment. Two clear illustrations of this situation were provided in the evidence. First, the Westend Pallets business described in the evidence of Mr Aiton and Mr Fisher used a casual workforce to perform long term, full-time, wholly regular Monday-Friday work where clearly the business could have engaged, at least substantially, a full-time permanent workforce. Second, Mr Francis’ evidence showed him performing long term, regular, full-time work at the Blackwater Mine Site owned by BMA, in circumstances where he was employed to do the same job by a succession of labour hire companies, some of which employed him casually and other of which employed him permanently. The employment model in each case appears simply to have been the choice of the employer at the relevant time, and that casual employment was not a business necessity as demonstrated by the fact that some of the labour hire employers engaged him permanently.

[354] Third, the reasons why, from their perspective, employees become engaged as casuals, and their levels of satisfaction with their casual status, vary greatly. The ACTU survey, although not necessarily quantitatively reliable, gave a sound qualitative guide to the range of reasons as to why persons become engaged in casual employment. As was discussed in the *Penalty Rates decision*, “the assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected”. In this respect and as with the discussion of survey work in the *Penalty Rates decision* “given the limitations ... we propose to treat the survey results as suggestive or anecdotal, rather than definitive”.³¹³ It identified that, overwhelmingly, the 2 most common reasons (selected from a range of options given) were “*It was the only work available, I had no choice*”³¹⁴ and “*I freely choose to work casual*

³¹² Witness statement – 22 February 2017, Exhibit 41 at para 42

³¹³ [2017] FWCFB 1001 at [1574]

³¹⁴ Witness statement – 19 October 2015, Exhibit 110 at RM-2, p.20

because it is more flexible/convenient for me".³¹⁵ These are plainly diametrically opposite reasons for engaging in casual employment. A small proportion identified the higher income produced by being paid with a casual loading as a relevant reason. Different measures of casual employee satisfaction were referred to in the expert evidence:

- (1) The First Markey Report referred to HILDA data which showed that 43% of casual employees working part-time hours wanted more hours of work, and the Second Markey Report referred to AWRS data which indicated that 43% of all casual employees would prefer to work longer hours. From this it can be inferred that these proportions of casual employees were dissatisfied with their existing hours of casual employment.
- (2) The Withers Report referred to ABS data concerning the satisfaction of employees working part-time hours with their current hours of work. The data included permanent part-time employees as well as casual employees in the sample, as pointed out in the Fourth Markey Report, so that it was effectively a measure of satisfaction with part-time hours of work, not casual work *per se*. Nonetheless we consider that the data does have some bearing on the level of satisfaction with casual employment involving part-time hours for the same reason as the AWRS data just referred to, since part-time hours is a feature of the employment of a majority of casuals, as earlier found. The data showed that almost 70% were satisfied with their current hours of work (that is, over 30% were not satisfied), with over 10% desiring full-time hours.
- (3) The ACTU survey indicated that 27.5% of long-term casuals (those employed by the same employer for over 6 months) would prefer permanent employment (and were therefore presumably dissatisfied with their casual status). Of the approximately 80% of casual employees who had not made a request for conversion to permanent employment, almost half said that they had not done so because they were satisfied with their current employment arrangements. Of those who had been notified of an existing right of casual conversion but had not made a request, the proportion who had not done so because they were satisfied with their existing employment arrangements increased to about 70%.

[355] Although quantification of the relevant proportions arising from this data is problematic, it can at least be concluded that a significant proportion of casual employees, probably a majority of them, are satisfied with their current casual employment arrangements and do not want permanent employment or additional working hours. Equally, a significant proportion of casual employees have accepted their current casual employment because it was the only work available, and would prefer permanent employment and/or additional hours. The ACTU/AMWU's individual casual employee witnesses all expressed one or both of these views.

[356] Fourth, the career trajectory of casual employees may vary greatly. It is clear that many young persons engage in casual employment in order to earn income while studying for a career in an entirely different field of endeavour. In that sense, it is not intended by the employee (or, presumably, the employer) that the casual employment should lead to a longer-

³¹⁵ Witness statement – 19 October 2015, Exhibit 110 at RM-2, p.20

term career in the same field. In other cases, a casual position may constitute an entry opportunity to a longer term career with the same employer or in the same industry. For example, Mr Blanchard, whose evidence we have earlier referred to, said that his business had provided permanent employment to juniors engaged to wash trucks on Saturday mornings who had expressed an interest in working in the road transport industry as a career. Similarly, Ms Meilak, who ran an automotive repair business, said that her business employed school students casually during after-school hours as a way of giving them experience in the automotive industry and as the first step in a potential career path in the industry. This pattern of employment is consistent with the “*stepping stone*”³¹⁶ thesis referred to in the Withers Report. However for other employees, casual employment may be engaged in on a long-term basis during the prime working age of 25–64 years without there being any real prospects of career progression or even a conversion to permanent status. This may be by choice; for example, long-term part-time casual work may suit a performer who has unpredictable creative commitments. Such work may also suit a parent who has the primary responsibility for raising children if the hours of work are fairly stable. In other cases it may not be by choice, but may represent the only work which is available to the employee in the labour market over a period of time. In this case, the employee may be said to be “*locked into*” casual employment and insecure work. There were numerous examples of witnesses who fell into this category, including Mr Aiton, Mr Perry, Ms Campbell, Mr Kubli, Mr Heit, Mr Elks and Mr Hynes.

[357] There are a number of common characteristics of casual employment which emerge strongly from the evidence:

- (1) The casual workforce has a significantly larger proportion of young persons than the permanent workforce, with 38% of casuals aged 15–25 years (and 19% of casuals being dependent students). However it remained the case that the large majority of casuals were not young persons, with 59% of them in the 25–64 year old age group.
- (2) Casual employees are disproportionately female, and 59.1% of long-term casuals are female. This is, in part, likely to reflect the desirability of working part-time hours that is commonly associated with casual employment.
- (3) Casual employees are disproportionately award-reliant workers and, both on a weekly and an hourly basis, earn significantly less on average than permanent workers notwithstanding that they are usually paid a casual loading. Most but not all of this “*pay gap*” is explicable by the fact that casuals are disproportionately employed in lower-paid industry sectors such as Accommodation, Food services, Contract cleaning and Retail and in lower-skilled positions.
- (4) Casual employment is, not surprisingly having regard to the history of award regulation and the structure of the NES provisions of the FW Act which we have earlier described, overwhelmingly associated with a lack of paid annual leave and personal/carer’s leave benefits. For long term casuals, the evidence before us (in particular, that of Dr Underhill, Ms Minervini, Mr Aiton and Mr Hynes)

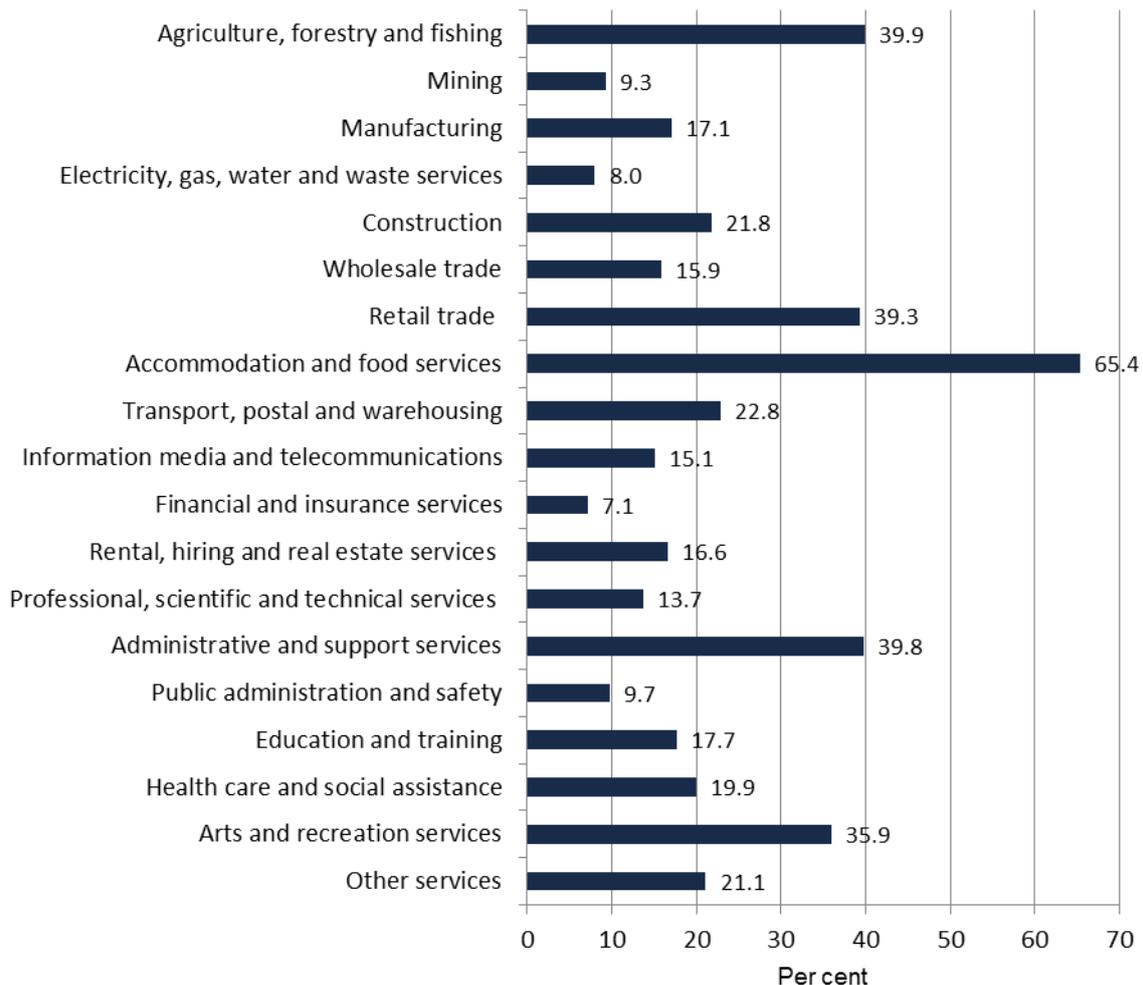
³¹⁶ Witness statement – 8 October 2015, Exhibit 52 at para 123

indicates that the lack of sick leave benefits made casual employees more likely to attend work when sick. The evidence also suggested that longer term casuals were less likely to take time off work for recreational leave purposes because of the lack of payment and the risk that they might not be allocated shifts in future because of their non-attendance at work.

- (5) Long-term casual employees find it difficult to obtain housing finance and other forms of loans from financial institutions, and this can mean they are locked into the rental housing market and excluded from the wealth acquisition usually associated with home ownership in Australia. Evidence to this effect was given by Mr Morgan, Mr Aiton, Mr Fisher, Ms Wright, and Mr Malone.

[358] There is also evidence (particularly that of Dr Underhill and Dr Vallance) that casual employees tend to have poorer workplace health and safety outcomes, with this being attributed to a lack of access to information, exclusion from consultation processes, lack of knowledge about rights, lower levels of instruction and training, confusion about roles, unclear lines of communication and the psychological effects of actual or perceived insecurity in employment. However the evidence also made it clear that these effects differed because of the heterogeneous nature of casual employment. Thus casuals who were intermittently and irregularly engaged on a short term basis were more likely to have their safety endangered through a lack of knowledge, information and training, but if such casuals were satisfied with such work because it suited their personal circumstances (because, for example, they were studying full-time), they were unlikely to suffer adverse health effects because of insecurity in employment.

[359] Finally, and significantly having regard to the across-the board nature of the ACTU's claim, the evidence supports the proposition that the general characteristics of casual employment described above apply across all industry sectors covered by modern awards. As the following figure demonstrates, some industry sectors have much higher proportions of casual employees than others, but in no sector can the proportion of casual employees be characterised as insignificant:

Figure 2: Casual employment density of industries, 2013

Source: Second Markey Report, p. 12; ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, 2013.

[360] Critically, in relation to the ACTU's casual conversion claim, long-term casuals (that is, those who had worked more than 6 months with the same employer) were a majority of all casuals in each industry sector as well as in total. The ACTU survey result which showed that 27.5% of all long-term casuals would prefer permanent employment found various results across industries, ranging from a low of 13.3% in Construction to a high of 45.8% in Information, media, and telecommunications, Financial and insurance services, and Rental, hiring and real estate services. Although the proportions for some sectors in the ACTU survey may not be statistically reliable because of the small sample size, we accept that a non-negligible proportion of long-term casuals in every industry sector would prefer to be employed on a permanent basis. The AWRS data also demonstrates that a non-negligible proportion of casuals in each industry sector would prefer to work longer hours, with the proportion being a majority in some sectors.

Is a casual conversion clause in modern awards necessary to achieve the modern awards objective?

[361] In order for the ACTU's claim for a model casual conversion claim to succeed, we would need to be satisfied for the purpose of s.138 of the FW Act that it is necessary for all

the modern awards the subject of the claim to include a casual conversion provision in order for the modern awards objective in s.134 to be met. In addressing that issue, it is necessary deal with the main bases upon which the ACTU advanced its case in that respect.

[362] A fundamental proposition advanced by the ACTU was that casual employees may be divided into 2 classes: “*true casuals*”³¹⁷, whose employment is irregular and intermittent, and “*permanent casuals*”³¹⁸ or “*false casuals*”³¹⁹, with the latter category being in some sense illegitimate and to be deprecated. Whilst that proposition finds some support in some of the decisions to which we have earlier referred in our analysis of the history and legal incidents of casual employment, we do not consider that it is a distinction that is of much utility within the scheme of NES and modern award regulation established under the FW Act. As earlier stated, most modern awards permit persons to be employed as casuals on the basis that they are engaged and paid as such – that is, casual employment for award purposes is usually no more than a method of payment selected by the employer and accepted by the employee at the point of engagement. A small number of modern awards either do not currently permit casual employment or place restrictions upon the circumstances in which or the period for which casuals may be employed, but they can be set aside for present purposes (we will deal with the small number of modern awards with special characteristics later in this decision). The legal consequence of engagement as a casual under most modern awards is, on the approach taken in *Telum*³²⁰, that the employee is not entitled to those NES benefits which are expressed not to apply to casual employees – most significantly, paid annual leave, paid personal/carer’s leave, paid compassionate leave, payment for public holidays not worked, notice of termination of employment or payment in lieu thereof, and redundancy pay. Even if there is some doubt as to whether *Telum* represents the correct legal position in light of the decision in *Skene v Workpac*³²¹, the evidence of the practical position is overwhelmingly that persons engaged on a casual basis are not afforded the NES entitlements we have referred to, and are paid an award casual loading in lieu of these entitlements. The ultimate outcome of the *Skene* litigation is unlikely to have any effect on that practical position except at the most extreme margins. Thus whether casuals are engaged on a short-term or long-term basis, whether their work pattern is intermittent and irregular or is continuous and regular, or whether they work under discrete contracts of employment or have continuous contracts of the type described in the *Ryde-Eastwood Leagues Club*³²², makes no difference to the position which we have described. The legislature in enacting the FW Act chose not to attach any definition to the expression “*casual employee*” which would operate to define its legal and practical incidents and thereby restrict the operation of the casual employee exceptions to major NES entitlements. Nor, as earlier stated, do most modern awards confine the usage of casual employment and, apart from the small number of awards in relation to which the ACTU and the AMWU have advanced the “*deeming*” variant of their casual conversion claim, there is no proposal before us to vary modern awards to alter this position. In that context, to describe some casuals as not being “*true casuals*” and in some sense illegitimate seems to us to be inconsistent with the regulatory scheme, which plainly permits casual employment of this nature. The access to the unfair dismissal regime in Part 3-2 provided by the FW Act for long-

³¹⁷ ACTU submission – 19 October 2015 at para 32

³¹⁸ ACTU submission – 20 June 2016 at para 11

³¹⁹ ACTU submission – 20 June 2016 at para 11

³²⁰ [2013] FWCFB 2434

³²¹ [2016] FCCA 3035

³²² [1994] NSWIRComm 112; (1994) 56 IR 385

term casuals who have been employed on a regular and systematic basis and have an expectation of such employment continuing evinces an express acceptance of the existence of so-called “*permanent*” or “*false*” casuals. It could not be said therefore that the case has been made that the suppression of this form of casual employment (assuming this was achievable by the use of a casual conversion clause) was something required to meet the modern awards objective.

[363] A second major proposition advanced by the ACTU, namely that the unrestricted use of casual employment without the safeguard of a casual conversion clause may operate to undermine the fairness and relevance of the safety net, has more substantial merit. The modern awards objective as stated in the chapeau to s.134(1) requires the Commission to ensure that “...*modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions...*” (underlining added). It is apparent from the reference to the NES that the “*fair and relevant*” safety net which the objective requires consists of both modern awards and the NES. Thus although the substantive content of the NES is beyond the purview of the Commission, it is necessary in order to ensure that the objective is met for the Commission to give consideration to the way in which the modern awards it makes interact with the NES. As earlier discussed, this interaction is in no respect more critical than the way in which the application of many of the NES entitlements is dependent upon whether a person is engaged and paid as a casual for the purpose of the applicable modern award.

[364] As we have found, persons may accept casual employment for different reasons, including principally that it is the only form of employment available to them at the relevant time, or that it suits their personal and economic circumstances. In the former case, the employee may be said to acquiesce in the employer’s designation of the employment as casual, with the payment of a casual loading in lieu of the principal NES entitlements, in order to obtain much-needed employment. In the latter case, there is likely to be a greater degree of mutuality in the employee’s acceptance of an offer of casual employment. In either case however, the lack of any guarantee of future work that is a usual feature of casual employment means that the future characteristics of the casual employment will not be predictable at the point of engagement. Whether the employment will ultimately turn out to be short or long term, the numbers of hours that will be worked, and their degree of regularity, will usually not be known, or at least will not be guaranteed. In that sense, employees accepting casual employment will usually not be doing so on a fully informed basis.

[365] The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer in those circumstances may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness. If the casual employment turns out to be long-term in nature, and to be of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then we consider it to be fair and necessary for the employee to have access to a mechanism by which the casual employment may be converted to an appropriate form of permanent employment. As our earlier findings have made clear, there exists 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

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

[366] That the majority of casual employees do not have these 3 characteristics does not operate to deny the proposition that the significant minority who do should not be permanently denied access to permanent employment and the NES entitlements that come with it on the basis of the employer's preference for casual employment at the point of engagement. Although the casual loading for which modern awards provide notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits, particularly for adult long-term casuals who are financially dependent on their casual employment. These include, as earlier stated, attending work while sick and not taking recreational leave because of concerns about whether any absence from work will endanger future employment, the incapacity to properly balance work and attending to personal and caring responsibilities and commitments, changes in working hours without notice, and potential for the sudden loss of what had been regular work without any proper notice or adjustment payment. Additionally, as we have found, there are other detriments associated with casual employment of this nature, including the lack of a career path, diminished access to training and workplace participation, poorer health and safety outcomes and the inability to obtain loans from financial institutions.

[367] Because, under most modern awards, the applicability of most NES entitlements depends on whether the employer chooses to engage and pay an employee as a casual, the employer notionally has the capacity to deny NES entitlements to anybody it employs, regardless of the incidents of the employment. There is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award. The lack of any such constraint creates the potential to render the NES irrelevant to a significant proportion of the workforce. Such a result is difficult to reconcile with that part of the object in s.3(b) of the FW Act which refers to "*ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders*", and s.61 which provides (in relation to Part 2-2, *The National Employment Standards*) "*This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5)*".

[368] The evidence before us does not suggest that employers generally have exploited this potentiality to render the NES irrelevant on a widespread scale. The level of casual employment has not significantly changed since the enactment of the FW Act, and most employers recognise that the maximisation of permanent employment as far as practicable is desirable in order to maintain a dependable and motivated workforce. That means that it is not necessary to impose any drastic constraint on the use of casual employment at the point of engagement, and in any event as stated no party has applied for an award variation of that nature. However the evidence does demonstrate that some employers do engage indefinitely as casuals persons who under the relevant award provisions may be, and want to be, employed permanently, with the result that the NES does not form part of the safety net as it applies to them and is rendered irrelevant. In order to ensure that the modern awards objective is met with respect to such persons – that is, to ensure that the safety net including its NES component remains fair and relevant to them – we consider that it is necessary for modern

awards containing unrestricted casual employment provisions to contain a mechanism by which casual employees who bear the 3 characteristics earlier identified may convert to permanent employment. A casual conversion provision is an appropriate mechanism for this purpose, and we propose to develop a model casual conversion provision for all those modern awards the subject of the ACTU claim set out in Attachment A, with the exception of the following awards:

- (1) The *Black Coal Mining Industry Award 2010* does not currently contain provisions allowing for casual employment, so in that context a casual conversion provision would not serve any purpose. We will deal later in this decision with Ai Group's claim to insert casual employment provisions into this award
- (2) The following 17 modern awards already contain a casual conversion clause, and the ACTU has not articulated a case as to why the existing provision needs to be replaced:

Alpine Resorts Award 2010
Asphalt Industry Award 2010
Cement and Lime Award 2010
Concrete Products Award 2010
Cotton Ginning Award 2010
Electrical, Electronic and Communications Contracting Award 2010
Hospitality Industry (General) Award 2010
Plumbing and Fire Sprinklers Award 2010
Premixed Concrete Award 2010
Quarrying Award 2010
Registered and Licensed Clubs Award 2010
Road Transport and Distribution Award 2010
Sugar Industry Award 2010
Timber Industry Award 2010
Transport (Cash in Transit) Award 2010
Waste Management Award 2010
Wine Industry Award 2010

We will deal later in this decision with the position of those modern awards which already contain a casual conversion clause.

- (3) The *Meat Industry Award 2010* provides, in respect of meat processing establishments, for an intermediate type of employment known as “*daily hire*”. A daily hire employer is one “*employed by the day or shift or part thereof as the case may be, without breaking service for the purposes of the award and the NES as to payment for public holidays, personal/carer's leave and annual leave*”³²³, and accrues leave benefits and is paid a reduced loading of 10%.³²⁴ 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-

³²³ Clause 14.2

³²⁴ Clause 14.8

time employment to daily hire and vice versa on 7 days' notice.³²⁵ 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.

- (4) The *Stevedoring Industry Award 2010* also contains a unique intermediate category of employment, namely "*Guaranteed wage employment*"³²⁶, 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.

[369] The model casual conversion clause we propose to develop will be added to the remaining 85 modern awards listed in Attachment A. In reaching the conclusion that a casual conversion clause is necessary in those awards in order to meet the modern awards objective, we have taken into account, so far as they are relevant, the matters identified in paragraphs (a)–(h) of s.134. Of most relevance are paragraphs (a), (d), (f) and (h). In relation to paragraph (a), we have earlier found that casual employees are disproportionately award reliant, earn less on average than permanent employees, whether analysed by weekly or hourly earnings, and are most concentrated in low paid industries and occupations. That makes it likely that a significant proportion of casual employees may properly be characterised as "*low paid*" for the purpose of our consideration under s.134. A casual conversion clause which gives an opportunity for low paid, long term, regularly employed casuals to transition to permanent employment should they perceive it as being in their interests to do so is a measure which addresses the needs of the low paid to that extent.

[370] In relation to paragraphs (d), (f) and (h) of s.134, we have taken into account the extent to which a casual conversion clause in the modern awards in question might affect the efficiency, productivity and regulatory burden on relevant employers, as well as any macro effects on the economy generally. Firstly, it may be accepted that compliance with a casual conversion clause will add somewhat to the regulatory burden of employers although, as will be explained when we turn to consider the form of the model clause to be adopted, we consider that this will be minimal. We are not satisfied that conversion of any casual employee to permanent employment will affect the cost of the employee's employment in any discernible way on the basis that the conversion does not involve any change, or substantial change, to the number or pattern of working hours for the employee (a matter to which we will also return in our consideration of the form of the model clause). The casual loading is notionally compensatory for the standard benefits of permanent employment which are not applicable to casuals, which in the context of the FW Act are the NES entitlements from which casuals are excluded. Although it is not possible to say that the standard casual loading

³²⁵ Clause 11.4

³²⁶ Clause 10.2

of 25% represents the precise equivalent of the cost of those entitlements³²⁷, there was no cost analysis before us demonstrating that a casual engaged for a given number of hours per week on a regular basis would have a direct cost that is less than a permanent engaged on the same basis, either on a weekly basis or over the life of the employment. Indeed, given that the 25% loading arguably contains a compensatory element for the insecurity of casual employment³²⁸, it is more likely that permanent employment has a direct cost that is less than casual employment for a given pattern of regular working hours.

[371] The expert witnesses before us differed as to the indirect efficiency and productivity effects on conversion from casual to permanent employment. The Withers Report, as we have earlier outlined, contended that it could be inferred from the lack of cost advantage for employers associated with casual employment that the use of casual employees must involve significant productivity advantages. Although that inference could plausibly be drawn in relation to the use of casuals to cover intermittent and irregular work, it is much harder to see how it would be applicable to the class of casual employees who would be eligible for conversion under a casual conversion clause by reason of the length of their employment and the irregularity of their hours. The First Markey Report stated that the greater numerical flexibility associated with casual employment may come at a cost to functional flexibility, and the Third Markey Report pointed to the lack of research demonstrating any clear link between casualisation and productivity growth and contended that casual employment might reduce labour productivity through diminished employee commitment and higher turnover (with its concomitant increased recruitment and training costs). Ultimately we consider the expert evidence on this issue to be of little assistance, being theoretical and speculative in nature. There was no empirical evidence before us that the conversion to permanent employment of long term regular casuals on a voluntary basis would cause any discernible detriment to business productivity or efficiency. There was certainly no evidence to that effect in respect of industries (such as manufacturing) which have for many years been covered by awards already containing casual conversion clauses.

[372] We reject the modelling of the aggregate economic effects of the ACTU claim undertaken in the Withers Report on the basis that the modelling essentially adopted as input assumptions the conclusions it sought to demonstrate without any proper basis to do so. There was, for example, no demonstrated basis to assume, as the modelling did, that the grant of the ACTU claim would reduce the casual employment share to the OECD average or that this would cause a loss of 30% of the labour productivity gains since 1993. The results produced were therefore highly questionable. We do not accept on the evidence before us that the adoption of a model casual conversion clause for the 85 awards in question would have any discernible aggregate effects on employment growth, inflation, and the sustainability, performance and competitiveness of the national economy.

[373] We do not accept the submission advanced by a number of employer groups, perhaps most forcefully articulated in the ACCI final submissions, that the requirement in s.156(5) to review each modern award “*in its own right*”³²⁹ prevents the adoption of a model casual conversion clause in the absence of evidence specifically concerned with employers and employees under each modern award under consideration. As we have made clear, the critical

³²⁷ See the *Metals Casuals Case* at [155], [198], applied in *Award Modernisation Decision* [2008] AIRCFB 1000 at [48]–[50]

³²⁸ See e.g. the *Metals Casuals Case* at [184]–[192]

³²⁹ Final Submission – 8 August 2016 at para 2.11

feature of casual employment which attracts consideration of a casual conversion clause is the capacity of the employer to determine, at the point of engagement, that the employment will be on a casual basis and thus permanently deprive the employee of those NES entitlements from which casuals are excluded. Nearly all of the 85 modern awards in question contain a provision to the effect that a casual employee under the award is one engaged and paid as such, and thus empowers the employer to make the determination referred to. For the reasons earlier set out, this position operates unfairly with respect to long-term casual employees working regular hours who have become dissatisfied with their casual status and would prefer permanent employment. We have made the evidentiary finding that there is a significant proportion of casual employees in every industry sector covered by the awards in question that fall within this category. For this reason we are satisfied in respect of each of the 85 modern awards considered in its own right having regard to its terms and operation that it is necessary and desirable that a casual conversion be added to the award.

The form of the model casual conversion clause

[374] The model casual conversion clause proposed in the ACTU claim gives rise to a number of questions:

- (1) After what period of employment should an employee be eligible for conversion?
- (2) What category of casual employees should be eligible for conversion?
- (3) Should the employer be required to notify casual employees of their rights under the casual conversion clause?
- (4) Should the right to convert be absolute, or should there be grounds upon which the employer can refuse the conversion?

[375] In relation to the first question, we consider that the ACTU's proposal for a 6 month eligibility period is not appropriate for the model provision. The evidence before us, in particular that of Ms Colquhoun and Ms Neill, indicated that, at least in some industries, a 6 month period would tend to render eligible for conversion casual employees whose employment was seasonal or for the purpose of meeting a temporary surge in demand or which for other reasons was not likely to continue on an ongoing basis. We note that a number of awards which currently contain a casual conversion clause provide for a 12 month qualifying period.³³⁰ We consider that a calendar period of 12 months is the appropriate qualifying period for the model provision.

[376] In relation to the second question, the ACTU's proposed clause makes eligible for conversion after the qualifying period is reached all casual employees except an "*irregular casual employee*"³³¹, which is defined to mean a casual employee "*engaged to perform work*

³³⁰ *Alpine Resorts Award 2010, Cotton Ginning Award 2010, Higher Education Industry—General Staff—Award 2010, Hospitality Industry (General) Award 2010, Premixed Concrete Award 2010, Registered and Licensed Clubs Award 2010, Road Transport and Distribution Award 2010, Transport (Cash in Transit) Award 2010, Waste Management Award 2010, Wine Industry Award 2010*

³³¹ Submission – 12 November 2016 at p.5

on an occasional or non-systematic or irregular basis".³³² Although this formulation captures the gravamen of the purpose of a casual conversion clause – that is, to allow casual employees engaged on a long-term, regular basis a mechanism to convert to permanent employment – we nonetheless have 2 concerns about this formulation. The first is that it is lacking in firm criteria by which the employer can determine whether a casual employee is eligible for conversion, and essentially requires the employer to make an evaluative judgment. Although the formulation is comparable to the criteria used in s.384(2)(a) of the FW Act for determining whether a casual employee has served the minimum employment period necessary to qualify as a person protected from unfair dismissal, the critical difference is that under the ACTU proposal the employer would be liable for a civil penalty for breach of s.45 of the FW Act if it made the wrong judgment about whether the formulation was satisfied. The second difficulty is that the formulation does not make it necessary that the casual employee's working pattern be transferable to full-time or part-time employment in accordance with the provisions of the relevant modern award. 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. The purpose of a casual conversion clause is not to require the employer to engage in a major reconstruction of the employee's employment in order that the employee is able to convert.

[377] We therefore consider that the qualifying criterion should be that the casual employee (over a calendar period of 12 months) has worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time employment provisions of the relevant award. That formulation accommodates the possibility that conversion could require some adjustment to the employee's working pattern. It will obviously follow from the adoption of that criterion that the more flexible the hours of work provisions for full-time and part-time employees are, the greater the opportunity there will be for casual conversion to occur.

[378] In relation to the third question, we consider that notification of rights under the casual conversion provision is necessary in order to make it work effectively. It is clearly necessary for casual employees to be aware of their rights under the provision in order to be able to exercise those rights. The evidence before us indicates that casual employees are less likely to have access to workplace information than permanent employees, which makes it more necessary that they be notified of the provision. It is no answer to this difficulty to say that casual employees in contemporary circumstances have ready access to relevant information on the internet, since some knowledge of the existence of the casual conversion right is necessary in order to motivate the employee to undertake a search for the relevant information.

[379] Although it was advanced in support of the RCSA's claim to vary existing casual conversion clauses in modern awards to remove the notification requirement, we have taken into account the evidence adduced by the RCSA concerning the regulatory burden involved in the notification process. The conclusion we draw from that evidence is that the burden lies not in the actual process of sending the information to casual employees, but rather the work involved in identifying when casuals have completed the qualifying period and whether they meet the eligibility criteria for conversion. In the model we propose to remove this aspect of

³³² Submission – 12 November 2016 at p.5

the burden by establishing a simple notification requirement under which *all* casual employees (whether they become eligible for conversion or not) must be provided with a copy of the casual conversion clause within the first 12 months after their initial engagement.

[380] In relation to the fourth question, we do not consider that the employer should be deprived of the capacity to refuse a casual conversion request on reasonable grounds. If it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist or the employee's hours of work will significantly change or be reduced within the next 12 months, we consider that it would be unreasonable to require the employer nonetheless to convert the employee in those circumstances. The circumstances we have identified would generally constitute the grounds upon which a conversion request could reasonably be refused, although there may be other grounds which we currently cannot contemplate. We emphasise that for a ground for refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable, and not be based on speculation or some general lack of certainty about the employee's future employment. A conversion request should only be able to be refused after consultation with the employee, the refusal and the reasons for it should be communicated in writing within a reasonable period, and if the reasons are not accepted resort should be had to the award's dispute resolution procedure.

[381] Having regard to these conclusion, we are currently minded to insert a casual conversion provision in the following form in the 85 modern awards to which we have earlier referred (with the clause numbering used consistent with the *Pharmacy Industry Award 2010* exposure draft published on 20 January 2017):

11.6 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 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).

[382] We will provide interested parties an opportunity to make further submissions concerning this proposed model clause, including whether it requires adaption to meet the circumstances of particular awards, in accordance with the directions appearing at the end of this decision. We will also provide interested parties, in accordance with those directions, an opportunity to make further submissions concerning whether there is any appropriate form of casual conversion provision which might be placed in the *Meat Industry Award 2010* or the *Stevedoring Industry Award 2010* having regard to the views we have expressed in relation to those awards earlier in this decision.

The ACTU "deeming" variant and the AMWU claim

[383] The "deeming" model advanced by the ACTU in respect of 5 awards and by the AMWU in respect of 4 of those 5 awards seeks to reverse the basic concept of conversion as established in the *Clerks (SA) Award Decision* and the *Metals Casuals Decision*, so that instead of casual employees being given the opportunity to "opt in" to permanent employment if certain criteria are satisfied, they are deemed to be permanent once those criteria are satisfied but may "opt out" and continue to be casuals if they so wish. The nature of the case for this "deeming model" was primarily articulated by the AMWU, and we have earlier set out the propositions advanced by the AMWU in this respect.

[384] The fundamental proposition underlying the AMWU's case in respect of the Manufacturing Award, the VMRSR Award, the Graphic Arts Award and the Food and Beverage Award was that the proportion of casual employees in manufacturing had increased since the *Metals Casuals Decision*, meaning that the provisions had not met its objective of discouraging the trend towards the use of "permanent casuals"³³³, and the reason for this was

³³³ Submission – 13 October 2015 at para 116

that the current “*opt in*”³³⁴ election mechanism was ineffective. For the reasons set out below, we do not accept that this proposition has been made out such as to justify the variations sought by the ACTU and the AMWU to the awards in question.

[385] First, while it is clear that the Full Bench in the *Metals Casuals Decision* chose to adopt a casual conversion provision as a measure “to discourage the trend toward the use of permanent casuals”³³⁵, we do not accept that the growth of the proportion of employees who are casuals in the manufacturing sector since that decision is necessarily demonstrative of the failure of the provision to work as intended. We did not have evidence before us which analysed in any systematic way the reason why casual employment has grown in manufacturing since 2000, but it is likely that structural changes in the sector, increased exposure to international competition, reduced industry protection and assistance, and changes to the legislative framework were all important factors. The growth in the proportion of casual employment in the manufacturing sector has been from about 14% to 17% since 2000, with the greatest phase of growth having occurred before the *Metals Casuals Decision*. Importantly, the evidence did not demonstrate that the proportion of long-term casuals who wished to convert to permanent employment was sufficiently high to affect in a significant way the proportion of casuals in the industry. The HILDA data which indicates that about 60% of casuals had worked regular shifts with the same employer for 6 months or more might be taken as indicative of the proportion of casuals who might become eligible to elect for conversion under the current casual conversion provisions in the awards in question. On any view of the evidence, the proportion of those eligible who might actually want to convert to permanency is a minority of them. The ACTU Survey showed that 27.5% of all long-term casuals would prefer permanent employment, with the percentage for the manufacturing and utilities sector being slightly lower. The Joint Employer Survey showed that of casual employees eligible to request conversion, only 9.36% had actually made a request (which, the Ai Group submitted, represented the proportion who wanted permanency). That suggests that the proportion of all casual employees who become eligible to elect for conversion *and* who actually wish to become permanent is in the range of about 5.6% - 16.5%.³³⁶ That is not a proportion that would ever be likely to counteract in a significant way the other factors affecting the extent of the use of casual employment in the manufacturing sector.

[386] Second, the evidence did not demonstrate that, for those who exercised the election to convert, the existing provisions in the awards in question were ineffective in leading to conversion actually occurring. The survey evidence presented on both sides shows that a significant majority of those who sought conversion to permanency actually obtained it. The ACTU survey, showed (albeit on the basis of fairly small response numbers) that 77% of those casuals who asked for conversion to permanency succeeded (although the responses seem not to have been confined to persons who had made their request via an award casual conversion clause mechanism), and the figure for the manufacturing and utilities sector was 67%. The Joint Employer Survey indicated that about 63% of those who elected to convert were actually converted – a broadly consistent outcome. Given that the current provisions

³³⁴ Submission – 13 October 2015 at para 116

³³⁵ (2000) 110 IR 247; Print T4991 at [115]

³³⁶ That is, if 60% of casual employees are estimated to be eligible for conversion under current provisions, the Joint Employer Survey figure of 9.36% and the ACTU Survey figure of 27.5% for the proportion of eligible employees who exercise their conversion right translates to 5.6% and 16.5% respectively in relation to *all* casual employees.

generally allow for conversions to be resisted on reasonable grounds, it does not seem to us that these figures are inconsistent with the proper operation of those provisions.

[387] The evidence given by AMWU officials and individual workers called by the AMWU did not significantly contradict this general evidence. Mr Waite was employed casually by a labour hire business and unsuccessfully sought conversion to permanent employment with the host employer – a situation that would involve a change of employer, and is accommodated neither by the current provision nor by the new provision proposed by the AMWU and the ACTU. A number of the concerns expressed by AMWU officials such as Mr Murphy, Mr Malone, and Mr Herbertson similarly related to the position of labour hire casuals who desired permanent employment with their host employer. Mr Kubli did not give evidence that he had actually sought conversion pursuant to the current casual conversion provision. It is not clear whether Mr Fornah sought conversion under the award provision, but in any event after some delay he did succeed in being converted to permanent employment.

[388] The evidence did identify 3 instances where requests for casual conversion had been made and denied. Mr Elks described making what appears to have been informal approaches to his employer for conversion to permanency and not to have invoked any applicable casual conversion provision. On one view he was “*fobbed off*”, but it cannot be said that his case disclosed any failure of operation in the current conversion provision. Mr Heit, who was casually employed by 2 labour hire businesses supplying services to the coal mining industry, made application on a number of occasions for conversion to permanency whilst employed by the first of these businesses, but was refused on the basis that his employer was only a supplier of labour to a third party coal mine operator. Given the regularity of the roster on which Mr Heit worked (which was set by the coal mine operator), we accept that there may not have been reasonable grounds for the refusal of the conversion. However there was no evidence that there was an attempt to invoke the dispute resolution procedure to resolve the issue.

[389] Mr Bauer and Mr Hynes described the situation which arose at Christie Tea where a number of casuals (including Mr Hynes) performing regular work sought conversion to permanency but were refused. In this case the AMWU actually invoked the dispute resolution procedure as contemplated by the casual conversion clause, and the matter went to Fair Work Australia (Hampton C) for resolution. The Commissioner issued recommendations in the matter³³⁷, but they did not lead to the dispute being resolved, and it appears that the employees were ultimately not converted. Under s.595(3) of the FW Act, the Commission may only deal with a dispute by arbitration if it is expressly authorised to do so under or in accordance with another provision of the FW Act. There is no provision in the FW Act which expressly authorises the arbitration of a dispute pursuant to a dispute resolution procedure in a modern award, so the Commissioner in the Christie Tea case was not empowered to resolve the conversion dispute by arbitration. The AMWU pointed out that this was not the legislative position which prevailed at the time that the casual conversion provision in the Manufacturing Award was made, and it means that an employer refusal is effectively unchallengeable and renders the casual conversion provision a dead letter.

[390] There is considerable substance in this proposition. The dispute resolution procedure no longer provides a ready mechanism to resolve deadlocked disputes about an employer

Section 2.02 ³³⁷ [2010] FWA 10121; [2011] FWA 905

refusal of a casual conversion request. The clause can be enforced in a relevant court but it would be necessary to demonstrate that the employer's refusal was unreasonable, which gives very broad scope for a defence of any enforcement proceedings. However, we do not consider that the AMWU's proposed alternative deeming model, which entirely removes the capacity of the employer to reject a conversion request, is the appropriate answer to the problem identified. There are clearly some circumstances where there is a legitimate business reason for refusing a conversion request, perhaps most obviously where the employer knows that the work which the employee performs will come to an end in the near future and thus the continuation of the employment would be unsustainable. We think the better approach is that which we have taken in the model clause we provisionally prefer, as set out earlier. It gives greater definition to the grounds upon which a conversion request may be refused, although it may be accepted that it is ultimately not possible to exhaustively describe the grounds for a reasonable refusal.

[391] Third, but on a fine balance only, we cannot accept that the deeming model is necessary on the basis that some casual employees who wish to convert to permanent employment choose not to do exercise their rights under the current casual conversion provision because of concern about the security of their employment or ignorance of the existence of conversion provision or for other reasons. There is certainly evidence before us of this proposition. The ACTU survey showed that among casuals who had not made a request for conversion to permanent employment, a significant proportions said they did not do so for reasons other than that they were satisfied with their current arrangements, and the AMWU's witnesses such as Mr Yuen, Mr Murphy and Mr Herbertson gave evidence that many casual employees had the perception that they might not continue to be engaged in the future if they applied for casual conversion. There was no probative evidence before us of any case where an employer had *actually* taken retaliatory action against a casual employee for requesting conversion pursuant to a casual conversion clause, but we accept that the *perception* that this might happen is widely held and operates as a deterrent to the making of conversion requests. Additionally, there was evidence before us (including that of Mr Yuen, Mr Lewin and Mr Herbertson) that casual employees often did not request conversion because of ignorance of their right to do so, particularly where the employer had not provided notification of the right as the current provision required.

[392] However, as we have earlier observed, a fundamental rationale for the original establishment of casual conversion provisions which operated at the election of the employee was that the employee was in the best position to assess whether the continuation of employment on a casual basis was detrimental to the employee's interests. A provision which deems a casual employee to become permanent once certain criteria are satisfied, and then requires the employee to take positive action to "*opt out*" of that situation if they wish to remain in casual employment, may adversely affect those casuals who are satisfied with their current arrangements (which, as we have found, is probably the majority of them). They may not exercise the proposed right to "*opt out*" because of ignorance of their right to do so, confusion about what it means to be deemed a permanent employee, simple inaction, or peer pressure at the workplace. We do not consider that the problem of casuals who would prefer permanent employment but are deterred for various reasons from electing to request casual conversion rights, which we accept is a genuine difficulty, is best resolved by transferring the problem to casual employees who would prefer to stay casually employed.

[393] In relation to the Higher Education Award, we do not consider that the evidence before us demonstrated any major difficulty with the operation of its casual conversion clause

such as to justify the major change to it that is sought by the ACTU and the NTEU. The evidence of Ms Gale indicated that there had been problems in terms of delays by universities in responding to conversion requests, and rejecting them, but it also tended to indicate that the NTEU had been effective in responding to these problems when they arose. The witnesses called by the Group of 8 Universities and the AHEIA did not indicate that there had been many disputes about casual conversion in the sector, and some of their evidence (in particular that of Mr Ward in relation to the University of NSW) indicate that the success rate of casual conversion requests was very high. It may also be noted that there is very wide enterprise agreement coverage in the sector, so that the relevance of the modern award provision may not be significant.

[394] For these reasons, we do not propose to vary the casual conversion clauses in the 5 awards in question to adopt the deeming model advanced by the ACTU and the AMWU.

The Ai Group and RCSA claims to remove the notification requirement

[395] The Ai Group and the RCSA (particularly the latter organisation) called evidence which was intended to demonstrate that the requirement in existing casual conversion clauses (for example, in cl.14.4(b) of the Manufacturing Award) for the employer to notify casual employees of their eligibility to apply for conversion imposed an excessive administrative burden. In relation to labour hire employers (represented by the RCSA), we accept that the proportion of casuals employed by them who would desire to convert to employment with their labour hire employer (as distinct from a host employer) is small both relative to casuals employed directly by the businesses in which they work and in absolute terms. That is likely to be for 2 reasons: first, persons who work in labour hire businesses are likely to have a higher propensity to take casual work because it suits their personal circumstances; and, second, conversion to permanent employment with a labour hire employer is not likely to bring significant advantage to the employee in terms of job security, since the ongoing supply of work is controlled by third party clients (host employers) and not directly by the labour hire employer. It is also the case that the labour hire employer's lack of control over the continuity of the provision of work makes it more likely that it will have a reasonable basis to refuse any request for conversion that might be made. That means that for labour hire employers, the administrative burden of notifying casual employees of their conversion rights may seem entirely disproportionate to the frequency with which any employee seeks to exercise those rights. However we do not consider the evidence concerning labour hire employers adduced by the RCSA to be necessarily representative of employers generally, where the proportion of casuals employed will usually be lower and the proportion of casuals desiring permanent employment with the same employer is likely to be higher.

[396] The nature of the administrative burden involved requires closer analysis. It seems to us, based on the evidence, that there are 3 steps involved: (1) identifying casuals who have reached the 6 month (or 12 month) threshold, (2) examining which of those casuals meets the requirement for regularity in engagement, and (3) physically notifying in writing those casuals of their casual conversion right. In relation to the third step, the evidence does not satisfy us that the burden of sending a standard-form written notice to the identified casual employees is particularly onerous. The evidence of Ms Wolverson, Ms Mead, Ms Last, Mr Noble, Mr Shepherd and Ms Fordred demonstrates, we think, that the real difficulty lies in the first 2 steps, that is, identifying those casual employees who might be eligible for casual conversion. That task will necessarily involve monitoring the length of the period over which casual employees are engaged and an examination of the records of the shifts they have worked over

that period in order to make an assessment of the regularity of their engagement. For smaller businesses at least, that task will be time consuming and burdensome. There is added to that the further difficulty that the determination to be made involves an evaluative assessment which carries with it a degree of subjectivity. The employer must decide whether a casual who has been engaged over a 6 month period is or is not an “*irregular casual employee*”, defined in cl.14.4(k) of the Manufacturing Award to mean “*one who has been engaged to perform work on an occasional or non-systematic or irregular basis*”. Reasonable minds might differ in marginal cases as to whether that definition is satisfied, but an incorrect determination about this issue by the employer leading to a failure to provide the required notification will constitute a breach of the award and render the employer liable to the imposition of a civil penalty.

[397] Having regard to these matters, we are not satisfied that there should be a total removal of the notification requirement. We consider it to be essential to the effective functioning of any casual conversion provision in an award that casual employees be made aware of their rights under the provision. It cannot be assumed that casual employees will be able to ascertain these rights themselves, because casual conversion provisions are among the least widely known of award provisions, and only currently exist in a minority of awards, so there is no reason to expect that most casuals will either know how they operate or even that they exist; and union density generally has fallen to low levels, and is lower amongst casuals, so the majority of casuals are not likely to have access to appropriate advice from a registered organisation. The evidence of, for example, Mr Waite and Mr Yuen confirms that absent advice from the employer or a union, casuals are unlikely to be aware of casual conversion entitlements.

[398] In the model casual conversion clause we have earlier provisionally adopted with respect to 85 modern awards which currently do not have such a provision, the notification requirement has been simplified so that the employer is required to provide all casuals engaged, whether regular or not, with a copy of the conversion clause at any time within the 12 month qualifying period. The Ai Group, the RCSA and other interested parties may give consideration as to whether existing casual conversion clauses should be modified to vary the notification requirement in a similar way. This would have the effect of removing what we have earlier identified as the most burdensome aspect of the notification process, namely identifying those casuals who would be eligible for conversion, because the requirement would simply be to provide a copy of the clause to all casuals engaged. We will provide an opportunity for any interested party to advance a submission that such a variation should be made, but we otherwise dismiss the Ai Group and RCSA claims concerning the casual conversion clauses.

3.46 Consideration – minimum engagement period

[399] Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. 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. Minimum engagement periods are also important in respect of the incentives for

persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).

[400] Relatively detailed consideration was given to minimum engagement periods by the Full Bench in the *Metals Casuals Decision* in response to a claim by the AMWU for minimum engagement periods of 6 hours for casuals and 4 hours for part-time employees.³³⁸ The Full Bench consideration and conclusion concerning this claim was as follows (footnotes omitted):

“[126] The AMWU case in support of the claims may be summarised as follows:

- minimum consecutive hours for casuals are unassailably allowable as part of the award safety net. There is no reason to draw a distinction in that respect against part-time employees;
- an extensive list of awards disclose a safety net of between three and four consecutive hours’ engagement for casual workers;
- payment or engagement for less than eight hours in the metal industry is the exception and a six hour minimum would pose no problems;
- the minimum income from a casual engagement determines whether or not people who rely on social security or who have children will accept the job. Travel costs, child care expenses erode savagely any earnings. Any reduction in the expected length of a daily engagement has a severe impact on an already disadvantaged employee, and most heavily so for intermittent casual workers. The difficulties in balancing the requirements of the social welfare Newstart program with an offer of casual work are often too great to make the job worth the extra trouble;
- in contrast to part-time workers, casual workers have no certainty as to future income and need a minimum level of income each day to make viable the expense of attending the job;
- a feature of the precariousness of casual work is the absence of minimum engagement requirements;
- several major manufacturing awards provide a four hour minimum for part-time work, a relatively new type of employment in industry awards.

[127] The employer respondents and the Commonwealth did not generally oppose in principle the setting of minimum periods of engagements for casual and part-time employees. They made strong objection to a minimum six hours for casuals, claiming it was excessive. The AiG opposed also a four hour minimum for part-time employees. Excessive minimum engagement periods, they submitted, could disadvantage casual employees wishing to balance work and family responsibilities.

³³⁸ (2000) 110 IR 247; Print T4991

That point was made also by HREOC in its submission. The AiG submitted that it was specious for the AMWU to contend that casual employment should be subject to a higher minimum engagement than part-time employment.

[128] In both contexts, the AiG drew attention to recent decisions of the New South Wales Industrial Relations Commission (the NSWIRC). A Full Bench of the Commission had recently ruled that a three hour minimum engagement period for part-time employees across the State of New South Wales was fair and reasonable. That ruling also allowed for a minimum two hour start when it is sought *by the employee* to accommodate personal circumstances or where the place of work is within a distance of five km from the employee's place of residence. In an earlier decision *Re Restaurant Employees (State) Award*, Marks J had stated:

'I cannot see why in all the circumstances the same minimum should not as a matter of logic apply to casual [and part-time] employees. The operational requirements of the employers in the context of both part-time and casual employment are the same. The criteria by which one judges what should be an appropriate minimum standard to be applied by employers are the same.'

[129] The Commonwealth in its submission noted that Marsh SDP when simplifying the Graphic Arts Award had reduced the minimum engagement period for casuals from six to four hours after determining that six hours was likely to inhibit productivity.

11.2 Determination of minimum engagement provisions for casual and part-time employees:

[130] We consider that a sufficiently compelling case has been made by the AMWU for the inclusion of minimum engagement provisions for both casual and part-time employees. We accept that for casual employees particularly, a minimum engagement period may appropriately be conceived to be a necessary component of the award safety net for that type of employee. A similar, albeit less forceful, justification applies to similar effect for part-time employees in the industries covered by the Award. Our acceptance of that aspect of the matter has been increased also by the way in which the respondents distinguished the question of principle from issues about the level of any minima, and the need for facilitative provisions that permit individual employees to take the initiative. We attach weight also to evidence that indicates in the metals and manufacturing industry a relatively high proportion of casuals regularly work full shifts approximating to standard or ordinary time hours. That statistic is one of the indications of the emergence of the 'permanent casual'. However, it also indicates that there may be less need in this industry for a minimum engagement protection than is the case with industries where the use of broken shifts and labour scheduling practices is more intense. We accept that a reasonable minimum payment per day is a critical consideration for less advantaged employees faced with a choice between intermittent casual work, or no work and perhaps threatened social welfare benefits. We note also that the *Award Simplification Decision* retained minimum consecutive hours for casuals, and that the AMWU listed 22 federal awards containing such provision, 16 of which provided for four hours or more.

[131] On balance of all considerations we are satisfied that it would be unnecessary and excessive to impose a minimum period of six hours, however we consider there should be a minimum. We are attracted to reasoning of Marks J for reasons of administrative simplicity that the minimum period should be the same as for part-time employees but on balance we have decided not to opt for such a result. For part-time employees we will adopt a minimum of three hours, we also allow a similar dispensation to that which was applied by the Full Bench of the New South Wales Industrial Relations Commission in the *State Part-Time Work Case*. For casuals however, we will adopt a four hour minimum. In setting that minimum we are strongly influenced by the four hour minimum set in a large number of manufacturing industry awards which were in evidence before us. We are also influenced by the arguments summarised in the second, third, fourth and fifth dot points in paragraph 126 of the AMWU submissions. In short part-time employment provides greater financial certainty and predictability of earnings. Accordingly there is less need for each engagement or attendance to meet a minimum level of payment. We so [sic] no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances.

[132] In determining an appropriate minimum engagement for this award we wish to make it plain we are not setting any general standard beyond the award. As noted above we have been influenced in determining the four hour minimum by the existing position in manufacturing industry awards. There should be no expectation that the four hour period is an appropriate minimum in other sectors of employment where the factual circumstances are different and the needs and aspirations of both employees and employers are different.”

[401] In the *State Part-Time Work Case*³³⁹ referred to in the above passage, a Full Bench of the Industrial Relations Commission of NSW considered whether standard minimum daily engagements should be established for part-time employees in NSW as follows³⁴⁰:

“There was a deal of evidence about existing provisions of industrial instruments and part-time work agreements which provided minimum hours of part-time work of as few as one per day and as many as 18 per week; three hours per day was quite common and two hours not unusual. The disagreement between the parties was both practical and philosophical, with the Labor Council and the Minister emphasising the possibility of exploitation and pressing for three hours as a minimum and the employers emphasising the opportunity for employers and employees to agree to arrangements which suited them and urging that there be a minimum of two hours.

There was little evidence before us of any actual exploitation of employees in practice. Under the 1991 Act employers were not obliged to file part-time work agreements which they entered, hence little information was available as to the types of arrangements agreed to under that system. The Minister in the Second Reading Speech in relation to the 1995 Bill referred to a part-time work agreement in the country where the employee concerned had to travel for 90 minutes for one hour’s work; no

³³⁹ (1998) 78 IR 172

³⁴⁰ Ibid at pp.204–5

other examples of such exploitation were brought forward by the parties, although they emphasised that the Commission must guard against the possibility of future exploitation. Evidence was brought of a part-time work agreement under the 1996 Act which provided for two hours work per day by a kitchen hand at a boarding school, an arrangement precluded by the relevant industrial instrument. There was also evidence of circumstances where part-time employees had sought to work two short starts per day in industries where such arrangements required the consent of the union. An example was a bus driver who collected aged persons from their homes in the morning to transport them to an aged care centre and who would also have liked to transport them home in the afternoon. It seemed to follow that circumstances which could be described as exploitation on one definition might, on a different view, amount to desirable work conditions.

The Labor Council was candid in its closing submissions accepting that the scheme proposed provided for a particular balance which would have the result that some part-time work arrangements which some employees desired could not be available to them. It was submitted that such a balancing exercise was inevitable if exploitation was to be guarded against. Furthermore, it was conceded that the Labor Council's approach sought to ensure that there was a clear delineation maintained between part-time and full-time work. As a corollary, the Labor Council argued for a scheme that ensured the provision of what was perceived to be a 'real' wage or income stream for all those employees who entered part-time work agreements having regard particularly to the provisions of the federal SGC legislation. That legislation prescribes that superannuation guarantee charges are only payable if superannuation is not made available to employees who earn over \$450 per month. It was also candidly conceded that this approach could operate detrimentally for those employees, primarily young workers, including those in secondary or tertiary education who might require part-time work for periods which would not attract such superannuation benefits.

While we accept the notion that the prescription of the minimum conditions required by the 1996 Act must potentially have the consequence that some employees will thereby be precluded from entering part-time work arrangements which they desire and which do not involve exploitation, we take the view that given that the scheme established by the 1996 Act intended to expand access to part-time work, we should seek to minimise the incidence of those consequences.

We were unable to accept the submission that in establishing minimum conditions we should ensure that part-time work agreements encompass the requirement that a 'real' wage or income stream for part-time workers is achieved. This is a concept undefined in the 1996 Act. No evidence was directed to the concept - certainly none was relied on in submissions. The upshot is that the notion was ill defined and, in a sense, illusory. The introduction of such concepts might provide benefits for some employees who would otherwise be offered fewer hours of work than they would ideally prefer; the risk involved (a real one on the evidence before us), would however be to introduce indirect, possibly direct, discriminatory consequences for women and young workers who require part-time work of limited hours and for whom such hours are not, in any usual sense, exploitative, (notwithstanding that they do not carry with them rights to superannuation under federal SGC legislation). For such employees the limited hours of work which they seek, based on their own requirements, may well achieve a 'real' wage or income stream suitable to their circumstances. We also finally

note that under many industrial instruments superannuation is payable for all part-time workers; such conditions will flow to employees who enter part-time work agreements as a matter of course under s79(1). Where no provision is made, part-time employees will be entitled to a pro rata superannuation benefit under s79(2).

...

We have determined to fix a minimum start per occasion of three hours per day, subject to a number of exceptions. We take the view that it would be wrong to deprive employees of existing work under current part-time work agreements, particularly in the absence of tangible evidence of exploitation. As we mentioned earlier, there was evidence of part-time work agreements before us which provided for work of two hours per day, on several days per week including agreements entered by employees suffering from disabilities who could not work for longer hours. We have determined to permit such arrangements where two hours per start is agreed for two or more days per week, provided that the arrangement is either sought by the employee whose ability to work other arrangements is restricted by personal circumstances, the place of work is within five km of the employee's place of residence or where the applicable industrial instrument already makes provision for a minimum start of two hours.

As we earlier noted we have been conscious of the evidence led which demonstrated that some people had a real need for working hours of this kind and that there was little evidence before us of any exploitation of employees. The evidence also showed that some industrial instruments do not allow either part-time or casual hours of work of two hours duration, thus precluding employees from obtaining such working arrangements on any terms, no matter what the employee's circumstances may be.

We have a real concern however, that for some employees the time and expense incurred in preparing for and travelling to and from work may in reality outweigh the remuneration and other benefits which such work provides. The example used by the Minister in the Second Reading Speech where an employee '*... living approximately 90 minutes from a major regional centre in this State, was working a 60-minute shift under the part-time work agreement, that being the only employment available*', illustrates the point. The minimum conditions which we have fixed endeavour to balance these competing concerns."

[402] The question of minimum engagements did not receive any systematic consideration during the award modernisation process which led to the establishment of the modern awards currently in operation under the FW Act, and largely preserved the predominant provisions concerning minimum engagements contained in pre-reform awards, as explained in the Full Bench decision in *Victorian Employers' Chamber of Commerce and Industry*³⁴¹:

"[12] The Award Modernisation Full Bench of the Australian Industrial Relations Commission (AIRC) did not address the question of minimum engagements in any of its decisions and statements made in connection with the award modernisation process. This is because minimum engagements did not emerge as a significant issue during that process. Minimum periods of engagement have been a common feature of State

³⁴¹ [2012] FWA FB 6913

and Federal awards for a very long period. The rationale for minimum periods of engagement is one of protecting employees from unfair prejudice or exploitation. Given the time and monetary cost typically involved in an employee getting to and from work, it has long been recognised that employees, especially casual employees, can be significantly prejudiced if a shift is truncated by the employer on short notice (as would otherwise be lawful in a typical casual engagement) or the employee can be pressured into accepting unviable short shifts in order to retain access to longer shifts. The inclusion of a minimum engagement period in a modern award invariably reflected the fact that such provisions were to be found in a sufficient proportion of the pre-reform awards and NAPSAs that are operated within the coverage of the modern award.”

[403] These decisions confirm the fundamental rationale for minimum engagement periods which we have earlier identified. The *Victorian Employers’ Chamber of Commerce and Industry* decision also adds that, in respect of casual employees, particular prejudice may arise where a shift is ended after a short period with little or no notice or where the casual employee agrees to perform unfairly short shifts in order to ensure that the employer continues to allocate work to them in the future. However the decisions also identify that, in establishing award minimum engagement requirements, there are a number of important countervailing considerations that need to be taken into account:

- longer minimum engagement periods may prejudice those persons who wish to and can only work for short periods of time because of family, study or other commitments, or because they have a disability;
- the need for and length of a minimum engagement period may vary from industry to industry, having regard to differences such as in rostering practices and whether there are broken shifts;
- an excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work, which may prejudice those who desire or need such work; and
- a minimum daily engagement period for part-time employees might not need to be as long as for casual employees, because part-time employees are likely to enjoy the greater security of a guaranteed number of weekly hours of work.

[404] Modern awards contain a range of different minimum daily engagement periods for casual and part-time employees, and some contain no minimum at all, such as the VMRSR Award. These provisions generally derive from provisions in pre-reform awards which were in most cases likely formulated by the agreement of the award parties. It can be presumed that in doing so the parties took into account the circumstances of the industries in which they operated that prevailed at the time, but beyond this it is not possible to generalise about the basis upon which such provisions were struck. In particular modern awards, it is clear that the minimum engagement periods were intended to meet the peculiar circumstances of special types of work or workers. For example, in clause 10.5(d) of the Bus Award, the minimum engagement period for casuals is 3 hours, but for school bus drivers it is 2 hours per engagement; and in clause 12.2 of the Higher Education Award the minimum engagement period for casuals is 3 hours, except that for undergraduate students who are attending the

university as a student on the day they work, or for employees with a primary occupation elsewhere, it is one hour.

[405] The ACTU's claim seeks to replace the current variegated situations with a uniform standard of a 4 hour minimum engagement for all part-time and casual employees. It advances that claim on the basis that it would enhance the job and income security of casual employees and part-time employees. However we do not consider that a standard provision of this nature would achieve that objective, because the evidence demonstrates that in respect of a number of awards the imposition of a 4 hour minimum would probably have the opposite effect and may lead in many cases to a loss of work opportunities and working hours for casual and part-time employees which currently exist. It is not necessary to refer to all of the evidence in this respect; the following examples will suffice:

- (1) The very short minimum engagement period for student casuals in clause 12.2 of the Higher Education Award to which we have just referred was evidently intended to allow such casuals to take advantage of casual employment opportunities on campus while attending to other study commitments there. The evidence of Mr Ward, Mr Gladigau and Mr Greedy for example demonstrated that much of the casual work in which employed students were employed did not require 4 hours' work, and for that reason suited students' commitments and timetables. An increase to a standard 4 hour minimum carries with it the risk that either the university would cease to be able to offer such work to students because the cost would be prohibitive, or students would not be able to perform it because they could not fit it into their other study commitments.
- (2) For school-aged students, the uniform extension of a 4 hour minimum would also be destructive of work opportunities. Mr Blanchard in the road transport industry, Ms King in the hospitality industry and Ms Meilak in the automotive industry gave evidence that they used school students for short engagements to perform basic tasks and gain an introduction to work in their industries, but that a 4 hour minimum engagement would prevent this because there was not sufficient work to perform to support it. In Ms Meilak's case, her automotive business employed school students after school finished, but they could not be employed for 4 hours after school because the business closed before then.
- (3) Some adults also use casual engagements shorter than 4 hours to suit their family commitments and other personal circumstances. For example Ms Golisano in the hairdressing industry referred to engaging casuals in the evening who had caring responsibilities during the day, who could not come to work early enough in the afternoon to work 4 hours before her salon closed at 9.00 pm; Mr Brown referred to employing parents and university students in his hotel who would have difficulty making themselves available for 4 hour shifts; and Ms Brannelly and Mr Mondo in the childcare industry referred to engaging casuals for short shifts which allowed them to fit paid work around their study timetables. A 4 hour minimum engagement requirement might lead to such casuals not being able to be employed in the future.
- (4) There was evidence generally that a 4 hour minimum would not necessarily lead to additional work and income for casual employees, but that the work

would be redistributed to other non-casual employees to avoid the impost and the number of casuals employed would be reduced.

[406] There was some evidence of short shifts being worked in a manner which verged on being exploitative. For example, in the disability sector, Ms Potoi referred to working 1½ hour shifts in the disability sector as a part-time employee in circumstances where the travel required to perform the shift took the same amount of time again; Mr Quinn worked shifts varying in length from 4 hours to 30 minutes; and Mr Morgan worked whatever shifts were offered in order to preserve his job security. However while the evidence might call for the review of minimum engagement periods in some particular awards, it did not go so far as to demonstrate that any daily engagement of a casual or part-time employee below 4 hours was necessarily unfair and exploitative, which is what we think would be needed to justify the establishment of a 4 hour minimum engagement standard across all awards. Additionally we do not consider that a case has been made out for the daily minimum engagement of casual employees and part-time employees to be aligned in all cases, since in most modern awards part-time employment operates on the basis of a minimum weekly guarantee of hours, with the pattern of working hours established at the commencement of the employment and thereafter not able to be changed other than by agreement. For that reason, the circumstances of part-time employees are distinct in terms of income security from those of casual employees.

[407] While a 4 hour minimum daily engagement might under some awards represent an appropriate balancing of the competing considerations to which have earlier referred, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. That would not in all awards meet the modern awards objective in s.134, because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion, and also because under some awards it may inhibit flexible modern work practices and the efficient and productive performance of work. The ACTU's claim for a standard 4 hour minimum engagement for casual and part-time employees is therefore rejected.

[408] However, we do consider, having regard to those same competing considerations, that it is necessary for modern awards to contain some form of minimum engagement period for casual employees in order to avoid their exploitation in order to meet the modern awards objective. The modern awards listed in Attachment G contain no minimum engagement period at all. We have reached the provisional view that such awards should be varied to include a 2 hour minimum engagement period for casuals. However we will provide interested parties an opportunity to provide further submissions concerning this proposition.

[409] In relation to the AMWU's claim to vary the minimum engagement provisions for part-time and casual employees in the Manufacturing Award, the VMRSR Award, the Graphic Arts Award and the Food and Beverage Award, we consider that the variations sought should be made. A facilitative provision which allows any minimum engagement period, or none at all, to be substituted for the prescribed standard 4 hour minimum period has the potential to be used in a way which entirely undermines the purpose of the provision. That the current provisions require the employee to initiate a request for the reduced minimum does not serve as a practical protection, particularly in relation to casual employment where the employer has the power to determine whether any future work is offered. This potential for exploitation means that the current provisions cannot be said to achieve the objective of a safety net set of terms and conditions that is fair and relevant. We consider that a facilitative provision with a minimum "*floor*" of a 3 hour minimum engagement is necessary to achieve

the modern awards objective in this respect. The 4 awards will be varied in the terms proposed by the AMWU.

3.47 Consideration – further ACTU model clause

[410] We are not satisfied that the grant of the further ACTU model clause (reproduced in paragraph [105]) is necessary to meet the modern awards objective. In relation to paragraph (a) of the proposed clause, there was no probative evidence of employers engaging and re-engaging employees, including casual employees, in order to avoid award obligations. The operation of the standard casual conversion provision which we have earlier proposed does not depend on its operation on any notion of continuous service, so that it is difficult to see how any termination and re-engagement of a casual employee could be carried out in a way which frustrated its operation. In any event, ss.340–342 of the FW Act provide legislative protections against adverse action by employers against employees which is taken because the employee has, is exercising or proposes to exercise an award entitlement.

[411] In relation to paragraph (b), the proposal that employers must first offer additional hours of work to existing casual or part-time employees before increasing the number of casual or part-time employees is unsustainable for a wide range of reasons. It is sufficient to give 3 of those reasons. First, there was simply no probative evidence that employers engage in the practice which the provision seeks to prohibit in a way which is unfair to existing employees. Second, the evidence demonstrated that for employers other than quite small businesses, the provision would be highly impracticable and would impose an unnecessary administrative burden. It would appear to require an employer in any case where additional hours of work were needed to be performed, perhaps urgently, to contact each existing casual or part-time capable of performing the work to offer them the hours before engaging a new casual or part-time employee. This would obviously be onerous where an employer had a large number of such employees, and the employer would have to discharge the obligation even if the employer understood the employee was usually unavailable because of other commitments. Third, the provision privileges existing employees over prospective employees in a way which may not be consistent with promoting workplace participation and social inclusion.

[412] In relation to paragraph (c), the evidence did not demonstrate that casual employees, on engagement, were not provided with sufficient information about the type of their employment and their pay rate in order to be able to understand the nature of their employment and to enforce their award entitlements. The effect of the requirements for the content of payslips prescribed by reg 3.46 of the *Fair Work Regulations 2009* is that casuals would have identified on their payslips their hourly rate of pay and their casual loading. We do not think that it is fair or practicable to require the employer to identify the likely number of hours that a casual is required to perform each week, since an employer who uses casual employees to perform intermittent and variable work will simply not be in a position to make any prediction about future hours of work, and should not be made liable to a civil penalty for breach of an award if they cannot do so.

[413] The further ACTU model clause is therefore rejected.

4. HOSPITALITY AWARDS

4.1 AHA/MIMA/AAA claim

[414] AHA, MIMA and AAA (collectively the Hospitality Associations) have sought variations to the part-time employment provisions of the *Hospitality Industry (General) Award 2010* (Hospitality Award) to permit greater employer flexibility in the rostering of working hours. The Hospitality Associations contend that the current part-time provisions, which require that ordinary hours are to be fixed at the commencement of employment and thereafter changed only by written agreement, are unworkable and rarely utilised in the hospitality industry because there is insufficient flexibility to allow employers to meet fluctuating and variable work demands. This, the Hospitality Associations contend, is a major reason for the high degree of casualisation in the sector.

[415] Clause 12 of the Hospitality Award currently provides:

“12. Part-time employment

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

12.2 A part-time employee is an employee who:

- (a) works less than full-time hours of 38 per week;
- (b) has reasonably predictable hours of work; and
- (c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

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

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

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

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

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

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

[416] The Hospitality Associations have proposed that clause 12 be varied to provide:

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

12.2 A part-time employee is an employee:

(a) Whose ordinary hours are between either:

(i) 3 hours and 37 hours per week (inclusive); or

(ii) 12 hours and 148 hours over a four week period (inclusive); and

(b) Who receives either:

(i) at least two days off each week, which must be the same days each week; or

(ii) if the ordinary hours are less than 19 per week (or 76 per four week period), at least three days off each week which must be the same days each week; and

(c) Who receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who are employed within the same classification.

12.3 Arrangements for work

(a) At the time of engagement the employer and the part-time employee will agree in writing on the arrangements for work specifying:

(i) Whether the part-time employee will work over a one week or four week period;

(ii) The part-time employee’s ordinary hours of work over the one week or four week period; and

(iii) Subject to clause 12.2 (b), the days upon which the part-time employee’s ordinary hours can be rostered over the one week or four week period.

(b) The matters addressed in clause 12.3 (a) may be varied by agreement. Any agreed variation must be recorded in writing.

NOTE: Please refer to clause 29.2 for the daily minimum and maximum hours applicable to part-time employees.

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

12.5 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20—Minimum wages, for the work performed subject to clause 32 – Penalty rates.”

[417] Clause 29.2 of the Hospitality Award sets out the ordinary hours of work for part-time employees as follows:

“29.2 Part-time employees

A part-time employee’s regular pattern of work must meet the following conditions:

(a) A minimum of three hours and a maximum of 11 and a half hours may be worked on any one day. The daily minimum and maximum hours are exclusive of meal break intervals.

(b) An employee cannot be rostered to work for more than 10 hours per day on more than three consecutive days without a break of at least 48 hours immediately following.

(c) No more than eight days of more than 10 hours may be worked in a four week period.

(d) Where broken shifts are worked the spread of hours can be no greater than 12 hours per day.”

[418] The Hospitality Associations propose that the first line of the clause be replaced with “*A part-time employee’s ordinary hours of work are to be worked in accordance with the following conditions:...*”

[419] Clause 33.2(b) of the Hospitality Award provides when a part-time employee is entitled to overtime rates and relevantly provides:

“33.2 Entitlement to overtime rates

...

(b) A part-time employee is paid at overtime rates in the circumstances specified in clause 12.7.”

[420] The Hospitality Associations propose that clause 33.2 be amended to read:

“(b) A part-time employee is paid at overtime rates for any work performed:

(i) in excess of the ordinary hours agreed to under clause 12.3(a); or

(ii) on the days falling outside of those agreed under clause 12.3(a)(iii); or

(iii) outside of the conditions in clause 29.2.”

4.2 Clubs Australia Industrial claim

[421] CAI has advanced a claim in respect of part-time time employment in the *Registered and Licensed Clubs Award 2010* (Clubs Award). It has sought to replace the current substantive provision contained at clause 10.4(a) with a provision based on the part-time clause of a former NSW State Award, the *Clubs Employees (State) Award*, which subsequently became part of a NAPSA which came into effect after the enactment of the Work Choices Act and was then preserved in a transitional provision in the Clubs Award until 31 December 2014 (when it was removed in accordance with s.154 of the FW Act).

[422] Clause 10.4 of the Clubs Award currently provides:

“10.4 Part-time employment

(a) Substantive provision

(i) An employer may employ part-time employees in any classification in this award.

(ii) A part-time employee is an employee who is employed in a classification in Schedule C—Classification Definitions and who:

- is engaged to work fewer than 38 ordinary hours per week or, where the employer operates a roster, an average of fewer than 38 hours per week over the roster cycle;
- has reasonably predictable hours of work; and
- receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

(iii) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work either:

- specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day; or
- specifying the roster that the employee will work (including the actual starting and finishing times for each shift) together with days or parts of days on which the employee will not be rostered.

(iv) Any agreed variation to the regular pattern of work must be recorded in writing.

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

(vi) All time worked in excess of the employee's agreed ordinary time hours will be overtime and paid for at the rates prescribed in clause 28—Overtime.

(vii) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.

(viii) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.

(b) Interim provision

In respect of part-time employees engaged prior to 1 January 2015, the following provisions will also apply:

(i) the pattern of ordinary hours of work for any such employee may, notwithstanding clauses 10.4(a)(iii) and (iv), be set by a roster established in accordance with clause 25—Roster; and

(ii) where the pattern of ordinary hours is set by such a roster, any hours worked in addition to the rostered ordinary hours will be overtime and paid for at the rates prescribed in clause 28—Overtime.”

[423] The claim in the form ultimately advanced by CAI was that clause 10.4 be varied to provide:

“10.4 Part-time employment

(i) An employer may employ part-time employees in any classification in this award.

(ii) A part-time employee is an employee who is employed in a classification in Schedule C—Classification Definitions and who:

- is engaged to work no less than 32 and not more than 148 hours in a 4 week cycle.
- has reasonably predictable hours of work; and
- receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

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

(iv) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.

(v) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.

(vi) the pattern of ordinary hours of work for any such employee may, be set by a roster established in accordance with clause 25—Roster; and (vii) any hours worked in addition to the rostered ordinary hours will be overtime and paid for at the rates prescribed in clause 28—Overtime.”

4.3 United Voice claims

[424] United Voice has proposed that the Clubs Award, Restaurant Award and the Hospitality Award (collectively the Hospitality Awards) be varied to establish that casual employees be paid overtime penalty rates in circumstances where the employees have worked in excess of 38 hours per week or 10 hours per day.

[425] Clause 10.5 of the Clubs Award set outs the provisions relating to casual employment:

“10.5 Casual employment

(a) A casual employee is an employee who is engaged and paid as such.

(b) Casual loading

Casual employees will be paid the percentage at the ordinary hourly rate for the classification in which they are employed as prescribed in clause 29.1, which includes a 25% casual loading. The late and early work penalty prescribed in clause 29.4 for work between Monday to Friday also applies to casual employees.

(c) Casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

(d) On each occasion a casual employee (other than a casual employee engaged solely as a bingo caller or assistant bingo caller) is required to attend work the employee is entitled to a minimum payment for two hours’ work. A casual employee engaged solely as a bingo caller or an assistant bingo caller is entitled to a minimum payment for three hours’ work.”

[426] United Voice proposes (b) of clause 10.5 be varied to provide:

“(b) Casual loading

Casual employees will be paid the percentage at the ordinary hourly rate for the classification in which they are employed as prescribed in clause 29.1, which includes a 25% casual loading. The late and early work penalty prescribed in clause 29.4 for work between Monday and Friday also applies to casual employees. Where casual employees are entitled to overtime, the overtime rate of pay is paid.”

[427] It also proposes that a new paragraph (e) be added which specifies when a casual employee is entitled to overtime payments:

“(e) Casual employees are paid at overtime rates for:

- (i) all time worked in excess of 38 hours per week; or
- (ii) all time worked which exceeds 10 hours per day.”

[428] Clause 28 of the Clubs Award relevantly provides:

“28. Overtime

28.1 An employer may require any full-time or part-time employee to work reasonable overtime at overtime rates.

28.2 All time worked in excess of the hours and/or outside the spread of hours or outside the rostered hours prescribed in this award will be overtime and will be paid for at the following rates:

- (a) Monday to Friday inclusive—time and a half for the first two hours and double time for all work thereafter;
- (b) between midnight Friday and midnight Saturday—time and three-quarters for the first two hours and double time for all work thereafter;
- (c) between midnight Saturday and midnight Sunday—double time for all time worked;
- (d) all work performed on a public holiday—double time and a half for all time worked, with a minimum payment of four hours at the rate of double time and a half;
- (e) all work performed on an employee’s rostered day off—double time, with a minimum payment of four hours at the rate of double time.

...

28.7 A full-time or regular part-time employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work will be either supplied with a meal by the employer or be paid the allowance prescribed in clause 18.1(a)(i).”

[429] United Voice proposes that the following new paragraph (f) be added to clause 28.2:

“(f) casual employees are paid overtime at the same rate as applicable to permanent employees.”

[430] Clause 33 of the Hospitality Award relevantly provides:

“33.1 Reasonable overtime

(a) Subject to clause 33.1(b) an employer may require an employee other than a casual employee to work reasonable overtime at overtime rates.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to the employee’s health and safety;

(ii) the employee’s personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and

(v) any other relevant matter.

33.2 Entitlement to overtime rates

(a) A full-time employee is paid at overtime rates for any work done outside of the hours set out in clause 29—Ordinary hours of work.

(b) A part-time employee is paid at overtime rates in the circumstances specified in clause 12.7.

33.3 Overtime rates

(a) The following overtime rates are payable to an employee, depending on the time at which the overtime is worked:

(i) Monday to Friday: 150% of their normal rate of pay for the first two hours of overtime; and twice their normal rate of pay for the rest of the overtime.

(ii) Between midnight Friday and midnight Sunday: twice their normal rate of pay for any work done.

(iii) On a rostered day off: twice their normal rate of pay for any work done. An employee must be paid for at least four hours even if they work for less than four hours.

(b) The four hour minimum payment does not apply to work which is part of the normal roster which began the day before the rostered day off; or when overtime worked is continuous from the previous day’s duty.

(c) Overtime stands alone

Overtime worked on any day stands alone.

...”

[431] To give effect to the United Voice claim, it is proposed that clause 33.1(a) be varied to specify that when a casual employee is required to work overtime, such time worked is payable at overtime rates:

“(a) Subject to 33.1(b) an employer may require an employee to work reasonable overtime at overtime rates.”

[432] In respect of clause 33.2 United Voice proposes that a new paragraph (c) be added to specify when overtime rates are payable for casual employees:

“(c) A casual employee is paid at overtime rates for any work:

(i) in excess of 38 hours per week; or

(ii) which exceeds 10 hours per day.”

[433] Clause 33.3(a) would also be varied to include a reference as to how overtime rates shall be calculated for a casual employee, by inserting a new paragraph (iv):

“(iv) In the case of a casual employee the normal rate of pay will be their rate of pay exclusive of the casual loading.”

[434] United Voice has also proposed that clause 13.1 be varied to include an express reference that in addition to being paid the 25% casual loading, casual employees are entitled to overtime payments:

“13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25% or overtime as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment.”

[435] These claims were all advanced on the basis that casual employees, when working in excess of ordinary hours in a day or week, are subject to the same disabilities as full-time employees and should likewise receive overtime penalty rates. Currently they do not.

[436] Very late in the proceedings, United Voice also advanced a claim that the minimum daily engagement period for casual employees in each of the 3 hospitality awards should be increased from 2 hours to 3 hours (in the alternative to the ACTU’s claim for 4 hours in all awards), to align with the minimum engagement period for part-time employees, and that the daily maximum ordinary hours for full-time and part-time employees under each award should be equalised at 10 hours.

4.4 AHA/MIMA/AAA evidence

Rosario Leonardi

[437] Mr Rosario Leonardi³⁴² was the Human Resources Manager at Aspen Parks Property Management Pty Ltd (Aspen Parks). Aspen Parks operated 26 holiday parks across Australia that offer caravan and campervan sites, cabin and self-contained accommodation, camping sites and a range of associated services and facilities. Aspen Parks employed 29 full-time employees, 13 part-time employees and 233 casual employees across all its properties. Mr Leonardi gave evidence that the transient and seasonal nature of the industry made it very difficult to forecast labour requirements for part-time employees for set days, and the current award part-time provisions were too inflexible to manage the capricious nature of the industry. Aspen Parks supported the Hospitality Associations' proposed part-time employment provision, as it would be mutually beneficial to both Aspen Park and its employees. In cross-examination, Mr Leonardi said that Aspen Parks would prefer part-time employees because of the simplicity and stability they provide compared to casuals, who had the right to refuse a shift that was offered to them. Part-time employment would also be attractive in rural areas that did not necessarily have much stable work.

Elizabeth Cleaves

[438] Ms Elizabeth Cleaves³⁴³ was the Director of Human Resources of the Greenland (Sydney) Pitt Street Hotel Pty Ltd t/a Primus Hotel (Primus). Primus formed part of the Greenland International Hotel Group (the Group), which was a Chinese state-owned business. The Group currently owned 70 hotels in China, and was planning on opening 5 new hotels by the end 2020 under the brand name of Primus Hotels. The first of these was Primus Sydney, which opened in December 2015. Primus employed 53 full-time employees, 40 casual employees and no part-time employees at the time Ms Cleaves gave her evidence.

[439] Ms Cleaves gave 4 reasons as to why there were no part-time employees employed by Primus. First, the part-time employment provision in the Hospitality Award required that at the outset of employment, an employer must contract with an employee to work set days and hours of work including starting and finishing times. Second, anything outside of those fixed hours of work must be paid at overtime rates. Third, the award provisions created additional administrative costs in writing and signing-off on a new contract on each occasion that the parties wanted to alter the pattern of work. Fourth, Ms Cleaves' belief was that Primus could not employ a part-time hotel manager under the award's annualised salary provision. Primus could not always predict an employee's days and hours of work, and the hotel needed flexibility to be able to draft rosters in accordance with the changing needs of the business. If part-time employment under the Hospitality Award was more flexible, she would be open to employing part-time employees. Primus' view was that the Hospitality Associations' claim was an opportunity for Primus to diversify its workforce by adding part-time employees. During cross-examination Ms Cleaves accepted that casual employees were usually willing to work whenever asked, and the main reason why she would employ part-time employees as

³⁴² Witness statement – 12 October 2015, Exhibit 199; Oral evidence – Transcript 12 July 2016 at PN1477–PN1568

³⁴³ Witness statements – 12 October 2015, Exhibit 200; 8 July 2016, Exhibit 201; Oral evidence – Transcript 12 July 2016 at PN1570–PN1704

opposed to casual employees was for retention purposes, as casual employees in her experience had a high rate of turnover.

Christopher Gatfield

[440] Mr Christopher Gatfield³⁴⁴ has been employed by the AHA in New South Wales as a Policy and Research Officer for approximately 11 months. He conducted a survey on behalf of the AHA concerning part-time employment in September–October 2015. There were 613 responses to the survey, with 455 complete responses, representing 1616 venues.

[441] The results were expressed in charts as annexures to Mr Gatfield's statement. They included the following:

- 35.6% of the respondents were in NSW, 29.9% in Victoria, 18.7% in Queensland and the remaining 15.8% from other parts in Australia.
- The venue type of the respondents were 64.4% hotels/pubs, 40.9% hotels/accommodation, and the others were from motels, resorts, serviced apartments, small bars/venues, casinos, caravan parks or other (the respondents could indicate more than one type of venue).
- Where the employer was covered solely by the Hospitality Award, 65.8% of employees were casual employees, 30.6% were full-time employees and only 3.6% were part-time employees.
- Where the employer was solely covered by an enterprise agreement, 35.6% of employees were full-time employees, 42.2% were casual employees and 21.9% were part-time employees.
- Where the employer was covered by the Hospitality Award and an enterprise agreement, 35.9% of employees were full-time employees, 49.9% were casual employees and 14.2% were part-time employees.
- In organisations that owned only one venue, if the Hospitality Award applied, part-time employment was only 5.1% of all employment, whereas if an enterprise agreement applied, part-time employees was 35.3% of all employees, and if both the Hospitality Award and an enterprise agreement applied, part-time employees were 44.3% of the total.
- For organisations with 2 venues, the corresponding figures were 2.9%, 23.8% and 38.3% respectively.
- For organisations with 3–5 venues, the corresponding figures were 4.8%, 32.6% and 59.7% respectively.
- For organisations with 6 or more venues, the corresponding figures were 2.4%, 6.3% and 44.6% respectively.

³⁴⁴ Witness statement – 12 October 2015, Exhibit 202; Oral evidence – Transcript 12 July 2016 at PN1712–PN1781

- The majority of part-time employees were female between the ages of 25–34, and the next largest demographic group of part-time employees was females aged 18–24.
- In the reasons given by respondents for not employing part-time employees, 62.3% chose the answer “*award term and conditions not suitable or flexible enough for the organisation*”, 39.2% chose “*overtime rates*”, 35.5% chose “*number of hours*”, 31.9% chose “*labour costs*” 15.9% chose “*type of work available*” and 8.3% chose “*other*”.³⁴⁵
- In the reasons given by respondents who had entered into an enterprise agreement for doing so, 44.8% chose the answer “*gain flexible part-time employment provisions*”, 41.4% chose “*flexible overtime provisions*”, 28.7% chose “*penalty rate structures*”, 25.3% chose “*consolidate employees under one industrial instrument*”, 24.1% chose “*creation of multi-hiring provisions*” and 5.7% chose “*other*”.³⁴⁶

Robert Woods

[442] Mr Robert Woods³⁴⁷ was the Director of Largs Hotel Pty Ltd, which operates the Bushranger Bar and Brassiere (Bushrangers). Mr Woods is the Licensee. As at 30 September 2015, Bushrangers employed a total of 24 employees with 13 of those employees being full-time employees and 11 being casual employees. There were no part-time employees.

[443] Mr Woods said that he determined the days and times that employees were required to work in advance over a roster period, and he based those days and times on operational forecasts such as restaurant and function bookings. He said that Bushrangers required the ability to be able to adjust an employee’s roster to align with the operational needs of the business on a week to week basis, and the part-time provision in the Hospitality Award restricted his ability to do so. He said that if the award was amended in accordance with the clause proposed by AHA, he would most definitely employ some new employees on a part-time basis where appropriate. In cross-examination, he explained that although the proposed clause still required a set number of hours per week or over a 4-week period, it would be more suitable because it gave him “*the tools to manage it*”.³⁴⁸ In particular it would allow additional hours worked in one week to be balanced out with a reduction in hours the following week, so that over the roster cycle there would be no requirement to pay overtime.

Joanne Blair

[444] Ms Joanne Blair’s³⁴⁹ evidence in relation to the common claims has been summarised in detail in Chapter 3 of this decision. She also gave evidence in support of the AHA’s claim for the Hospitality Award. She said that 75% of her business’s employees were casually employed, and that the part-time employment provision in the Hospitality Award was “*too*

³⁴⁵ Witness statement – 12 October 2015, Exhibit 202 at Annexure I

³⁴⁶ Witness statement – 12 October 2015, Exhibit 202 at Annexure J

³⁴⁷ Witness statement – 11 October 2015, Exhibit 203; Oral evidence – Transcript 12 July 2016 at PN1787–PN1914

³⁴⁸ Transcript 12 July 2016 at PN1848–PN1850

³⁴⁹ Witness statements – 11 October 2015, Exhibit 122; 14 March 2016, Exhibit 123; Oral evidence – Transcript 23 March 2016 at PN10163–PN10411

*inflexible*³⁵⁰ and “*not compatible with the operational requirements at the Venues*”.³⁵¹ During cross-examination she confirmed that the main problem was not that she did not have enough hours of work to meet a part-time guarantee of hours, but rather that there was no flexibility as to when those hours could be rostered to suit the needs of the business.

Darren Brown

[445] Mr Darren Brown’s³⁵² evidence concerning the common claims is summarised in Chapter 3. In relation to the AHA’s part-time employment claim, Mr Brown gave evidence that his business, the Shoreline Hotel, had approximately 52% casual employees and no part-time employees. This was due, he said, to the requirement in the Hospitality Award for a part-time employee’s hours of work and days of work including starting and finishing times to be fixed in advance. He referred in his evidence to a full-time employee who wanted to work part-time hours. Because of the inflexibility in the part-time provision in the Hospitality Award, it was mutually agreed for her to become a casual employee.

Paul Stocks

[446] Mr Paul Stocks’³⁵³ evidence concerning the common claims is also summarised in Chapter 3. In relation to the AHA’s claim, he said that his business, the Kelly’s Motor Club Hotel, had 83% of its employees casually employed because the part-time provisions in the Hospitality Award were “*too rigid and offer[ed] no flexibility to adjust times and days that an employee can work to match the fluctuations in trade*”.³⁵⁴ He said that relying on casual employees was not ideal as they have the right to decline shifts, even though some of the longer serving casuals had more or less the same hours on every roster. He stated that these employees enjoyed the flexibility as they were either parents or students.

4.5 Clubs Australia Industrial’s evidence

Lesley Thompson

[447] Ms Lesley Thompson³⁵⁵ was a part-time waitress at the Campbelltown Catholic Club. She is covered by the *Campbelltown Catholic Club Employees Enterprise Agreement*. She said she worked approximately 20–25 hours a week, on an average of 2 day shifts and 4 night shifts. However the days and shifts she worked fluctuated per roster cycle. Ms Thompson had previously worked as a casual, and states that she was never guaranteed reliable hours each month and could not plan for her future, holidays or sick leave. She preferred working part-time as it allowed her to take care of her grandchildren 3 days a week. The club rostered her around her personal needs and gives her the opportunity to work nights. Sick leave entitlements were also important to her, as they enabled her to care for herself and her family,

³⁵⁰ Witness statement – 11 October 2015, Exhibit 122 at para 11

³⁵¹ Witness statement – 11 October 2015, Exhibit 122 at para 12

³⁵² Witness statements – 9 October 2015, Exhibit 126; 23 February 2016, Exhibit 127; Oral evidence – Transcript 23 March 2016 at PN10421–PN10524

³⁵³ Witness statements – 10 October 2015, Exhibit 128; 23 February 2016, Exhibit 129; Oral evidence – Transcript 23 March 2016 at PN10532–PN10629

³⁵⁴ Witness statement – 10 October 2015, Exhibit 128 at para 11

³⁵⁵ Witness statement – 9 October 2015, Exhibit 192

and she was able to go on holidays knowing that she is also able to pay for bills and have job security. It was Ms Thompson's judgment that if the part-time provisions that apply to employees were to change in the future and restrict flexibility for staff in a manner which made it easier to hire more casuals and reduce part-time hours, it would be a struggle for Ms Thompson to find another job at her age that would suit her family's needs.

Maree Sophocleous

[448] Ms Maree Sophocleous³⁵⁶ was also employed at the Campbelltown Catholic Club as a part-time banking attendant under the *Campbelltown Catholic Club Employees Enterprise Agreement*. On average Ms Sophocleous worked about 24–30 hours per week and she worked set days and hours. However her roster could change and if it did she was given 2 weeks' notice. She was able to work additional hours/days if required, and she could change her availability by notifying the rostering manager. It was important to Ms Sophocleous for her to retain her part-time permanent position for job security, annual leave, sick leave, and to assist in providing her with the flexibility to attend her carer's responsibilities as she is the sole carer for her ageing mother.

Colette Williams

[449] Ms Collette Williams³⁵⁷ was also employed at the Campbelltown Catholic Club as a gaming/bar attendant under the *Campbelltown Catholic Club Employees Enterprise Agreement*. As a bar/gaming attendant, her hours could vary depending on the business' needs. In a typical week she worked 35–40 hours. If her rostered hours ever needed to be changed, her employers always asked whether she could accommodate the change. The rosters were usually posted 2 weeks in advance.

[450] As the mother of 2 children, it was important to Ms Williams to have a permanent part-time position rather than be employed as a casual. She had the flexibility to work the hours she normally worked and does not miss anything that her children required such as driving them to school or after school activities. Ms Williams also said that she relied on her paid annual leave, as her family all lived in New Zealand. In September 2015 she needed to fly to New Zealand as her father was critically ill with cancer, and she was able to do so knowing that she still had job security. The provisions Ms Williams worked under suited her and her family and she did not want them to be changed.

Denis Kildare

[451] Mr Denis Kildare³⁵⁸ was the Workplace Relations Manager for the Licenced Clubs Association of South Australia Inc (Clubs SA). He represented licensed clubs in South Australia on behalf of Clubs SA on all industrial matters ranging from advice on pay rates through to representing clubs at conciliation and arbitration at the Commission, Federal Court and South Australian Industrial Court. He said that clubs in South Australia mainly hired full-time or casual employees. There were very few part-time employees employed by the SA

³⁵⁶ Witness statement – 8 October 2015, Exhibit 193

³⁵⁷ Witness statement – 8 October 2015, Exhibit 194

³⁵⁸ Witness statement – 12 October 2015, Exhibit 195

clubs and those who were part-time were predominantly employed as clerical officers where they could work standard “office hours”³⁵⁹ with very little need for payment of penalty rates.

[452] Mr Kildare said that the majority of clubs in South Australia utilised casual employees on the food, beverage and gaming side of their business, because this allowed clubs greater flexibility in rostering in accordance with the specific operational needs of the business. He said that since South Australia’s economy had slowed down, long standing casual employees were looking for a greater sense of security in their employment options, and he was aware of a number of applications from casuals engaged in systematic and regular work seeking conversion to part-time employment. He also states that a similar situation had been happening with his counterparts in the AHA with whom he met on a weekly basis.

[453] He said clubs in South Australia had very low rates of part-time employment as the nature of the hospitality industry made it extremely difficult to provide set days and hours of work for all employees. Their main business revolved around events, sporting activities and the like. In South Australia approximately 98% of licenced clubs had less than 40 employees, and only approximately 12% of those clubs opened for business 7 days per week. Mr Kildare suggested that there needed to be a greater deal of flexibility for clubs and their employees.

Karen Giles

[454] Ms Karen Giles³⁶⁰ was the Chief Executive Officer of Clubs Western Australia (Clubs WA). There were over 900 licenced clubs in Western Australia. Approximately 450 of these clubs operated with a full club licence, which typically indicated that they operated from their own facility, were larger in size and were generally better resourced in all areas. The other licenced clubs operate under a restricted club licence, meaning they were likely to operate from a shared community facility. A study conducted in 2009 found that 6000 persons were employed by licensed clubs in WA, comprised of around 1700 full-time employees (29%), 1400 part-time employees (23%), 2600 casual employees (44%), 79 trainees (1.3%) and 150 apprentices (2.7%). A National Club Census undertaken in 2011 indicated 59% of employees within the clubs community in Western Australia were casual compared to only 13% being part-time.

[455] A NAPSA derived from the previous State award was the main industrial instrument covering the club industry in Western Australia prior to the commencement of the Clubs Award. Clubs in Western Australia had traditionally embraced the casual provisions in the Clubs Award because many of the clubs operated very strongly over particular seasons and then suffered a drop in trading after that, making it impossible to ensure that part-time employees would always receive the minimum 20 hours over a fortnight. Ms Giles said that the significant additional restrictions did not create any incentive for clubs in WA to engage part-time employees and, if anything, the current percentage of part-time employment was expected to decrease. The part-time provisions proposed by the CAI would provide a greater deal of flexibility for both clubs and their employees. Ms Giles was of the view that these provisions would recognise the needs of club employees and also the fluctuating operational needs of clubs in Western Australia.

³⁵⁹ Witness statement – 12 October 2015, Exhibit 195 at para 6

³⁶⁰ Witness statement – 29 September 2015, Exhibit 196

Walter Lee

[456] Mr Walter Lee³⁶¹ was the Workplace Relations Business Manager of the Registered and Licenced Clubs Association of Queensland, Union of Employers, which traded as Clubs Queensland (Clubs Qld). Clubs Qld had approximately 480 registered and licensed clubs members ranging from RSL and Services clubs through to sporting and other clubs. Clubs in Queensland overwhelmingly traded over 7 days, including evenings, and operated so as to meet the varying demands for service by members, guests and visitors, day to day.

[457] A report prepared by KPMG on the economic and social contribution of licenced clubs in Queensland showed that 26% of employees were full-time employees, 18% were part-time and 54% were casual. Mr Lee said that although there were part-time employees in Queensland, in his experience he had found that there was a proportionately lower incidence of part-time employment in clubs than full-time employees or casual employees. A significant reason for this according to Mr Lee was that award part-time provisions made it costly to achieve hours arrangements that were sufficiently flexible to meet operational demands that change from day to day. As a consequence, it had been more attractive to engage employees as casuals to meet these changing operational requirements.

[458] Mr Lee said there were disadvantages in not having flexible part-time provisions in the Clubs Award. Workforce planning to meet varying operational demands was much more difficult when availability of staff had to be confirmed on each and every occasion an employee was engaged. Also, casual employees were generally less committed to the business in terms of availability than their part-time or full-time counterparts. Mr Lee's view was that the CAI's proposed provisions would provide a greater deal of flexibility for both clubs and their employees than was currently provided. These or like provisions would assist clubs in Queensland to deliver more flexible and high quality services, simplify administration and provide more certainty for employees in relation to the nature of their engagement, their remuneration and their work commitments.

Melissa Faddy

[459] Ms Melissa Faddy³⁶² was a part-time employee at the Revesby Workers' Club. She worked as an Executive Assistant, and her employment was covered by the Clubs Award. Ms Faddy worked every Monday, Tuesday, Wednesday and Friday at set hours each week for a total of 32 hours per week, unless there was a board meeting or she needed to make any adjustment. She had never been a casual employee, and she chose to work part-time for a number of reasons including limited childcare availability. She could not consider full-time employment until such time as childcare arrangements could be made for all of her children attending school. It was important for Ms Faddy to be employed in a permanent capacity because it provided her security and made her feel a part of the team, whereas as a casual she would not. Even though Ms Faddy had set days of work, she felt as though she had flexibility in her working arrangement, and if she had appointments or events during her "*normal*" working hours, she simply informed her manager in advance, as she had her roster set 2 weeks in advance.

³⁶¹ Witness statement – 2 October 2015, Exhibit 197

³⁶² Witness statement – 7 October 2015, Exhibit 198

Richard Tait

[460] Mr Richard Tait³⁶³ was the Executive Manager of Workplace Relations for the Registered Clubs Association of New South Wales (Clubs NSW), and also holds the position of Executive Director of CAI. Clubs NSW is the registered union of employers for clubs in NSW and is the industry's peak representational body in NSW. There were approximately 1400 not-for-profit registered clubs in NSW spread across metropolitan and regional areas, comprised of 32% bowling clubs, 20% RSL clubs, 18% sporting/recreation clubs, 16% golf clubs, 5% leagues/football clubs, 3% cultural/religious clubs, 2% community/workers clubs and 4% other workers clubs. The NSW Club Census made findings that were published in April 2012 that 91% of clubs in NSW were small to medium sized organisations. In 2011, there were approximately 41,300 people employed in clubs in NSW. The gender distribution was 54% female employees and 46% male employees.

[461] State award part-time employee provisions for clubs in NSW had been very restrictive up until 1999. The industry had been seeking more flexible, secure and stable part-time provisions since the mid-1990s. In 1998, Clubs NSW, the ALHMWU (as United Voice was then) and the NSW Government undertook a tripartite report into creating such part-time provisions. The report recognised the need to improve flexibility, security and stability for both clubs and their employees. This led to the part-time employment provisions in the applicable State Award, *Clubs Employees (State) Award*, being varied by consent to phase out part-time loadings and to provide greater flexibility in the span of hours of work. After this change, approximately one-third of the casual workforce in Clubs NSW converted by choice to part-time employment within the first 6 months post-1999. Since then the provisions had worked incredibly well over a 15 year period (including when the State award became a NAPSA after the Work Choices Act). From the introduction of the Hospitality Award to the end of 2014, clubs in NSW have had the benefit of the transitional provisions.

[462] From around 2009, there had been approximately 125 enterprise agreements that Clubs NSW had directly negotiated on behalf of the clubs in NSW, and United Voice had never raised any issue about the flexible part-time provisions in those agreements. Over the last 5 years, Mr Tait stated that the feedback he had received regarding the standard (non-transitional) part-time provisions in the Clubs Award was that they were too inflexible and operationally too challenging to be utilised. Specifically, the feedback expressed concern at the rigidity of setting a pattern of work for part-time employees that could only ever be changed by consent. This created operational challenges for clubs that were seasonal and were subject to unexpected factors. Under the provisions derived from the former State award, clubs could change the pattern of work with each new roster that was posted, with the protection for employees being that once a roster was posted, changes could only be made by mutual consent or with appropriate notice. Mr Tait said the feedback he had received from part-time employees was that they were being provided with a regular pattern of work when they commenced employment, and that this fluctuated slightly in accordance with the demands of members and more often than not because of requests from employees themselves.

³⁶³ Witness statements – 12 October 2015, Exhibit 205; 6 July 2016, Exhibit 206; Oral evidence – Transcript 12 July 2016 at PN1934–PN2078

[463] Mr Tait's view was that if the flexibility of part-time employment was maintained, the majority of clubs would prefer to reward and recognise staff with the security of part-time employment. If the flexibility was not in the Clubs Award, Mr Tait warned, there was no incentive for clubs to employ part-time employees, as they would gain the necessary flexibility with casual employees. He said that since the transitional part-time provisions were removed from the Clubs Award at the end of 2014, clubs had significantly changed their recruitment strategies by employing fewer part-time employees and more casual employees.

Rachel Ferris

[464] Ms Rachel Ferris³⁶⁴ was the Human Resources Manager of the Castle Hill RSL Club Limited (Castle Hill Group) in NSW, which is constituted by a number of clubs, the largest being the Castle Hill RSL. The Castle Hill Group has approximately 530 employees. Prior to the July 1999 State Award restructure, the workforce was comprised mostly of casual employees (60%), with only 17% being full-time employees and 15% being part-time employees. Post July 1999, the casual labour percentage was progressively reduced to 23% and the part-time labour increased to 60%. Ms Ferris said that some of the part-time employees had set rosters, but the majority (over 60%) were quite fluid, meaning that their hours and roles regularly changed as trade levels, special events, employee leave, changing availabilities and unforeseen circumstances occurred. Part-time employees were multi-skilled and had varying availabilities due to study and family responsibilities. The Castle Hill Group ensured that employees' weekly hours preferences were met as closely as possible so as to be an employer of choice. Roster coordinators needed to make alterations to rosters on a daily basis, mainly because of employees requesting shift swaps because of study, family or sporting responsibilities. There were also alterations made to accommodate sick leave, return to work programs and fluctuations in trade. In the main trading areas, it was estimated that there were 25–30 shift changes a week with 90% of those being employee requests. The majority of roster changes were last minute due to the high levels of trade fluctuation in the hospitality industry as well as unplanned shift swaps and sick calls.

[465] Ms Ferris said that part-time employees were more cost efficient when compared to the casual 25% loaded rate from Monday to Friday. The flexibility provided by the part-time provisions derived from the former State Award allowed employees the ability to alter their rosters at short notice. A large proportion of employees were university students or those who had a second job to support their family, and they appreciated that they could accrue sick leave and annual leave entitlements without interrupting their income. From the Castle Hill Group's perspective, flexible part-time provisions provided ease in coordinating staff allocations when changes are necessary which happen almost daily, did not impose the administrative burden of seeking signed change of roster documentation from each employee when a shift was altered, and reduced staff turnover rates. Ms Ferris said that the percentage rate of staff turnover over the past 8 years had dropped from an annual rate of 51% to 26% in 2014/15. However, since the alteration to the Clubs Award provisions from 1 January 2015, only 3 permanent part-time employees had been hired compared to 109 casual staff. This was necessary to reduce excessive overtime caused by frequent changes to part-time rosters. However, employees who were engaged prior to 1 January 2015, still maintain the flexibility.

³⁶⁴ Witness statement – 27 June 2016, Exhibit 207; Oral evidence – Transcript 12 July 2016 at PN2080–PN2166

Paula La Rocca

[466] Ms Paula La Rocca³⁶⁵ was the Human Resources Manager of Canterbury Hurlstone Park RSL Club (Canterbury RSL) in NSW, which had approximately 220 employees. Ms La Rocca gave evidence that prior to the introduction to the flexible part-time provision in the State Award mid-1999, the majority of the Canterbury RSL's workforce was casually employed with only managers and some team members being employed full-time. After the changes in 1999, the Canterbury RSL intentionally changed the status of the workforce to provide job stability. Canterbury RSL has entered into an enterprise agreement to keep flexible part-time employment provisions, but Ms La Rocca was concerned that when this agreement expired, if the provisions could not be continued, Canterbury RSL would probably have to replace many part-time employees with casual employees in order to be able to respond to fluctuating customer demand.

Neill Murray

[467] Mr Neill Murray³⁶⁶ was the Chief Operating Officer of Community Clubs Victoria (CCV), which had approximately 250 member clubs of sporting, cultural, racing and/or social character. Mr Murray said that the club sector in Victoria was different to that in other states, because the clubs and gaming floors tended to be smaller, and thus clubs in Victoria tended to have fewer employees compared to other states. CCV's member clubs employed approximately 17,000 employees, based on the 2011 KPMG National Club Census. The majority of the workforce was female. Mr Murray states said that there was a very low incidence of permanent part-time work in Victoria, solely because the Clubs Award provisions acted as a deterrent. Clubs would not risk trying to maintain an inflexible permanent part-time arrangement as prescribed by the Clubs Award, and so turned to high levels of casual employment to supplement their permanent full-time resources. The award part-time provisions requiring written agreement on hours and rosters in advance, with any hours worked above the agreed hours being paid at overtime rates, was both financially and administratively difficult. It was simpler for clubs to rely on casual labour to top and tail the permanent full-time workforce, and even the 25% casual loading was less of a penalty than employing permanent part-time staff. The new provisions proposed by CAI would facilitate the conversion of many casual employees to permanent part-time employment. Part-time employees would be more connected with their employment, and their greater confidence and certainty would improve their approach to service.

Alan Robinson

[468] Mr Alan Robinson³⁶⁷ was the Employee Relations Coordinator at Ingleburn RSL Sub Branch Club Limited (Ingleburn RSL). Ingleburn RSL employed 71 staff, made up of 16 full-time employees, 14 part-time employees and 41 casual employees. In comparison, in 2009 the club employed 65 staff, 24 full-time employees, 36 part-time employees and 5 casual employees. Mr Robinson stated that the decrease in part-time staff and the increase in casual staff were primarily due to restrictions imposed by the part-time provisions that came into operation on 1 January 2015. The Ingleburn RSL required flexibility when rostering staff,

³⁶⁵ Witness statement – 7 October 2015, Exhibit 209; Oral evidence – Transcript 12 July 2016 at PN2206–PN2337

³⁶⁶ Witness statement – 8 October 2015, Exhibit 211; Oral evidence – Transcript 12 July 2016 at PN2348–PN2398

³⁶⁷ Witness statement – 9 October 2015, Exhibit 301

particularly when catering for short notice functions, and the award provisions did not allow this. As a result, the Ingleburn RSL had not employed any part-time employees since 1 January 2015 compared to 25 casual staff. Since January 2015, some staff had asked to become permanent part-time employees, but the club was currently unable to accommodate any requests as they were unable to maintain the flexibility in services needed.

Krystal Rees

[469] Ms Krystal Rees³⁶⁸ was the Human Resources Manager of Belmont 16ft Sailing Club Ltd (Belmont) in NSW. Belmont employed 59 full-time employees, 30 part-time employees and 69 casual employees. Prior to 1999 Belmont had only one person employed part-time because the State Award provisions which then applied were very restrictive and did not enable Belmont the flexibility in rostering needed to meet the operational requirements of the organisation. When the new part-time provisions were introduced in 1999, part-time positions were created at Belmont when the opportunity arose. 15% of Belmont's workforce was currently part-time, and this was expected to increase to over 20% in the next 3 months.

[470] Ms Rees said that the current part-time provisions under which Belmont operated pursuant to an enterprise agreement provided flexibility to meet the operational requirements of the club, which were seasonal. The club had planned renovations, which meant that it needed to change operating times, and it could accommodate this without having to gain written approval from part-time employees. The majority of part-time employees at Belmont were female (85%), and many had carer's responsibilities or were students. The current provisions provide part-time employees with the flexibility to attend special events and to request days off or night-shifts depending on their circumstances.

Lisa Petrie

[471] Ms Lisa Petrie³⁶⁹ was the Human Resources Manager at the St George Leagues Club (St George). She gave evidence that prior to June 1999, 39% of employees were full-time employees and the remainder (61%) were casual employees. Since the introduction of the State Award part-time provisions, 32.8% were now full-time employees, 19.7% were part-time employees, and 47.5% were casual employees. Ms Petrie attributed this change directly to the introduction of the flexible part-time provisions, which provided many casual employees with the rights that come with permanent employment, but with the flexibility to change their roster regularly to accommodate personal matters. At St George, 90% of changes that were made were made at the part-time employee's request and not by St George. On the rare occasion that St George needed to change the roster, they always provided in excess of 12 hours' notice to change a part-time staff member's shift.

[472] Ms Petrie said that she was informed by her staff that they chose part-time employment to suit their work/life balance and commitments. They fell into 3 main categories: university students, employees with carer's responsibilities and potential retirees who choose to continue to be employed. However St George's recruitment strategy had changed since the introduction of the substantive and inflexible part-time provisions in the Clubs Award in January 2015. St George now employed casuals for the majority of positions.

³⁶⁸ Witness statement – 7 October 2015, Exhibit 214; Oral evidence – Transcript 12 July 2016 at PN2579–PN2751

³⁶⁹ Witness statement – 17 September 2015, Exhibit 215; Oral evidence – Transcript 13 July 2016 at PN2945–PN3207

This did not supply a steady, reliable income for employees, causing concern particularly for more mature employees. 35 casual employees have been employed since January 2015 so St George could have the ability to alter rosters as required St George had engaged only one part-time employee since January 2015, and this was for specific purpose of accommodating a full-time employee who wanted to work part-time hours. Ms Petrie stated that St George did their best to avoid paying overtime in any circumstances and rarely pay it.

Jill Teeling

[473] Ms Jill Teeling³⁷⁰ was the Human Resources Manager of the Campbelltown Catholic Club (CCC). The CCC had 57,000 members and 366 staff. As at June 1999 CCC had 75% of employees engaged as casuals, 25% full-time staff and no permanent part-time staff. This changed post July 1999. All casual staff working more than 8 hours per week signed an agreement to change their status from casual to permanent part-time, with the full support of the union, and 71% of employees were now engaged in a part-time capacity.

[474] At CCC, part-time employees were rostered across all businesses according to availability/capability, with 30% of permanent part-time employees have set shifts and the other 70% having rotating rosters. Ms Teeling emphasised that the rotating roster was important, as it allowed greater opportunity to cross-train staff whilst maintaining operational needs, and it also gave staff the flexibility to accommodate family needs, which in turn created a more harmonious workplace and healthier workplace culture at CCC. Ms Teeling has also found that the more flexible working arrangements were, the less likely employees were to call in sick. Flexible permanent part-time employment was mutually beneficial, since not only did staff feel secure in their jobs but it was also cost efficient as it reduced recruitment costs and the need to consistently train staff. Approximately 64% of the staff was female in CCC's house area, because part-time employment suited carers' responsibilities and/or supplemented the family income.

[475] CCC was covered by an enterprise agreement which would expire in 2018. One of the motivating factors for entering into the original enterprise agreement was to preserve the flexible part-time employment provisions, with the support of United Voice. If the CCC no longer had access to flexible part-time employment provisions, it would have to offer current part-time employees a change to casual employment to retain their usual average hours or alternatively keep them as part-time employees but on reduced hours. Ms Teeling stated that there was little doubt that CCC would revert to the pre-1999 position where no part-time employees were engaged if it had to apply the Clubs Award provisions.

Michelle Best

[476] Ms Michelle Best³⁷¹ was the Finance Manager of Carina Leagues Club (CLC). The CLC employed approximately 127 staff, of which 21 were full-time staff, 2 part-time and 104 casual staff. Ms Best stated that this differed from back in 2012 where there were 29 full-time staff, 8 part-time staff and 73 casual staff making up a total of 110 staff. The CLC employed more casuals because it suited the staff for flexibility, as the part-time conditions were too restrictive in the set days and hours that they had to work, and was inflexible for roster

³⁷⁰ Witness statement – 2 October 2015, Exhibit 217; Oral evidence – Transcript 13 July 2016 at PN3214–PN3390

³⁷¹ Witness statement – 25 September 2015, Exhibit 218; Oral evidence – Transcript 13 July 2016 at PN3406–PN3609

changes and swapping shifts. Ms Best stated that part-time employees were not happy that they were not called in for extra hours and were also not allowed to go home if the CLC was, quiet whereas casual employees were.

[477] The CLC was a 7 day hospitality trading business in which service demand fluctuated greatly and rostering and staffing requirements often changed. The CLC's point of view was that they needed the right mix of qualified permanent part-time employees and casual employees to cover shifts when required and at the right cost of wages. If the CAI's proposed flexible part-time provisions were implemented, the CLC would be able to provide additional hours to part-time employees without having to pay overtime, and staff could swap shifts and have more flexibility with their own needs on the rosters without the CLC having to deny the changes due to the extra costs to replace or change the shift.

Joanne Luke

[478] Ms Joanne Luke³⁷² was the Human Resources Manager of Ryde-Eastwood Leagues Club (RLC). RLC was a medium-to-large club which had approximately 35,000 members with 202 employees made up of 44 full-time employees, 55 part-time staff and 103 casual employees. The part-time provisions the RLC has been utilising for the past 15 years were those derived from the State Award. Prior to the introduction of those provisions in 1999, RLC employed 238 employees made up of 68 full-time employees, 13 part-time employees and 157 casual employees. After the more flexible provisions were introduced in mid-1999, RLC offered a conversion to permanent part-time employment for casual staff, and all but a handful of casual employees voluntarily made the switch as they overwhelmingly preferred the security of more regular hours plus the benefit of permanent employment in terms of financial and employment security. In June 2001, RLC employed 262 employees, which were made up of 62 full-time employees, 113 part-time employees and 87 casual employees. Prior to 1 January 2015, part-time employees could choose a structured monthly roster or a weekly roster, and only one quarter of staff opted for the more structured roster.

[479] Ms Luke said that the RLC anticipated that a move away from flexible part-time provisions would disadvantage their part-time workforce, because fewer hours would be available to be offered, and new staff would only be offered to casual employment. The RLC was already moving from part-time employees to casual employees, and since October 2014 the recruitment strategy of the RLC had changed. The RLC had engaged 50 employees in total since that time, made up of 5 full-time employees, 3 part-time employees and 41 casual employees. Ms Luke said that if the RLC had not been required to implement the standard part-time provisions in the Clubs Award, 15 of those casual employees would have been engaged as part-time employees.

Karen Stansfield

[480] Ms Karen Stansfield³⁷³ was a gaming analyst and gaming attendant at the Ryde-Eastwood Leagues Club (RLC). Ms Stansfield was a part-time employee who had been employed by the RLC for the last 24 years. She said that she had fixed shifts as well as occasional additional hours. She had been a casual employee prior to late 1999 when she

³⁷² Witness statement – 6 October 2015, Exhibit 219; Oral evidence – Transcript 13 July 2016 at PN3612–PN3858

³⁷³ Witness statement – 1 October 2015, Exhibit 221; Oral evidence – Transcript 13 July 2016 at PN3876–PN3911

converted to permanent part-time, and consequently she enjoyed more regular hours week to week and better job security overall, and she was able to care for her daughter when she was sick and take leave during school holidays without losing pay. It was important to her to be permanent part-time as opposed to casual, as her current arrangements gave her regular hours and flexibility around on-going health issues, as she suffered from a back condition and needed to care for her father.

Michaela Hamilton

[481] Ms Michaela Hamilton³⁷⁴ was a gym attendant employed at DOOLEYS Health + Fitness at DOOLEYS Lidcombe Catholic Club (Dooleys). She was employed as a part-time employee under the DOOLEYS *Lidcombe Catholic Club Limited Enterprise Agreement 2010-2014*. Ms Hamilton stated that even though her part-time employment arrangement provided flexibility in the hours and days of work, she had set days and times with the benefit of flexibility when she required it. An average week for Ms Hamilton consisted approximately 18 hours between Sunday and Thursday. She had been casually employed in the past, but preferred part-time employment as she was entitled to annual leave, sick leave and other benefits. Ms Hamilton chose to work part-time as she had 2 young children and a husband who works full-time. She enjoyed the security of guaranteed hours each week whilst having the flexibility to suit her needs through reduced hours of work. Dooleys did not change her roster very often, at worst only once a fortnight. She had never been asked or advised of a change of roster that she had never happily accepted, and her manager never rostered her outside of the hours she had told him she was available for shifts.

Scott Spicer

[482] Mr Scott Spicer³⁷⁵ was the Executive Manager of Human Resources at the Revesby Workers' Club (RWC). RWC has over 65,000 members across its 4 clubs with the main site operating 24 hours a day, 7 days a week. RWC employed 387 employees, made up of 124 full-time employees, 97 part-time employees and 166 casual employees. As a 24/7 operation, many of the overnight staff were students, who were primarily casual rostered depending on their availabilities and 82% of part-time employees at RWC were female. The vast majority of staff commenced as casuals and then could elect to become part-time employees. To encourage and maintain part-time status, Mr Spicer stated that there was long term training, 14 different forms of leave, free uniforms as well as free food and beverages.

[483] Mr Spicer gave evidence that the possible move to more restrictive part-time provisions in the Clubs Award was the catalyst for an enterprise agreement that was made with United Voice. The enterprise agreement was renewed in March 2014. If RWC had to operate under the more restrictive part-time provisions in the Clubs Award, it would be impossible for RWC to maintain the hours of work that the current part-time employees enjoyed, with the result that there would be more casual employees and less part-time employees. Retaining staff would become even more difficult in an industry that was already viewed as being transient.

³⁷⁴ Witness statement – 13 October 2015, Exhibit 222; Oral evidence – Transcript 13 July 2016 at PN3917–PN3982

³⁷⁵ Witness statement – 18 September 2015, Exhibit 223; Oral evidence – Transcript 13 July 2016 at PN4019–PN4156

Gerard Robinson

[484] Mr Gerard Robinson³⁷⁶ was the General Manager of Tweed Heads Bowls Club in New South Wales, which employed 134 staff. Mr Robinson gave evidence that the club had been utilising the flexible part-time provisions derived from the former State Award since 2012, and offered employees the opportunity to convert from casual to part-time employment where possible. Part-time employees employed after 2012 could be rostered for between 8–37 hours per week, and did not have set shifts. Rosters were posted 3 weeks in advance, and changes were by consent or very rarely at the request of the employer. Mr Robinson stated that the flexibility in the Clubs Award part-time provisions was necessary to accommodate unexpected fluctuations in trade and seasonality. He said that losing that flexibility would be detrimental to the business and to the employees, who would need to be moved to casual employment. Mr Robinson said that during the negotiations for the club’s enterprise agreement, neither the union nor the employees requested removal of the flexible part-time provisions.

Carol Jarvis

[485] Ms Carol Jarvis³⁷⁷ was the HR and Return to Work Coordinator for the Revesby Workers’ Club. Ms Jarvis worked part-time, approximately 25 hours per week over 4 days. Having a weekday off had enabled Ms Jarvis to take a friend to chemotherapy treatments, and to manage work done to her home after it was severely damaged during storms in April 2015. Ms Jarvis valued the job security, ability to access paid leave and the flexibility to spend time with her family, which flexible part-time employment offers. During cross-examination by United Voice, Ms Jarvis explained that the 25 hours she worked per week was not the result of an agreement between herself and her employer, but rather a consistent pattern of hours resulting from her availability. She said that there were some weeks where she might work more than 25 hours. Ms Jarvis confirmed that her family budget is based in part upon her working 25 hours per week.

Kristy Gardiner

[486] Ms Kristy Gardiner³⁷⁸ was employed as an Administration Supervisor at Toronto Diggers on a permanent part-time basis. Ms Gardiner had 3 school-aged children and a baby, and requires flexibility in her working hours to enable her to work around her husband’s roster and to maintain financial stability for the family. She said that restrictions to the flexibility of part-time employees would negatively impact upon working parents and their families. During cross-examination by United Voice Ms Gardiner stated that she had a regular pattern of shifts totalling 29 hours per week over 4 weekdays. She was unsure how her employer came to the figure of 29 hours per week. Ms Gardiner said that she was sometimes asked to work additional shifts, and though she could decline to do so, she was happy to work an extra shift if she could because of the financial benefit. If Ms Gardiner was unable to work on a day she is rostered, she was usually permitted to make up those hours at another time. Ms Gardiner also confirmed that her family’s budget was based in part on her working 29 hours per week, and that if her hours dropped she might have to seek additional employment.

³⁷⁶ Witness statement – 7 October 2015, Exhibit 302

³⁷⁷ Witness statement – 1 October 2015, Exhibit 303; Oral evidence – Transcript 17 August 2016 at PN2331–PN2403

³⁷⁸ Witness statement – 12 October 2015, Exhibit 304; Oral evidence – Transcript 17 August 2016 at PN2407–PN2475

Brenda Devine

[487] Ms Brenda Devine³⁷⁹ was employed by Toronto Diggers as a casual cleaner. Prior to September 2014 she had been employed there on a permanent part-time basis. As a part-time employee Ms Devine had worked approximately 25 hours per week, picking up additional hours when requested. Ms Devine said that in September 2014, when the Club’s CEO informed employees about potential changes to the part-time provisions under the Hospitality Award, she had elected to convert to casual employment in order to maintain the hours of work she had been working since 2007. This was because the CEO said extra shifts would be allocated to casuals and not part-time employees in order to avoid the payment of overtime penalty rates. Ms Devine said that as a single mother she relied financially on being able to pick up any additional work that she could, even at short notice. Though casual employment does not provide stability and financial security, Ms Devine said that she could not have afforded any reduction to her hours if the part-time provision became restrictive.

4.6 United Voice’s evidence

Dr Olav Muurlink

[488] Dr Olav Muurlink³⁸⁰ was a senior lecturer in Organisational Behaviour at Central Queensland University and Senior Research Fellow (adjunct) at Griffith University. Dr Muurlink provided an expert report entitled “*Impact of intra-day or intra-week overtime on physical and psychological health*”.³⁸¹ The report examined the physical and psychological impacts of working more than 10 hours in a single day or night shift, and working more than 38 hours in a single 7-day period, with a particular reference to hospitality workers. Dr Muurlink stated in his report that the conclusions drawn relied on a base of international studies chiefly in the field of epidemiology and ergonomics, but also touched on the issue of work-life balance, which he believed is the source of many of the psychological impacts of overwork. The report showed that the hospitality industry is predominantly female which is “*critical in considering health implications*”.³⁸² The industry also had a relatively larger proportion of unusual working hours which may be part of the reason why females, who predominately have family responsibilities, tended to be part of this industry. He gave evidence in his report that there had been a change in the last few decades where females had increasingly worked on weekends in addition to their responsibilities at home, and were more likely to experience time pressure.

[489] Dr Muurlink stated that working excessive hours caused fatigue by triggering physiological reactions in the human endocrine system related to stress. Studies showed that those who work tended to sleep less than those who do not, and fatigue, insomnia and sleep disorders were a precursor to serious social and individual impacts. Fatigue was clearly a key link between overtime and many of the consequences of overtime work, with even moderate fatigue linked in laboratory studies to issues such as reduced self-control and accidents. Cardiovascular disorders were the most prominent physical factors that were affected,

³⁷⁹ Witness statement – 12 October 2015, Exhibit 305; Oral evidence – Transcript 17 August 2016 at PN2482–PN2536

³⁸⁰ Witness statement – 29 February 2016, Exhibit 290; Oral evidence – Transcript 16 August 2016 at PN1419–PN1460

³⁸¹ Witness statement – 29 February 2016, Exhibit 290, Annexure C

³⁸² Witness statement – 29 February 2016, Exhibit 290, Annexure C

however, working in excess of 40 hours was also associated with significant increases in obesity and smoking, spontaneous abortions, pre-term births and mental disorders. For intra-day working, the 8 hour mark appeared to be the tipping point, with increases in everything from chronic fatigue syndrome, back pain, hypertension and accident rates. In regards to women, Dr Muurlink concluded that there were serious implications for female employees with carer responsibilities, and women with those duties were more likely to suffer health and fatigue effects and work-related accidents during overtime.

[490] Dr Muurlink concluded that the literature showed that at the 8 hour (for intra-day working hours) and 40 hour mark (for intra-week working hours), both the physical and psychological risks associated with work rose. The rise at the 10 hour and 48 hour markers respectively, rose steeply, and for physical accident risk (which was an accurate marker of fatigue), the risks were, in his view, at a minimum of 20% higher than at the 7.5 and 38 hour marks, respectively.

Dr Damian Oliver

[491] Dr Damian Oliver³⁸³ was the Deputy Director of the Centre of Management and Organisation Studies at the University of Technology of Sydney. He has produced an expert report entitled “*Characteristics of casual and part-time hospitality employees*”, which includes descriptive analysis of data from the ABS and data from the HILDA survey.

[492] Dr Oliver found that, based on ABS data, the number of casual employees in the Accommodation and food services industry had been increasing at approximately the same rate as the growth in the industry overall, and the proportion of casual employment (defined as employees without paid leave entitlements) had remained fairly constant since 2006. Data from the HILDA survey showed that among hospitality employees, levels of casual employment had been increasing since 2010, with a decline in part-time and full-time employment over the same period. Median hours per week for casual employees had remained fairly consistent during this period at 20 hours per week and there had been more variation for part-time employees, at a maximum of 30 hours and a minimum of 22 hours per week.

[493] Dr Oliver’s report showed that the proportion of casual employees working weekends ranged from 73.9–82.2% between 2004 and 2013, with the proportion of part-time employees who worked weekends ranging from 51.2–74.2%. Casual and part-time employees reported a similar level of multiple job holding. Dr Oliver’s report showed that the hospitality industry was dominated by females, with the median age of 22–25 years if they were casual employees and 28–35 years if they were full-time employees. Fewer than one in 5 casual employees and part-time employees had dependent children. Further, the proportion of casual employees who were full-time students ranged from 26–36.3%, and for part-time employees who were full-time students, the proportion ranged from 8.5–30.2%.

³⁸³ Witness statement – 22 February 2016, Exhibit 289; Oral evidence – Transcript 16 August 2016 at PN1231–PN1410

Elena Marsiglia

[494] Ms Elena Marsiglia³⁸⁴ was currently employed as a part-time housekeeper for AHS Hospitality under the Hospitality Award, and classified as a Guest Service Grade 4 employee. She gave evidence that she worked approximately 30 hours per week, and stated that when housekeeping was outsourced, AHS attempted to cut her hours but United Voice helped to stop this. In her current position she did not do any overtime work, and during the quieter periods AHS asked her to take her annual leave. Ms Marsiglia stated that the benefit of having a permanent job included being able to make plans for the future financially, with securing a mortgage as well as paying other bills. She also gave evidence that having regular hours allowed her to plan her life effectively. In regard to the award provision sought by the AHA, Ms Marsiglia stated that this would affect her badly and she would struggle financially and could not rely on her employment.

Marilyn Whitfield

[495] Ms Marilyn Whitfield³⁸⁵ was a bingo caller/bar attendant at Warilla Sports Club. She was initially a casual employee, and then after 12–18 months she was offered a change to permanent part-time employment, which she accepted. She currently worked approximately 27 hours per week under the Clubs Award as a Leisure Attendant Grade 3, Level 4. She did not receive any overtime. She stated that one of the positives of permanency was the entitlement to annual leave and carer’s leave, as well as being able to finance car loans and home loans as she was able to demonstrate that she had a regular income and pattern of work. She said that CAI’s proposed variation would negatively affect her by greatly reducing her “ability to enjoy the company of friends and family by not allowing me to make future arrangements such as, to meet, to have dinners, attending social functions”.³⁸⁶

Lyn Healy

[496] Ms Lyn Healy³⁸⁷ was a housekeeping attendant employed under the Hospitality Award as a Guest Service grade 2. Her ordinary rate hourly rate was \$18.94 per hour, and she worked approximately 35 hours per week. She stated that if the hotel was busy, or someone else was sick, she would be asked to come in on her days off, and she would do it for the extra money. She gave evidence that when it was quiet, she would work less hours. This arrangement was not in writing. She likes having a permanent job so she could take annual leave. In regard to the AHA claim, she said that she needed a stable pattern of work because of her family commitments, her need for a stable income, and to have leave entitlements for her family.

Keith Harvey

[497] Mr Keith Harvey³⁸⁸ was employed full-time as a National Industrial Officer of the ASU until 30 June 2011 when he retired. He gave evidence that the hospitality industry and related sectors were the most award reliant industries in the Australian economy, with nearly

³⁸⁴ Witness statement – 26 February 2016, Exhibit 286

³⁸⁵ Witness statement – 13 February 2016, Exhibit 287

³⁸⁶ Witness statement – 13 February 2016, Exhibit 287 at para 39

³⁸⁷ Witness statement – 13 June 2016, Exhibit 291

³⁸⁸ Witness statement – 22 February 2016, Exhibit 288

half of the employees in these sectors being paid no more than the award rate of pay. Mr Harvey gave evidence, supported by data, that the Accommodation and food service industry had the highest rate of “award only”³⁸⁹ pay setting of all industries which is twice the “all industries”³⁹⁰ average, despite there being a rise in the number of employees covered by collective agreements. He also provided data highlighting the problem with award compliance in the Accommodation and food services industry, with 67% of award non-compliance complaints between 2010–2011 coming from the café, restaurants, catering and take away food sectors.

Jack Gibney

[498] Mr Jack Gibney³⁹¹ was a member of United Voice and was employed as a casual waiter/bartender under the Hospitality Award. He was classified as a Food and Beverage Attendant Grade 2 or 3. He stated the most significant detriment for him being employed as a casual was the lack of sick leave, as there have been many occasions where he was unable to work due to injury or illness, and the lack of sick leave entitlements adversely impacted his finances. He stated that despite this, being a casual was flexible as he could accept or refuse shifts depending on his commitments. He stated that the downside of working long shifts was fatigue, and it could take him days to recover which affected his performance at university. He stated that although he could be offered shifts at short notice, he felt at liberty to decline the offer. He stated he wants to be paid overtime as he would take home more pay and be able to work less and focus on his studies. However, he also believed that his employer might hire more people for fewer hours to avoid this additional cost, which meant he might not actually end up with more pay.

Padcrijona Alvero

[499] Ms Padcrijona Alvero³⁹² stated that she had worked casually in various clubs, hotels and restaurants under the Hospitality Award. She said her pattern of work was erratic and her roster was regularly changed and altered at short notice, which could result in cancelled shifts and last minute call-ins. The benefit of being a casual employee was the flexibility it brought regarding holidays or birthdays, as well as the higher rate of pay. However the lack of regularity meant that her wages were unpredictable, and she relied on her husband’s wages. She gave evidence that during the holiday season she had to work very long shifts and was fatigued. She stated that in her experience, if you were casually employed you were amongst the first staff to be sent home. Ms Alvero had often felt as though she could not refuse a shift, even though she did not want to work a longer shift, because if she refused to work longer hours she might not be offered work in the future.

4.7 AHA/MIMA/AAA submissions

[500] The Hospitality Associations³⁹³ submitted that the current part-time employment provision in the Hospitality Award did not meet the modern awards objective because it was rigid

³⁸⁹ Witness statement – 22 February 2016, Exhibit 288 at para 20

³⁹⁰ Witness statement – 22 February 2016, Exhibit 288 at para 20

³⁹¹ Witness statement – 24 February 2016, Exhibit 292; Oral evidence – Transcript 16 August 2016 at PN1491–PN1604

³⁹² Witness statement – 29 February 2016, Exhibit 294; Oral evidence – Transcript 16 August 2016 at PN1626–PN1728

³⁹³ Final Submission – 16 September 2016

and inflexible, forcing employers to employ casual employees rather than part-time employees. They stated that they proposed a variation to incorporate a part-time employment provision that struck a fair balance between a degree of regularity and certainty for employees and flexibility for employers as to the days and times at which part-time employees ordinary hours of work may be rostered. The Hospitality Associations stated that the unions also realised the problem of over-casualisation in the industry. In assessing the evidence and drawing conclusions and observations, it was important to take into consideration the trading characteristics of the hospitality industry, which was characterised by a range of fluctuating trading characteristics which included unpredictability and peak service periods. The Hospitality Associations sought to remove the requirement to lock-in set days, hours and starting and finishing times and provide employers with the flexibility to roster a part-time employee's hours of work across a number of days and/or times within those days. They did not seek to disturb existing minimum or maximum shift lengths or other hours of work conditions set out in clause 29.2 and submitted that those matters were adequate and appropriate.

[501] The Hospitality Associations concluded from the evidence that there was a higher level of “*award-reliance*”³⁹⁴ in the hospitality industry compared to other industries. There was also a much higher level of casual employment compared to part-time employment under the Hospitality Award, and the primary reason influencing an employer's decision not to employ a part-time employee was the lack of flexibility in the part-time employment clause. Although employers could generally guarantee a quantum of ordinary hours, the problem was that they did not have flexibility as to when that quantum of hours could be rostered. The evidence showed that employees wanted stable hours in a rostered period rather than locked in hours and days, and that requests for casual conversion from casual employment or full-time employment to part-time employment were being refused even though some employers would prefer to employ part-time employees rather than casual employees. The Hospitality Associations submitted that a flexible part-time employment provision would lead to more part-time employees in the hospitality industry and therefore less casual employees.

[502] The Hospitality Associations submitted that a review of the particular operation of the particular part-time employment provision currently in the Hospitality Award, with reference to the evidence before the Commission, the modern awards objective and the objects of the FW Act, made it abundantly clear that the existing provision did not meet the modern awards objective or the objects of the FW Act.

4.8 CAI submissions

[503] The CAI³⁹⁵ similarly submitted that its claim would provide employees with reasonably predictable hours of work, equivalent pay and conditions, while allowing for flexibility and the ability for employees to work additional hours by agreement. It submitted that it had advanced a substantial amount of evidence to support its case, which was compelling and largely not refuted by any evidence proffered by United Voice. Of key importance was the ability a club to offer additional hours of work to part-time employees without the added burden of paying overtime. Under the current substantive award provisions, a part-time employee who worked outside their rostered hours would be paid at overtime rates as opposed to the 25% casual loading.

³⁹⁴ Final Submission – 16 September 2016 at para 68

³⁹⁵ Submission – 15 September 2016

[504] From an employer's perspective the engagement of part-time employees created a better employment relationship between the employer and the employee. It was a common theme in the evidence from witnesses, both employer and employee, that an employee's availability varied as did the needs of the Club. Both employees and employers attempted, usually successfully, to work together for a result that suits both parties' needs. The Commission should feel comfortable that the introduction of the part-time employment clause as sought by CAI would be of benefit to both the employers and the employees concerned and would not result in any unrealistic demands placed on employees; rather the provision of flexible part-time employment was of significant benefit to employees and, on the evidence, was actively sought by employees in the club industry.

4.9 Joint employer submissions re United Voice overtime claim

[505] The Hospitality Associations made a joint submission in response United Voice's overtime.³⁹⁶ They stated that it could not be said by United Voice that the overtime provisions in the Restaurant Award, the Hospitality Award and the Clubs Award were the result of an oversight in the modern award process, as they were created deliberately and with careful consideration by all parties involved. They concluded that nothing had been put forward by United Voice which showed any changes in circumstances since the making of these modern awards, and therefore the claim for overtime rates for casuals should be rejected.

4.10 United Voice submissions

[506] In respect of its own overtime claim, United Voice³⁹⁷ submitted that none of the Hospitality Awards provided for overtime benefits for casual employees, and its proposed variations sought, as nearly as possible, to treat casual employees in the same manner as permanent employees and avoid the situation where a casual employee doing the same work as a permanent employee was deprived of the premium paid for overtime while still experiencing all the disability associated with the work. The necessity of the flowed principally from the exclusion of casual employees from any entitlement to overtime and the inability to identify in the Hospitality Awards any term or condition that could be said to be directed to achieve additional remuneration for casual employees working overtime or compensate this category of employee for their disadvantageous treatment in comparison with permanent employees. The penalty rates that casual employees were entitled to under the Hospitality Awards only provided limited and inadequate additional remuneration, and there was no award impediment to employers over-utilising casual employees beyond 38 hours a week.

[507] United Voice³⁹⁸ did not support the part-time employment variation sought by the Hospitality Associations, and was concerned about the provisional view expressed by the Full Bench (to which we refer later in this decision) concerning to the part-time employment clauses in the Hospitality Award. The variation proposed would not address concerns about casualisation in the industry. The industries covered by the Hospitality Awards were consistently found to contain the lowest paid work in Australia as well as the highest rate of

³⁹⁶ Submission – 24 June 2016.

³⁹⁷ Submission – 19 September 2016

³⁹⁸ Reply Submission – 13 October 2016

casualisation. The claims were being advanced in terms of employer recruitment preferences only, whereby it was currently considered undesirable for employers to hire part-time employees given the apparent cost savings associated with employing casuals; for example, casuals could be sent home after a short time if they were no longer required, and conversely they could be required to work long hours without payment for overtime.

[508] The current part-time employment standard was appropriate, should be maintained, and was in accordance with the Act's modern awards objective. United Voice submitted that some premium should be paid and protections provided to part-time employees in exchange for greater flexibility as a matter of fairness and to ensure a level playing field in terms of recruitment preference of employers. United Voice expressed concern that the Full Bench's provisional view, by prescribing a minimum number of guaranteed hours, might lead to fewer hours being offered than what an employee usually worked. The requirement for agreement between the employee and employer should be maintained. The maximum number of hours that could be worked by a part-time employee should be 35 because this will distinguish them from a full-time employee.

[509] United Voice also opposed the CAI's proposed variation to the Clubs Award. The CAI's case was premised on the disinclination of employers in the industry to engage part-time employees after the end of the state-based difference terms that maintained the part-time provisions of the NAPSA. What was being proposed by employer groups was a form of part-time employment that devalued agreement, diminished an employee's ability to predict their pattern of work, and gave the employer the ability to unilaterally alter the pattern of work without consequences. Protections need to be provided to part-time employees in exchange for greater flexibility as a matter of fairness.

4.11 Consideration – AHA/MIMA/AAA and CAI claims re part-time employment

Hospitality industry – history of award part-time employment provisions

[510] The current part-time employment provision in the Hospitality Award was made in the award modernisation process by agreement between the AHA, the MIMAA and what was then the LHMU (now United Voice).³⁹⁹ The agreed provision represented a compromise on what had previously been a disputed issue, and was substantially based on the part-time employment provision which was contained in the pre-reform Hospitality Award. It included a provision to ensure that the hours of work and associated overtime and penalty arrangements did not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees.⁴⁰⁰

Clubs industry – history of award part-time employment provisions

[511] Prior to the making of the Clubs Award, the award regulation of the clubs industry (which has its predominant employment component in New South Wales) was mainly derived from awards of State industrial relations tribunals. In New South Wales, the *Clubs Employees (State) Award* was the applicable award until the Work Choices Act came into effect in 2006.

³⁹⁹ *Australian Hotels Association and Others - Applications to vary the Hospitality Industry (General) Award 2008* [2009] AIRCFB 967 at [15]

⁴⁰⁰ [2009] AIRCFB 967 at [20]

Prior to 1999, this award had a part-time employment provision which, among other things, limited ordinary hours to the range of 15–30 per week, and required the payment of a 15% loading for ordinary hours worked. At that time the clubs industry in New South Wales was marked by a high degree of casualisation, and the part-time provision was not extensively utilised. In 1999, the Industrial Relations Commission of NSW varied the award, with the consent of the relevant union (then the ALHMWU) to introduce a more flexible part-time employment provision. This provision phased out the 15% loading, and had the following features:

- ordinary hours were to be not less than 32 nor more than 148 in any 4 week period;
- ordinary hours were not to be worked on more than 20 days in any 4 week period;
- daily shift lengths were to be not less than 3 hours and not more than 12 hours;
- the employee's working hours were to be set out in a roster posted 2 weeks in advance, and not to be changed except by consent, or by the employer on 12 hours' notice because of absences or shortages of staff, or by the employer on 7 days' notice for any other reason; and
- except for clubs with less than 10 employees, a club could not have more than 3 part-time employees for each full-time employee.

[512] After it was made, this new provision was “*rolled out*” in the industry in NSW in a joint process involving the CAI and the union, with the result that within 6 months, one-third of casual employees had voluntarily converted to part-time employment. After the Work Choices Act came into effect, the part-time provisions continued in operation as part of a NAPSA which came into being pursuant to the provisions of that Act.

[513] The continued operation of part-time provisions of that nature for the club industry was considered by the AIRC in the conduct of the award modernisation process. In its exposure draft for the proposed modern Clubs Award, the AIRC had proposed a part-time provision based on that applicable in the federal pre-reform award applying to clubs in Victoria. This was opposed by Clubs NSW, which sought a provision modelled on that applicable in NSW. In its *Award Modernisation Decision* of 4 September 2009⁴⁰¹ the AIRC Full Bench determined this issue as follows (footnotes omitted):

“[142] A review of current federal awards and NAPSAs discloses three types of provision. First there is the provision in the Victorian clubs award, common to most modern awards, providing a high degree of certainty and regularity of working patterns for part-time employees and payment at overtime rates for work beyond agreed regular hours. Secondly there is the New South Wales provision which does not provide certainty and regularity of working patterns, although the statements provided by Clubs Australia suggest a proportion of employees are provided with regular times. Third, a number of NAPSAs applying in other states which provide for two types of part-time employees, those with specified hours and those without. A loading is paid to those without specific hours to compensate for the absence of

Section 2.03 ⁴⁰¹ [2009] AIRCFB 826

regularity and certainty of work. In one case there is a single category of part-time employee with flexible hours and a loading.

[143] In terms of the significance of those diverse forms of regulation of part-time employment, Clubs Australia submitted that the majority of clubs are in New South Wales, as is the majority of employment by clubs. This point was conceded by the LHMU and is supported by Australian Bureau of Statistics data, which shows:

- • New South Wales accounts for just under half of all hospitality clubs (49.4%), while Queensland accounts for 22.4% and Victoria accounts for 13.5%;
- • employment in New South Wales comprises 61.5% of all employment, while Queensland has 20.4% of all employment and Victoria has 10.2% of all employment.

[144] The weight of current regulation supports the adoption of the New South Wales NAPSA provision. However, that provision removes the essential characteristics of part-time employment of some degree of regularity and certainty of employment. It does not reflect a conventional concept of part-time employment as was conceded by Clubs Australia in submitting that ‘it is perhaps time to look at part-time in a different light and not with the conventional outlook of what is part-time.’ The New South Wales provisions for part-time employees provide a bare guaranteed minimum of 32 hours over a four week period, no certainty beyond the roster as to when work is to be done and a capacity to alter the roster with 12 hours notice in cases of absences or shortages of staff. These part-time provisions give little predictability to part-time employees and do not appear to be consistent with ‘the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38.’ The concerns we expressed about variation of hours by consent in relation to the awards in the health and welfare services industry apply equally in this context.

[145] Having regard to the significant departure from the conventional characteristics of part-time employment in the New South Wales provision and the diversity of current prescriptions, we are not prepared to apply the New South Wales provision across the licensed clubs industry, notwithstanding the predominance of club employment under the New South Wales NAPSA, without a fuller consideration of the issues raised through a more traditional arbitration, in advance of or as part of the two year review of modern awards, required by the Transitional Act.

[146] We have decided to maintain the part-time provision in the exposure draft, subject to the inclusion of a transitional provision for New South Wales, Queensland, South Australia, Western Australia and Tasmania, which will maintain the current arrangements for three years into the transitional period. This should accommodate the completion of the two year review...”

[514] The part-time employment provision which was awarded was as follows:

10.4 Part-time employment

(a) Substantive provision

(i) An employer may employ part-time employees in any classification in this award.

(ii) A part-time employee is an employee who is employed in a classification in Schedule A—Classification Definitions and who:

- is engaged to work fewer than 38 ordinary hours per week or, where the employer operates a roster, an average of fewer than 38 hours per week over the roster cycle;
- has reasonably predictable hours of work; and
- receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

(iii) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work either:

- specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day; or
- specifying the roster that the employee will work (including the actual starting and finishing times for each shift) together with days or parts of days on which the employee will not be rostered.

(iv) Any agreed variation to the regular pattern of work must be recorded in writing.

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

(vi) All time worked in excess of the employee's agreed ordinary time hours will be overtime and paid for at the rates prescribed in clause 28—Overtime.

(vii) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.

(viii) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.

(b) Transitional provision in respect of employers in New South Wales, Queensland, South Australia, Western Australia and Tasmania

An employer subject to a notional agreement preserving a State award that applied in New South Wales, Queensland, South Australia, Western Australia or Tasmania immediately prior to 1 January 2010 which prescribed part-time employment provisions different from those in clause 10.4(a), may continue to apply those provisions. This transitional provision ceases to operate on 31 December 2012.

[515] The transitional period referred to in the decision was the period of 5 years after the making of a modern award allowed by s.154 of the FW Act after the end of which state-based differences in award provisions were prohibited. The Clubs Award, which came into effect on 1 January 2010, was therefore required to have a nationally uniform part-time employment provision after 31 December 2014. The parties did not address the issue as part of the 2 yearly review of the Clubs Award, and the transitional provision was extended by consent until 31 December 2014.⁴⁰² The issue thereafter remained unresolved between the parties. No party made an application for a national uniform provision in sufficient time to allow the issue to be arbitrated prior to 31 December 2014. After a conciliation was conducted by the Commission (Hatcher VP), a Full Bench made an interim provision that removed the interstate differentials, and was intended to operate pending the full arbitration of the issue. That interim provision is the current provision which we have earlier set out.

Usage of part-time employment under the Hospitality Award

[516] The evidence makes it clear, we conclude, that the current part-time employment provision in the Hospitality Award is little used and has proven to be ineffective. The survey conducted by the Hospitality Associations, which we consider to have been reasonably reliable concerning the degree of usage of part-time employment, given that it involved 455 full responses and concerned a factual matter rather than the expression of an opinion, demonstrated that for employers to whom the award applied (that is, who were not covered by enterprise agreements), showed that only 3.6% of the workforce were part-time employees. The evidence of individual hotel employer witnesses called by the AHA, which we consider covered a representative cross-section of the industry, confirmed this picture; they all employed no or very few part-time employees.

[517] That is clearly a very small proportion of the workforce having regard to a number of matters. First, the percentage given by the survey is lower than the percentage of permanent part-time employees in the workforce as a whole. Second, the large majority of employees in the industry covered by the award work part-time hours, but overwhelmingly do so as casual employees. Third, the employer witnesses called by the Hospitality Associations generally expressed a preference to employ more part-time employees, because they had a greater commitment to the business, were subject to a lesser turnover rate than casuals, and operated under employment arrangements where they were obliged to attend for their rostered shifts unlike casuals who could accept or refuse shifts according to their personal convenience. The Hospitality Associations' survey likewise indicated that about 32% of respondent employers

⁴⁰² PR532923

would employ more permanent part-time employees if there was a more suitable part-time employment clause in the award.

[518] The reason for this situation consistently given by the employer witnesses was generally that the award clause lacked the flexibility to allow them to adjust the rosters of part-time employees to meet a highly variable workload and client demand. Mr Brown, Ms Cleaves, Mr Leonardi, Mr Stocks and Mr Woods all gave evidence to the effect that the current requirement that part-time employees have fixed days and hours of employment which may only be changed by written agreement meant that part-time employees could not be rostered by the employer in a way which was responsive to fluctuations in trade which were a feature of the industry, thus necessitating the use of casuals. We accept the evidence of these witnesses in that respect. United Voice cross-examined a number of these witnesses in respect of the lack of the administrative difficulty involved in changing a part-time employee's hours by agreement, but that with respect missed the point. The concern expressed was not so much about the administrative difficulty (although there was some complaint about this), but the fact that employers could not guarantee a weekly number of hours for part-time employees without knowing in advance whether they would be able to roster them to work the hours that were required to be worked in accordance with client demand.

[519] In the course of cross-examination by United Voice, a number of the Hospitality Associations' witnesses conceded that they had a number of roles filled by casual employees which nonetheless had fairly stable and predictable hours. They generally explained this by saying that this was because the employees involved preferred the flexibility associated with casual employment, particularly the ability to accept or refuse shifts as it suited them.⁴⁰³ This indicates that that there would be a limit to the proportion of casual employees who would be prepared to shift to part-time employment were there to be a more flexible award provision, but it does not derogate from the fact that substantial parts of hoteliers' business fluctuates because of special events, tourist groups, booking for functions, weather and seasonal factors.

Usage of part-time employment under the Clubs Award

[520] In the clubs industry, the evidence showed that the usage of part-time employees varied from State to State. In New South Wales, the provision which operated either under the State Award, under a NAPSA or as a transitional provision in the modern award until 31 December 2014 facilitated the employment of a substantial number of part-time employees. The evidence from individual clubs was variable about this, but at the high end of the range, larger clubs such as Castle Hill RSL, Ryde-Eastwood Leagues Club and the Campbelltown Catholic Club were able to move to over 50% of their employees being engaged on a part-time basis, and even at the lower end of the range the evidence demonstrated that about 20% were employed part-time. While the interim part-time employment clause awarded at the end of 2014 had allowed the employment arrangements of existing part-time employees to be maintained, the evidence demonstrated that the more restrictive provisions which operated for part-time employees engaged from 1 January 2015 onwards meant that few if any new part-time employees had been engaged, and that casual employment was being used as the employment-type for any non-full-time positions that needed to be filled. A number of witnesses (such as Ms Teeling, Ms Petrie, Mr Robinson and Ms Luke) gave evidence that

⁴⁰³ Transcript 12 July 2016 at PN1858–PN1863, 23 March 2016 at PN10477–PN10479, PN10614

their clubs had changed their recruitment strategies since the interim provision commenced operation, so that most if not all new employees were being engaged on a casual basis, with the result that the overall proportion of part-time employees was falling. Other clubs remain on enterprise agreements which were approved before the interim provision was made, and retain the NSW provisions as they were before that time, but are concerned that when those agreements are re-negotiated they will have to adopt the current provision, with the result that they will need to revert to the extensive use of casual employment.

[521] In Victoria, which had never had the type of part-time provision which had prevailed in New South Wales after 1999, the evidence of Mr Murray was that the proportion of part-time employees had always been very low. The evidence given by Mr Kildare concerning South Australia was to similar effect. In Western Australia, the evidence of Ms Giles was that the proportion of part-time employees was 23% in 2009 under the NAPSA which then applied, but that this had fallen to 13% by 2011 under the modern award, and that it was expected that the proportion of part-time employees would continue to diminish. In Queensland, the evidence of Mr Lee was that about 18% of employees were part-time, but it was not clear why this relatively high percentage had been achieved in that State.

[522] The reason why the current part-time employment provision was not utilised was essentially the same as that applying under the hospitality sector, namely that because it required part-time employees to have fixed days and hours of employment which could only be changed by agreement, there was insufficient flexibility to permit part-time employees to be rostered to meet variable service demands. These included seasonal trade levels, special events, coverage of employee leave, coverage of casuals' unavailabilities and community social changes.

Conclusions

[523] The modern awards objective in s.134 requires the minimum safety net of terms and conditions established by modern awards and the NES to be *relevant* as well as *fair*. In the *Penalty Rates Decision*⁴⁰⁴ the Full Bench said this about the requirement for relevance:

“[120] ...the word ‘relevant’ is defined in the Macquarie Dictionary (6th Edition) to mean ‘bearing upon or connected with the matter in hand; to the purpose; pertinent’. In the context of s.134(1) we think the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations.*’
(emphasis added)”

[524] We consider that the evidence demonstrates that the current part-time provision in the Hospitality Award is close to being a dead letter because it does not provide a workable model for the regulation of part-time employment in the sector covered by that award. It does not properly bear upon or connect with the circumstances of that sector for the reasons

⁴⁰⁴ [2017] FWCFB 1001

explained, and is therefore not relevant to that sector for the purpose of s.134. We have reached the same conclusion about the current part-time provision in the Clubs Award, except to the extent that the provision preserved part-time employment arrangements which were entered into prior to 1 January 2015.

[525] It is clear that greater flexibility in the rostering of hours is necessary for the part-time provisions in these 2 awards to become relevant. In stating this conclusion, we do not intend to depart from the general principle stated by the AIRC Full Bench in the *Award Modernisation Decision* of 4 September 2009 that, as a matter of concept and principle, part-time employment must carry with it a “degree of regularity and certainty of employment” and that it “should be akin to full-time employment in all respects except that the average weekly ordinary hours are fewer than 38”.⁴⁰⁵ However that degree of regularity and certainty in working hours for part-time employees needs to bear a proper relationship to the patterns of work in the industry sector in question. While there are many sectors with predictable patterns of hours which make the conventional model of part-time employment entirely workable, that is clearly not the case in the hospitality and clubs sectors. Further, it must be noted that in both the Hospitality Award and the Clubs Award, the provisions which require the days and hours of work to be fixed in advance, and thereafter not changed other than by agreement, have no equivalent in relation to full-time employees. In the Clubs Award, for example, clause 26 provides for a wide variety of ways in which the 38 hour week may be worked, about which the employer and employee must agree, but does not require permanently fixed days or hours of work (beyond the requirement for 2 full days off per week), and full-time employees otherwise work in accordance with their roster which under clause 25 is changeable by the employer on 7 days’ notice. The situation is substantially the same under the Hospitality Award. In this sense part-time employment is not “akin to full-time employment in all respects” under the 2 awards, although it may be accepted that in practical terms there is far less scope to make radical changes to the working pattern of someone working a full 38 hours per week compared to a part-time employee working, say, only 15 hours per week.

[526] The position which pertained in the club industry in New South Wales after 1999 under the *Clubs Employees (State) Award* and the succeeding NAPSA demonstrates that a more flexible part-time provision can lead to a very large increase in the proportion of part-time employees (and a corresponding drop in the proportion of casuals). That was a regime which was supported, and its introduction facilitated, by the union. A number of employee witnesses before us gave evidence that the part-time work arrangements which they had entered into under that regime were highly suitable to them, in that they had job security, a guaranteed level of income, access to leave entitlements, and better access to finance, and that they preferred part-time employment to casual employment. That confirms our view that greater flexibility in part-time employment provisions in the Hospitality Award and the Clubs Award would be in the interests of both employees and employers. It would also make the operation of casual conversion provisions more effective.

[527] The part-time work provisions proposed by the AHA and CAI however do not provide appropriate protections for part-time employees in one fundamental respect. The evidence before us demonstrates that part-time employment is generally seen as desirable to employees who have major family, study or other important commitments in their lives which they need

Section 2.04 ⁴⁰⁵ [2009] AIRCFB 826 at [144]

to accommodate. The degree of flexibility afforded to employers to alter working hours on notice cannot be to such a degree that part-time employees can be rostered to work during hours which they are simply unavailable to work because they need to attend to their other major commitments.

[528] A number of the clubs witnesses from New South Wales gave evidence that they manage this issue by keeping a record of the days and hours during the week when part-time employees are available to work, and then rostering so that the assigned hours of work fall within the employee's period of availability. This appears to us to be a fair and practical method of ensuring that part-time employees can properly balance their work and other life commitments whilst allowing employers flexibility in rostering so that working hours may be matched to variable service demands. We consider that the part-time provisions of the 2 awards should contain a mechanism of this nature.

[529] During the course of these proceedings, on 2 September 2016, the Full Bench sent correspondence to the relevant interested parties indicating a provisional view concerning the form which the part-time clauses in the 2 awards should take and inviting submissions about them. The provisionally proposed clause for the Hospitality Award was as follows (using current clause numbering):

“12. Part-time employment

- (a) An employer may employ part-time employees in any classification in this award.
- (b) A part-time employee is an employee who is employed in a classification in **Schedule D – Classification Definitions** and who:
 - is engaged to work at least 8 and less than 38 ordinary hours per week or, where the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle;
 - has reasonably predictable hours of work; and
 - receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
- (c) At the time of engagement the employer and the part-time employee will agree in writing upon:
 - (i) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and
 - (ii) the days of the week, and the periods in each of those days, when the employee will available to work the guaranteed hours (**the employee's availability**).

- (d) Any change to the guaranteed hours may only occur with the written consent of the employee.
- (e) The employer may roster the working of the employee's guaranteed hours and any additional hours in accordance with **clause 30 – Rostering**, provided that:
 - (i) the employee may not be rostered for work for any hours outside the employee's availability;
 - (ii) the employee must not be rostered to work in excess of 12 or less than 3 hours in a day; and
 - (iii) the employee must have two consecutive days off each week.
- (f) The employee may alter the days and hours of the employee's availability on 28 days' notice to the employer.
- (g) All time worked in excess of the employee's rostered hours will be overtime and paid for at the rates prescribed in **clause 33 – Overtime**.
- (h) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.
- (i) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed."

[530] The clause for the Clubs Award (using current clause numbering) was:

“10.4 Part-time employment

- (a) An employer may employ part-time employees in any classification in this award.
- (b) A part-time employee is an employee who is employed in a classification in **Schedule C – Classification Definitions** and who:
 - is engaged to work at least 8 and less than 38 ordinary hours per week or, where the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle;
 - has reasonably predictable hours of work; and
 - receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
- (c) At the time of engagement the employer and the part-time employee will agree in writing upon:

- (i) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and
 - (ii) the days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed hours (**the employee's availability**).
- (d) Any change to the guaranteed hours may only occur with the written consent of the employee.
- (e) The employer may roster the working of the employee's guaranteed hours and any additional hours in accordance with **clause 25 – Roster**, provided that:
 - (i) the employee may not be rostered for work for any hours outside the employee's availability;
 - (ii) the employee must not be rostered to work in excess of 12 or less than 3 hours in a day; and
 - (iii) the employee must have two consecutive days off each week.
- (f) The employee may alter the days and hours of the employee's availability on 28 days' notice to the employer.
- (g) All time worked in excess of the employee's rostered hours will be overtime and paid for at the rates prescribed in **clause 28 – Overtime**.
- (h) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.
- (i) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed."

[531] In response the interested parties (while not abandoning their primary positions) made the following submissions:

- (1) The Hospitality Associations⁴⁰⁶ submitted that the proposed provisions were broadly consistent with the objectives of its application, but was opposed to the capacity of an employee to change unilaterally his or her available hours on 28 days' notice, because this could mean that the employee was no longer available to perform the guaranteed hours at times when the employer traded or

⁴⁰⁶ Final Submission – 16 September 2016

had work for the employee to perform. It proposed that the hours of availability should only be alterable by agreement between the employee and the employer.

- (2) CAI407 made essentially the same submission as the AHA, namely that the right of the employee to change the hours of availability might make it impossible for the employer to continue to provide the guaranteed hours.
- (3) United Voice408 submitted that the provisions were open to abuse, because they allowed the employer to set the guaranteed hours lower than the regular hours worked, and the clauses needed to be amended to ensure that guaranteed hours reflected or came close to actual hours. It also proposed that there should be a weekly minimum of 10 hours per week, and a maximum of 35 to maintain the integrity of full-time employment.

[532] We accept the Hospitality Associations and CAI submissions that an unrestricted right for the employee to change his or her availability hours may have the result of compromising the employer's capacity to provide the guaranteed hours. However we do not consider that the employee's availability should only be alterable by agreement, since if the employee truly becomes unavailable to perform work on certain days or at certain hours (as distinct from merely preferring not to work on those days and hours), then any lack of agreement on the part of the employer to that alteration will not change the situation and allow the employee to continue his or her previous availability. We consider that the better course is, firstly, to require that any alteration to availability be the result of a genuine and ongoing change in the employee's personal circumstances and, secondly, to provide that if the change to the employee's availability cannot reasonably be accommodated by the employer within the guaranteed hours then, the guaranteed hours will no longer apply and the employer and the employee will need to reach a new agreement in writing concerning guaranteed hours.

[533] In relation to the United Voice submission expressing a concern about a divergence between guaranteed hours and actual hours worked, we will establish a mechanism under which the employee may request an increase in the guaranteed hours if he or she has regularly worked a number of ordinary hours that is in excess of the guaranteed hours over a 12 month period. The employer may only refuse such a request on reasonable business grounds.

[534] We determine therefore that the current part-time employment provision in the *Hospitality (General) Award 2010* will be replaced by the following provision:

12. Part-time employment

- 12.1 An employer may employ part-time employees in any classification in this award.
- 12.2 A part-time employee is an employee who is employed in a classification in **Schedule D – Classification Definitions** and who:

⁴⁰⁷ Submission – 16 September 2016

⁴⁰⁸ Reply Submission – 13 October 2016

- (a) is engaged to work at least 8 and less than 38 ordinary hours per week or, where the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle;
 - (b) has reasonably predictable hours of work; and
 - (c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
- 12.3 At the time of engagement the employer and the part-time employee will agree in writing upon:
- (a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and
 - (b) the days of the week, and the periods in each of those days, when the employee will available to work the guaranteed hours (**the employee's availability**).
- 12.4 Any change to the guaranteed hours may only occur with the written consent of the part-time employee.
- 12.5 The employer may roster the working of the employee's guaranteed hours and any additional hours in accordance with **clause 29.2 – Part-time employees** and **clause 30 – Rostering**, provided that:
- (a) the employee may not be rostered for work for any hours outside the employee's availability; and
 - (b) the employee must have two days off each week.
- 12.6 Where a part-time employee has over a period of at least 12 months regularly worked a number of ordinary hours that is in excess of the guaranteed hours, the employee may request in writing that the employer agree to increase the guaranteed hours. If the employer agrees to the request, the new agreement concerning guaranteed hours will be recorded in writing. The employer may refuse the request only upon reasonable business grounds, and such refusal must be provided to the employee in writing and specify the grounds for refusal.
- 12.7 Where there has been a genuine and ongoing change in the employee's personal circumstances, the employee may alter the days and hours of the employee's availability on 14 days' written notice to the employer. If the alteration to the employee's availability cannot reasonably be accommodated by the employer within the guaranteed hours then, despite clause 12.4, those guaranteed hours will no longer apply and the employer and the employee will

need to reach a new agreement in writing concerning guaranteed hours in accordance with clause 12.3(a).

- 12.8 All time worked in excess of the employee's rostered hours will be overtime and paid for at the rates prescribed in **clause 33 – Overtime**.
- 12.9 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.
- 12.10 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- 12.11 A part-time employee who immediately prior to (**operative date of variation**) has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause 12.3.

[535] The current part-time employment provision in the Clubs Award will be replaced with the following provision:

10.4 Part-time employees

- (a) An employer may employ part-time employees in any classification in this award.
- (b) A part-time employee is an employee who is employed in a classification in **Schedule C – Classification Definitions** and who:
 - (i) is engaged to work at least 8 and less than 38 ordinary hours per week or, where the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle;
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
- (c) At the time of engagement the employer and the part-time employee will agree in writing upon:
 - (i) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and

- (ii) the days of the week, and the periods in each of those days, when the employee will available to work the guaranteed hours (**the employee's availability**).
- (d) Any change to the guaranteed hours may only occur with the written consent of the employee.
- (e) The employer may roster the working of the employee's guaranteed hours and any additional hours in accordance with **clause 26 – Ordinary hours of work and rostering**, provided that:
 - (i) the employee may not be rostered for work for any hours outside the employee's availability;
 - (ii) the employee must not be rostered to work in excess of 12 or less than 3 hours in a day; and
 - (iii) the employee must have two days off each week.
- (f) Where a part-time employee has over a period of at least 12 months regularly worked a number of ordinary hours that is in excess of the guaranteed hours, the employee may request in writing that the employer agree to increase the guaranteed hours. If the employer agrees to the request, the new agreement concerning guaranteed hours shall be recorded in writing. The employer may refuse the request only upon reasonable business grounds, and such refusal must be provided to the employee in writing and specify the grounds for refusal.
- (g) Where there has been a genuine and ongoing change in the employee's personal circumstances, the employee may alter the days and hours of the employee's availability on 14 days' written notice to the employer. If the alteration to the employee's availability cannot reasonably be accommodated by the employer within the guaranteed hours then, despite clause 10.4(d), those guaranteed hours will no longer apply and the employer and the employee will need to reach a new agreement in writing concerning guaranteed hours in accordance with clause 10.4(c).
- (h) All time worked in excess of the employee's rostered hours will be overtime and paid for at the rates prescribed in **clause 28 – Overtime**.
- (i) An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.
- (j) A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.
- (k) A part-time employee who immediately prior to (**operative date of variation**) has a written agreement with their employer for a regular pattern of hours is

entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause 10.4(c).

[536] We will give interested parties an opportunity to make further submissions about the operative date of the above award variations and in relation to any residual issues which may arise.

Additional observations re the Restaurant Award

[537] RCI originally made a claim for alterations to the part-time employment provisions of the Restaurant Award, with its claim being advanced on a basis similar to those of the Hospitality Associations and CAI. However at the hearing on 29 February 2016 RCI withdrew that claim, saying that “*it may be a matter that is more appropriate for the award stage of proceedings*”.⁴⁰⁹

[538] Notwithstanding this, because we consider it likely that the circumstances of the restaurant and catering industry with respect to the workability of the current award part-time employment are substantially the same as those for the hospitality and clubs industries, we have formed the provisional view that there is a strong basis for the part-time employment clause in the Restaurants Award to be altered in the same way as for the Hospitality Award and the Clubs Award. We will invite interested parties to make further submissions and, if necessary, adduce evidence in relation to this proposition.

4.12 Consideration – United Voice claim re overtime penalty rates for casuals

[539] In establishing the modern Hospitality Award, the Restaurants Award and the Clubs Award as part of the award modernisation process, the AIRC Full Bench does not appear to have given explicit consideration to the justification for the exclusion of casual employees from the benefit of overtime penalty rates provisions. The provisions of the modern Hospitality Award were primarily derived from the pre-reform federal *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming - Award 1998*, which excluded casual employee from overtime penalty rates. Because no party contended that there should be in change to that position, the issue was not given any consideration. The pre-reform award had its origins in *The Hotels and Retail Liquor Industry Award, 1971*, which was made by consent in resolution of an industrial dispute and in which the overtime penalty provisions only applied to weekly employees.⁴¹⁰ In 1979 the *Federated Liquor and Allied Industries Employees Union* advanced an application to the Australian Conciliation and Arbitration Commission to, among other things, provide for overtime penalty rates to be paid to casual employees who worked in excess of 8 hours on Mondays–Fridays. This claim was rejected by Brack C, who said:

“For casual employment extending beyond eight hours the claim is for the same rate of overtime as is payable to weekly employees. The union puts this claim on the basis of ‘special circumstances that are apparent in this case’ and that it is unfair to have a situation where permanent employees are entitled to overtime payment for work in

⁴⁰⁹ Transcript 29 February 2016 at PN233–PN238

⁴¹⁰ (1971) 137 CAR 31 at 38

excess of eight hours and where casuals may be worked extended hours without payment. It is said that the casual is already on the same premium payments as the weekly employee ‘in respect of public holidays, Saturdays, Sundays and the like’.

Beyond later saying that there must be proper recognition of the overtime rates for casuals the claim was not otherwise supported and it is refused. I should point out that the implication that a casual is at present on the same overtime payments as a weekly employee tends to confuse what the situation is. For instance, a casual does not have a rostered day off and, as he may be engaged day to day, it would be rather odd if he did. He accordingly is not entitled to the overtime payment for a rostered day off and, of course, the rostered days off for weekly employees may vary as between employees themselves and from time to time anyway. For ordinary hours – not overtime hours – Monday to Friday outside 7 a.m. to 7 p.m. the weekly employee received an allowance. So too does the casual, in addition to his 25% loading, and the position as to that extra payment has been dealt with above. For ordinary hours on a Saturday the weekly employee is paid time and a half and the casual is paid a 75% loading. But for overtime the weekly employee receives time and three quarters for the first three hours and then double time. For ordinary hours on a Sunday in the back of the house the rate is time and three-quarters and in the front of the house it is double time. The casual loading is 100%. For overtime on a Sunday the weekly employee gets double time. For holidays all time for the weekly employee is at double time and a half and for the casual there is a loading of 150%.

Leaving aside the specially recognized position as to the back of the house on Sunday, it will be seen that the rate of payment to a casual is the same as the weekly overtime rate on Sunday and on a public holiday bit only, it seems, because that overtime rate coincides with the ordinary time rate on those days. The casual rate on Saturday is neither the ordinary time rate nor the overtime rate. As there is no hotel industry principle of paying a casual for special days at the weekly employee overtime rate there is not an argument to extend to casuals, on Monday to Friday, the weekly employee overtime provisions for those days.”⁴¹¹

[540] Observed across the distance of 38 years, the logic of the above reasoning is not pellucidly clear. The position whereby overtime penalty rates did not apply to casual employees was thereafter maintained without contest until the award modernisation process.

[541] At the time of the award modernisation process, the restaurant and catering sector was regulated by a variety of State-based instruments. As the AIRC Full Bench’s *Award Modernisation Statement* of 25 September 2009⁴¹² disclosed, the LHMU (as United Voice was then named) proposed an overtime clause based on the Victorian instrument, which did not apply penalty rates to casuals. The Full Bench said:

“*Overtime*

[223] The LHMU proposed an overtime clause based on that found in the Victorian Restaurant Award. It includes a 50% overtime penalty for the first two hours of

⁴¹¹ (1979) 216 CAR 794 at 804

⁴¹² [2009] AIRCFB 865

overtime worked Monday to Friday and double time thereafter, a 75% penalty for the first two hours of Saturday overtime and double time thereafter and a double time penalty for all Sunday overtime. The R&CA draft proposed an overtime provision based on work in excess of an average 38 hours per week, with a penalty of 25% for the first 8 hours overtime and 50% thereafter.

[224] We have included the LHMU proposal in the exposure draft. It is consistent with arrangements in current federal awards and NAPSAs. The calculation of overtime on a daily basis is common to all such instruments. No current instrument provides for overtime calculated by reference to hours in excess of an average 38 ordinary hours per week. The Monday to Friday overtime standard across current instruments is for time and a half for the first two hours and double time thereafter. Whilst time and a half applies for the first three hours in the two Queensland NAPSAs, the SA Restaurant Award and the ACT Award, the most common provision is for time and a half for the first 2 hours only. The Monday to Friday rates in current instruments are without exception time and a half for the first two or three hours and double time thereafter. No current instrument provides for the 25% and 50% penalties proposed by the R&CA.

[225] A Saturday overtime payment of a 75% penalty for the first two hours and double time thereafter is found in the Victorian Restaurant Award and the Tasmanian Restaurant Award. Federal awards applying in both Territories prescribe double time for all overtime on Saturday, as does the WA Restaurant Award. The NSW Restaurant award, both Queensland NAPSAs and the SA Restaurant Award provide for a 50% penalty for the initial overtime hours worked on Saturdays. A penalty of 75% for the first two hours of Saturday overtime and double time thereafter is an appropriate outcome when all of the relevant provisions are taken into account. Double time applies to overtime on Sundays and public holidays in Federal awards and NAPSAs, almost without exception.

[226] Both drafts included provision for time off instead of overtime payment by agreement. The LHMU draft provides for time off instead of overtime payment, calculated on the basis of the payment due. The R&CA draft, on the other hand, provides for time off on a time for time basis. Time off instead of overtime is calculated on the basis of payment due, rather than hour for hour worked, in all current awards and NAPSAs which provide for time off instead, except the NSW Restaurant Award and the SA Delicatessens Award. We have included the provision in the exposure draft on a payment due basis.”

[542] It is clear from the above passage that no specific consideration was given to the position of casual employees with respect to overtime. RCI continued to press in the award modernisation for a radical reduction in penalty rates entitlements, including to overtime penalty rates, but this was ultimately rejected by the Full Bench in its *Award Modernisation Decision re Stage 4 modern awards* of 4 December 2009.⁴¹³ The Full Bench said:

“[187] The RCA reargued the position in relation to penalty rates which it had put in the pre-exposure draft consultations. That position is set out in the table at paragraph

⁴¹³ [2009] AIRCFB 945

229 of our statement of 25 September 2009. The LHMU was more particular in its approach. It sought to amend penalty payments for casual employees working on public holidays, from 150% to 175%, and to have the penalty which applies to work between 10pm and midnight commence at 8pm instead.

[188] The penalty provisions generally and the two particular penalties raised by the LHMU were subject to considerable attention by us in preparing the exposure draft. As noted in our statement of 25 September 2009, these issues raise matters requiring fine judgement to be exercised in the context of a diverse range of provisions in the relevant instruments and the terms of cl.27A of the consolidated request. Nothing was put to us which indicates that we should depart from the penalty provisions in the exposure draft and we are of the view that those provisions, including the particular penalties addressed by the LHMU, should be included in the modern award. We adhere to the reasons contained in our statement of 25 September 2009.”

[543] In respect of the Clubs Award, the issue of overtime penalty rates received no specific consideration at all.

[544] United Voice submitted that the exclusion of casual employees from overtime penalty rate entitlements in the 3 awards was an “*oversight of the award modernisation process*”. We cannot accept this proposition, since the union, which we think had a full understanding of the significance of casual employment in the industry sectors in question, had the opportunity to advance a position that casuals should receive overtime penalty rates but declined to do so. However, we also cannot accept the submission of the AHA, CAI and RCI that the current overtime provisions in the awards “*were made quite deliberately and as a consequence of careful consideration by the Union, the employer parties and the Commission*”. At least so far as the Commission is concerned, there is no indication of any such consideration. The position appears to have been that the Commission accepted without comment a position which was not in contest between the interested parties which involved themselves in the award modernisation process.

[545] The lack of any contest about and consideration of the casuals overtime issue in the award modernisation, and the detailed evidentiary case now presented by United Voice, provides a cogent basis to now review the issue. It is also significant that the legislative context has changed, in that paragraph (da) was added to the modern awards objective in s.134(1) after the award modernisation process was completed. Section 134(1)(da)(i) requires us to take into account “*the need to provide additional remuneration for ... employees working overtime...*”. Section 134(1)(da) was the subject of extensive consideration in the *Penalty Rates Decision*⁴¹⁴, in which the Full Bench relevantly said (footnotes omitted):

“[185] Section 134(1)(da) was inserted by the *Fair Work Amendment Act 2013* (Cth), with effect from 1 January 2014. The Explanatory Memorandum to the Fair Work Amendment Bill 2013 made the following observation about the addition of s.134(1)(da):

‘Under the FW Act, the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of

⁴¹⁴ [2017] FWCFB 1001

terms and conditions. In making or varying modern awards, the FWC must take into account the modern awards objective (see subsection 134(1) of the FW Act).

Item 1 of Schedule 2 to the Bill amends the modern awards objective to include a new requirement for the FWC to consider, in addition to the existing factors set out in subsection 134(1) of the FW Act, the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.’

[186] In the second reading speech to the Fair Work Amendment Bill 2013 the then Minister for Employment and Workplace Relations said:

‘... as part of this Bill, the Government is seeking to ensure that work at hours which are not family friendly is fairly remunerated. This will be done by amending the modern awards objective to ensure that the Fair Work Commission, in carrying out its role, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends...’

[187] Section 134(1)(da) is a relatively new provision and one which did not exist at the time the modern awards under review were made. These provisions have not yet been the subject of substantive arbitral or judicial comment.

[188] Five observations may be made about s.134(1)(da).

[189] First, s.134(1)(da) speaks of the ‘need to provide additional remuneration’ for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv).

[190] An assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:

- (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);

(ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through ‘loaded’ minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and

(iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.

[192] The expression ‘additional remuneration’ in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as ‘ordinary hours’, that is reasonably predictable hours worked Monday to Friday within the ‘spread of hours’ prescribed in the relevant modern award. Such ‘additional remuneration’ could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a ‘loaded hourly rate’.

[193] As mentioned, s.134(1)(da) speaks of the ‘need’ to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

‘This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.’ (emphasis added)

[194] To the extent that the above passage suggests that s.134(1)(da) ‘requires additional remuneration for working on weekends’, we respectfully disagree. We acknowledge that the provision speaks of ‘the *need* for additional remuneration’ and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression ‘the need for additional remuneration’ must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances

mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a ‘relevant consideration’ in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

‘To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant’.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission’s task is to take into account the various considerations and ensure that the modern award provides a ‘fair and relevant minimum safety net’.

[197] A further contextual consideration is that ‘overtime rates’ and ‘penalty rates’ (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility* decision:

‘... s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards...’

[198] Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates. If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.”

[546] We consider that the evidence adduced by United Voice, which was not the subject of significant challenge by the Hospitality Associations, CAI or RCI, demonstrates the following propositions:

- the accommodation and food services industries have a high rate of casualisation, with the proportion being between 63% and 67% since 2006, and a large majority of them were award reliant;
- since 2001 over 14% of casual employees in hospitality have averaged more than 38 hours work per week;
- collective bargaining in the sector has not improved industry remuneration, and agreement-making was declining;
- daily work in excess of 8 hours per day saw a rise in physical and psychological risks to health, and the risks rose steeply after 10 hours work per day;
- there was overwhelming evidence that work in excess of 48 hours per week had a deleterious effect on health, and mounting evidence that workloads in excess of 40 hours per week gave rise to serious health implications;
- casuals who work in the hospitality sector for long hours suffer the same disabilities as permanent employees – in particular, fatigue and disruptive effects on family life, social life and other commitments such as studies;
- there is currently no disincentive for employers simply to require available casual employees to stay at work until the work is completed rather than implementing fairer rostering practices, and this may have the effect of placing casual employees under pressure to work long hours as required and exacerbating their sense of a lack of control over their working lives.

[547] The Hospitality Associations, CAI and RCI did not adduce any evidence from any employer that the introduction of overtime rates for casual employees would cause them any particular disadvantage, nor was this asserted in their closing submissions.

[548] We are satisfied, having regard to the matters we are required to take into account under s.134(1), that a fair and relevant minimum safety net for casual employees covered by the 3 awards in question requires that casual employees receive the benefit of overtime penalty rates. On the basis of the factual conclusion we have set out, it is apparent that casual employees who work long hours in the course of a day or a week are subject to significant disabilities. Those disabilities are essentially the same as those applying to permanent employees who work lengthy hours and receive overtime penalty rates for doing so. We see no good reason for the different treatment of casual employees, nor was any convincing rationale for this advanced by any interested employer party. These are matters bearing particularly upon the consideration in s.134(1)(da)(i), which we have accordingly assigned particular weight in reaching our conclusion. The position here appears to be the same as that discussed by the Full Bench in relation to the SCHCDSI Award in *Australian Municipal, Administrative, Clerical and Services Union*⁴¹⁵ as follows:

⁴¹⁵ [2014] FWCFB 379

“[39] We do not consider that there is any sound rationale for casual employees to be excluded from overtime penalty rates in circumstances where they apply to full-time and part-time employees. No such rationale was advanced by any party before us. The result of this exclusion is or will be twofold. Firstly, it will result in a reduction in the rate of pay for those casual employees who regularly perform overtime work, without any apparent industrial justification for this occurring. Secondly, it means that it will be cheaper to utilise casual employees to perform overtime work rather than full-time or part-time employees. No party was able to advance any reason why the SCHCDS Award should contain a bias in favour of casual employment and against full-time and part-time employment.”

[549] Overtime penalty rates serve the dual purpose of compensating employees for disabilities of that nature and establishing a disincentive for employers to require particular employees to work long hours. Employers in the industry sectors in question may be able avoid the cost of overtime penalty rates by adopting rostering systems and practices which ensure that no single employee is commonly required to work excessive hours, and in that sense the introduction of penalty rates need not cause significant additional cost burdens for employers. That is relevant to the consideration in s.134(1)(f), which we have taken into account as not being adverse to the proposition that a fair and relevant safety net should provide for casual overtime penalty rates.

[550] In each of the 3 awards, the hours of work provisions for full-time employees allow significant flexibility as to the way in which the 38 hour week may be rostered, and this may include ordinary hours being rostered for days of a length of up to 11½ hours in the Hospitality Award (cl.29.1(b)(i)) and the Restaurants Award (cl.31.2(a)), with there being no length limit in the Clubs Award. The awards also allow the 38 hour week to be rostered over the length of a 4-week roster cycle (see cl.29.1(a) Hospitality Award, cl.26.3(e) of the Clubs Award and cl.31.1 of the Restaurants Award). In each award, overtime is payable for hours worked in excess of the ordinary hours that are rostered in accordance with these provisions. We consider that the overtime provisions for casual employees to be introduced should broadly reflect these current provisions for full-time employees. Therefore, in respect of each award, we determine that overtime penalty rates should be payable to casual employees for all time worked in excess of 12 hours in a day or 38 hours per week. Where a casual employee works in accordance with a roster, the 38 hours may, for the purpose of overtime calculations, be averaged over the length of the roster cycle (which may not exceed 4 weeks). The rate of the overtime penalty will in the case of each award be the same as for full-time employees. It shall not however compound upon the casual loading.

[551] We direct United Voice to draft determinations for each award to give effect to our decision. We will then provide interested parties with an opportunity to make submissions about the form of the variations and the date they should take effect.

4.13 Consideration – United Voice claim re casual minimum engagement period and maximum daily hours

[552] As earlier stated, United Voice’s claim to increase the minimum engagement period for casual employees from 2 to 3 hours, and for the daily maximum hours of full-time and part-time employees under each award to be equalised at 10 hours, was raised very late in the proceedings, after the evidence had been heard. Both changes are of potential major significance. The timing of the making of the claims meant that the proposed changes could

not be addressed by any witness. We do not consider there is any evidentiary foundation upon which we could conclude that the proposed variations are necessary to achieve the modern awards objective. They are rejected.

5. SCHCDSI AWARD AND AGED CARE AWARD

5.1 ABI and NSWBC claim

[553] ABI and NSWBC⁴¹⁶ (collectively, ABI) have sought that the current part-time employment provision in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHCDSI Award) be varied to allow greater flexibility in the way in which the hours of work for part-time employees are fixed. This claim was primarily advanced in the context of the development and implementation by the Australian Government of the National Disability Insurance Scheme (NDIS).

[554] The NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, ABI contends that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to meet the demand for individualised services generated by the NDIS, will become casualised. The ABI claim was supported by Jobs Australia, which is a national peak body of non-profit organisations that assist disadvantaged people into work.

[555] Clause 10.3 of the SCHCDSI Award, which deals with part-time employment, currently provides:

10.3 Part-time employment

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

(b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) Before commencing employment, the employer and the employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing.

[556] Clause 10.3 of the SCHCDSI Award was not in this form at the time it took effect on 1 January 2010. At that time, paragraph (c) was not included. In the course of the Transitional

⁴¹⁶ Submission – 30 November 2015

Review of awards conducted pursuant to Sch. 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), the ASU sought, among other things, that clause 10.3 be varied by the addition of paragraph (c). This was granted by the Commission (Watson VP) in a decision issued on 27 June 2013.⁴¹⁷ The reasoning for this outcome was simply as follows:

“[20] That part of the application seeking a requirement that part-time arrangements be agreed in writing prior to commencing employment is a common award provision. It requires employees to be given clear information as to the basis of their employment when they are engaged. I consider that the case for such a clause is strong, especially when there is no award minimum engagement period. In my view the concerns of the employers can be allayed by standard procedures that comply with the clause, such as those that have been developed for employers covered by similar provisions in other awards. I will make this change prospective to allow employers to prepare for the change. If significant practical problems emerge an appropriate variation can be sought. I will insert the clause sought by the ASU with effect from 1 August 2013.”

[557] There was no employer appeal of the above decision.

[558] ABI’s claim, in its final amended form⁴¹⁸, was for clause 10.3 to read as follows:

“10.3 Part-time employment

- (a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.
- (b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.
- (c) Subject to clause 10.3(d), before commencing employment, the employer and the employee will agree in writing on the regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day. Any agreed variation to the regular pattern of work will be recorded in writing.
- (d) Despite anything else in this clause 10.3, an employer and an employee may agree not to fix the employee’s hours of work if the employee is engaged to provide supports to clients in circumstances where the client has discretion to vary when the support is provided. In these circumstances:
 - (i) before commencing employment the employer and the employee will agree in writing on:

⁴¹⁷ [2013] FWC 4141

⁴¹⁸ Submission – Draft determination – 5 July 2016

- (A) the number of hours to be worked each week (or the average number of hours); and
 - (B) the days and/or times of the week that the employee is not available to work (if any);
- (ii) the employee's hours will be set by the employer in accordance with clause 25.5, save that the employee will not be required to work on those days or at those times referred to in clause 10.3(d)(i)(B).
 - (iii) Any agreed variation to the employee's availability or to the number of hours to be worked must be recorded in writing."

[559] ABI's proposed variation, in its final iteration, was only directed at those aspects of disability service provision which were said to be subject to client control and thus where the employer had least control over the hours required to be worked. In respect of part-time employees in that area, its variation proposed an employment model whereby actual working hours were not determined by agreement at the outset of the employment and were thereafter only alterable by agreement, but rather that the employer would have the ability to roster those hours in accordance with clause 25.5 subject to it providing an agreed guaranteed number of weekly hours and such working hours being rostered at periods when the employee was agreed to be available to work.

[560] ABI's claim was opposed by the HSU, the ASU and United Voice, who were collectively represented in the proceedings in respect of this claim (the Unions), the ACTU, the ANMF and People with Disability Australia (PWDA), a national disability rights and advocacy organisation.

5.2. St Ives Group claim

[561] The St Ives Group⁴¹⁹, which is a Western Australian-based provider of aged care services, has sought variations to the *Aged Care Award 2010* (Aged Care Award) and the SCHCDSI Award in relation to part-time employment and rostering provisions.⁴²⁰

Part-time employment

[562] St Ives Group seeks the introduction of a more flexible system of part-time employment that, rather than requiring agreement on a fixed pattern of working hours at the commencement of employment which was thereafter only alterable by agreement, would allow the employer to roster when the employee was to work his or her hours of work in accordance within the pre-agreed periods that the employee was available to work. The model proposed was conceptually the same as that advanced by ABI, except that it was to apply to all part-time employees in each award.

[563] Clause 10.3 of the SCHCDSI Award has earlier been set out. Clause 10.3 of the Aged Care Award currently provides:

⁴¹⁹ Submission – 12 October 2015

⁴²⁰ A claim to also vary the *Nurses Award 2010* was withdrawn in correspondence dated 13 July 2016.

10.3 Part-time employees

- (a) A part-time employee is an employee who is engaged to work less than full-time hours of an average of 38 hours per week and has reasonably predictable hours of work.
- (b) Before commencing employment, the employer and employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day.
- (c) Any agreed variation to the hours of work will be in writing.
- (d) The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.
- (e) Payment in respect of personal/carer's leave (where an employee has accumulated an entitlement) for a part-time employee will be on a pro rata basis made according to the number of ordinary hours the employee would have worked on the day or days on which the leave was taken.

[564] St Ives Group proposed that clause 10.3 of the Aged Care Award be varied to provide as follows:

“Clause 10.3 Part-time Employees

- (a) A part-time employee is an employee who is engaged to work less than full-time hours of an average of 38 hours per week and has reasonably predictable hours of work.
- (b) The employer and employee will agree in writing on a minimum number of hours to be worked each fortnight and the employee's available days and hours of work.
- (c) Any agreed variation to the minimum hours of work, or the employee's available days and hours of work will be in writing.
- (d) Nothing in clause 10.3(b) or (c) is intended to prevent the employee being offered, or accepting additional hours of work.
- (e) The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.
- (f) Payment in respect of annual, personal/carer's leave (where an employee has accumulated an entitlement) for a part-time employee will be on a pro rata basis made according to the number of ordinary hours the employee was rostered to work on the day or days on which the leave was taken.”

[565] Clause 10.3 of the SCHCDSI Award is proposed to be varied to the following:

“Clause 10.3 Part-Time Employment

- (a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.
- (b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.
- (c) The employer and the employee will agree in writing on a minimum number of hours to be worked each fortnight and the employee’s available days and hours of work.
- (d) Any agreed variation to the minimum hours of work, or the employee’s available days and hours of work will be recorded in writing.
- (e) Nothing in clause 10.3(c) or (d) is intended to prevent the employee being offered, or accepting additional hours of work.”

Rostering

[566] The amendment sought to the rostering provisions in the 2 awards is intended to clarify that where an employer has provided an employee with a copy of their roster directly by telephone, facsimile, direct contact, post or email, the employer will not also be required to physically display the rosters in a place conveniently accessible to employees. Additionally, St Ives Group proposed that the requirement for employers to display rosters be varied from “*at least two weeks prior*” to “*at least seven days before*” the roster period commences.

[567] Clause 22.6 of the Aged Care Award currently provides:

22.6 Rosters

- (a) The ordinary hours of work for each employee will be displayed on a roster in a place conveniently accessible to employees. Such roster will be displayed at least two weeks prior to the commencing date of the first working period in any roster subject to clause 22.6(b) below.
- (b) It is not obligatory for the employer to display any roster of the ordinary hours of work of casual or relieving staff.
- (c) Seven days’ notice will be given of a change in a roster. However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.
- (d) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that

the part-time employee still has two rostered days off in that week or four rostered days off in that fortnight, as the case may be.

- (e) Where practicable, ADOs will be displayed on the roster.
- (f) This clause will not apply to hostel supervisors.

[568] St Ives Group proposes that clause 22.6 of the Aged Care Award be varied to provide as follows:

“Clause 22.6 Rosters

- (a) Employees will work in accordance with a weekly or fortnightly roster fixed by the employer.
- (b) The roster will set out an employee’s daily ordinary hours of work and start and finishing times and will be provided to the employee in accordance with 22.6(f), or displayed on a roster in a place conveniently accessible to employees at least seven days prior to the commencement of the roster period subject to clause 22.6(c) below.
- (c) It is not obligatory for the employer to display any roster of the ordinary hours of work of casual or relieving staff.
- (d) Seven days’ notice will be given of a change in a roster. However, a roster may be altered at any time by agreement or to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.
- (e) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has two rostered days off in that week or four rostered days off in that fortnight, as the case may be.
- (f) Rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email or facsimile.
- (g) Where practicable, ADOs will be displayed on the roster.
- (h) This clause will not apply to hostel supervisors.”

[569] Clause 25.5 of the SCHCDSI Award currently provides:

25.5 Rosters

- (a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.

- (b) Rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email or facsimile.
- (c) It is not obligatory for the employer to display any roster of the ordinary hours of work of casual or relieving staff.
- (d) Change in roster
 - (i) Seven days' notice will be given of a change in a roster.
 - (ii) However, a roster may be altered at any time to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.
 - (iii) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.
- (e) Where practicable, accrued days off (ADOs) will be displayed on the roster.
- (f) Client cancellation
 - (i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee will be entitled to receive payment for their minimum specified hours on that day.
 - (ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.

[570] St Ives Group's proposed variation for clause 25.5 of the SCHCDSI Award is as follows:

“Clause 25.5 Rosters

- (a) Employees will work in accordance with a weekly or fortnightly roster fixed by the employer.
- (b) The roster will set out an employee's daily ordinary working hours of work and starting and finishing times and will be provided to each employee in accordance with 25.5(e), or displayed in a place conveniently accessible to employees at least seven days before the commencement of the roster period.

- (c) Seven days' notice will be given of a change in a roster. However, a roster may be altered at any time by agreement or to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.
- (d) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has two rostered days off in that week or four rostered days off in that fortnight, as the case may be.
- (e) Rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email or facsimile.
- (f) It is not obligatory for the employer to display any roster of the ordinary hours of work of casual or relieving staff.”

[571] The St Ives Group's claims were opposed by the Unions and the ANMF.

5.3 ABI's evidence

Anthony Rohr

[572] Mr Anthony Rohr⁴²¹ was the Executive Manager, People, Culture, Safety at Mai-Wel, a not-for-profit organisation that provided a number of services to people with disability, including social and recreational support, various employment options and supported accommodation. Mai-Wel currently employed 425 employees including 208 part-time employees and 130 casual employees and had been part of the National Disability Insurance Scheme (NDIS) Hunter trial site since July 2013. Mr Rohr gave evidence that the company has favoured employing people on a part-time basis for benefits such as a stronger commitment of staff. He noted that due to recent changes in the industry the number of casual employees is growing to meet the evolution of clients' more personalised and individual support requirements. He gave evidence that a common element in many of the newer styles of consumer-driven support is frequent change. Mr Rohr gave evidence that the new model of service delivery requires a different approach to staffing, including the need for shorter and more varied working hours and a greater demand for flexibility and changes in work hours.

[573] Mr Rohr gave evidence about the company's recent experience as part of the NDIS trial. He stated that the company had experienced significant change where those traditional hours of work are now to a large extent being replaced by a growing and evolving participant-driven focus, with variations to work hours as different as the individuals themselves. Mr Rohr gave examples of 4 case studies of changes to various clients' programmes. He concluded that clause 10.3 of the award does not provide sufficient flexibility to make it practicable for Mai-Wel to engage part-time employees to provide services under the NDIS.

[574] Mr Rohr was cross-examined by the representative for the HSU, the ASU and United Voice. During cross-examination, Mr Rohr responded positively to a question about whether the *“the bulk of the work is carried out in areas where there's fairly consistent hours of*

⁴²¹ Witness statement – 1 December 2015, Exhibit 228; Oral evidence – Transcript 14 July 2016 at PN4366–PN4725

attendance on the participant”.⁴²² He said that the area of greatest unpredictability or irregularity of work was the one-on-one attendances that were a new feature of the NDIS, but conceded he was not able to specifically state what proportion of the work was taken up by this sort of attendance. He had not gone through the figures on how often cancellations occurred, and noted that there was no obligation on the organisation to carry out activities at short notice. Mr Rohr conceded that there was nothing to do with the intensity of the work, or outside of hours work, that would prevent him from using part-time employees under the current clause 10.3 of the award.

Hugh Packard

[575] Mr Hugh Packard⁴²³ was the Chief Executive Officer of Valmar Support Services Ltd (Valmar). He has held the position since around September 1991. Valmar was a not-for-profit public company that provides support services for people with disability and the elderly. Mr Packard gave evidence that the majority of employment at Valmar and across the aged care and disability sectors is part-time or casual employment. Mr Packard also gave evidence that Valmar sought to keep the percentage of casual employees in the organisation as low as possible by engaging staff on a permanent basis wherever possible as clients benefit from care provided by a familiar face and developing relationships with staff. Mr Packard stated that he believed the majority of their staff would rather have the certainty of a permanent position, even with some flexibility and/or uncertainty in working arrangements, rather than being engaged in a casual position.

[576] Mr Packard gave evidence that as a result of new funding models for people with disability through the NDIS, and reforms to the aged care system, these sectors were increasingly consumer driven with clients having greater control and choice over staffing. Mr Packard was cross-examined by representatives for the HSU, the ASU and United Voice, who queried whether it was realistic to give clients the expectation that they can have a high *“degree of flexibility but at the same time, get some sort of permanent staff member, even a selected staff member?”*⁴²⁴ Mr Packard replied that it was a conflict between where families are saying we want permanent, reliable staff but we also want flexibility and choice, but that *“if we give them absolute flexibility we’re not going to be able to staff it because the staff are going to say...we don’t want to work for you, because we need certainty”*.⁴²⁵

[577] Mr Packard gave evidence that the current rostering arrangements in the SCHCDSI Award for part-time employees were problematic as employees often do not have reasonably predictable work and employees may accept additional hours on short notice but it is very onerous and impractical to have written agreement and that these additional hours would not usually appear on the roster.

⁴²² Transcript 14 July 2016 at PN4563

⁴²³ Witness statement – 26 November 2015, Exhibit 254; Oral evidence – Transcript 15 July 2016 at PN5564–PN5846

⁴²⁴ Transcript 15 July 2016 at PN5818

⁴²⁵ Transcript 15 July 2016 at PN5818

5.4 Jobs Australia's witnesses

Ken Baker

[578] Dr Ken Baker⁴²⁶ was the Chief Executive of National Disability Services (NDS), the peak industry body for non-government disability services across Australia. NDS has 1,100 members across Australia and is the only organisation that represents the full spectrum of disability service providers. In his role, Dr Baker provided information, representation and policy advice to government on disability and related issues. He had worked in social policy and public affairs for over 30 years. Dr Baker supported the application by ABI to vary the SCHCDSI Award. He gave evidence about the roll out and the operation of the NDIS and workforce management under the NDIS.

[579] NDS was acutely aware that providers were finding it difficult to deploy workers flexibly within current award settings and tight NDIS pricing, and feedback from NDIS trial sites indicated that, in response to client demand, rostering had become a 24 hour, 7 day a week process, not a business hours function. Dr Baker provided data highlighting particular rostering issues such as increased hours worked per day and length of service requests. Dr Baker provided information relating to the changes in the disability sector due to the introduction of the NDIS, including the increasing number of for-profit providers in the sector. It was put to Dr Baker during cross-examination that greater flexibility of the workforce is something that was desirable, but not necessary, in meeting the needs of clients. Dr Baker's response was that providers would not be able to satisfy all of the client's choices and wishes, but they would do their utmost to be responsive.

David Carey

[580] Mr David Carey⁴²⁷ was the Chief Executive Officer of ConnectAbility Australia, a disability service provider based in the Hunter Region of NSW. ConnectAbility Australia was a member of NDS. ConnectAbility Australia operated mostly within the initial NDIS trial sites of the Hunter region. It supported people with significant or complex disabilities and provided support to approximately 200 participants. Mr Carey supported the ABI application to vary the SCHCDSI Award. He gave evidence about the NDIS trial and rollout across NSW and provided information relating to ConnectAbility's funding arrangements and changing support requirements since the introduction of the NDIS. Under the NDIS, ConnectAbility Australia has restructured the way it rostered staff to participants. Mr Carey provided evidence about the breakdown of participant support hours and the complexities involved in rostering staff under the NDIS, particularly when a participant required assistance for periods of one hour. He said that ConnectAbility Australia's workforce was 69% female and 31% male, with approximately 75% of staff employed as permanent part-time.

[581] Mr Carey said that in the NDIS environment at least 5 shift cancellations were received per day with 24 hours' notice given. The SCHCDSI Award did not permit rosters to be altered by the employer on such short notice. In those circumstances ConnectAbility was then unable to make a claim against the NDIS participant. Mr Carey also noted that the leave

⁴²⁶ Witness statement – 29 April 2016, Exhibit 232; Oral evidence – Transcript 14 July 2016 at PN4728–PN4871

⁴²⁷ Witness statement – 29 April 2016, Exhibit 233; Oral evidence – Transcript 14 July 2016 at PN4876–PN4962

entitlements for shiftworkers under the SCHCDSI Award were contrary to NDIS costings for staff working in supported accommodation.

[582] In cross-examination concerning rostering staff, negotiating with participants about agreements, dealing with cancellations by participants and the degree of flexibility demonstrated by current employees, Mr Carey stated that “*we have a workforce that’s flexible because of the environment we work in*”⁴²⁸ but added that with “*the award versus NDIS, there is just a clash there that makes it difficult for us to ... be flexible to what the participants needs are*”.⁴²⁹

Dr Jennifer Fitzgerald

[583] Dr Jennifer Fitzgerald⁴³⁰ was the Chief Executive Officer for Scope (Aust) Limited (Scope), a Victoria-based disability services provider. She was also Vice-President of the NDS and Chair of NDS Victoria. She had 20 years’ experience as a physiotherapist in the disability sector. Scope employed approximately 1000 disability support workers with approximately 65% employed on a permanent part-time basis, and approximately 70% were women. Dr Fitzgerald gave evidence that since the introduction of the NDIS, Scope had seen a change in the way it delivered services to accommodate the requests of the client. By way of example, she said a client might make a request for personal care supports in their home, and Scope had to ensure that it could provide those supports at that location and at the time requested, which might only be for a short period of time. This had increased the complexity of coordinating supports and rostering staff. Dr Fitzgerald said that there had been an increase in individual and in-home support shifts as well as a change in client preference from longer to shorter shifts. In the Barwon region of Victoria where the NDIS was first rolled out, 79% of individual supports in the period July 2015 to June 2016 were for less than 4 hours. Though Scope attempted to roster an employee for a series of short appointments where it could, Dr Fitzgerald said this was not always possible for a number of reasons, including that often clients were not seeking support at similar times, and the employer was not able to charge clients for extra wage costs arising when the support was for short periods.

[584] Dr Fitzgerald stated that the more prescriptive part-time award provisions were at odds with the flexibility required by service providers in order to match staff with client requirements. She said that this might lead to casualisation of the workforce. The award requirement to post rosters 2 weeks in advance was at odds with in-home services which were based upon demand and which may not be known in advance. In respect of shiftworkers’ entitlement to an additional week of annual leave under the award, Dr Fitzgerald stated this is an unfunded cost given that NDIS funding is premised on employees’ receiving 4 weeks’ annual leave.

[585] During cross-examination Dr Fitzgerald gave evidence that over the past 12 months, Scope’s therapy staff billable hours per day had increased from 3.6 to 4.6, being the number of hours for Scope to break even. She said that Scope had lost \$150,000 on therapy services in Barwon. She confirmed that Scope did not have any obligation to assign clients their preferred support worker, but it tried to do so where possible. She gave evidence that during the roll-out

⁴²⁸ Transcript 14 July 2016 at PN4936

⁴²⁹ Transcript 14 July 2016 at PN4936

⁴³⁰ Witness statement – 11 August 2016, Exhibit 280; Oral evidence – Transcript 15 August 2016 at PN708–PN1107

of the NDIS in Barwon, there had been a growth in Scope's casual workforce to accommodate the NDIS changes, which was not the preference of Scope. She also said that the current practice of Scope was that when a client requested a particular service at a particular time, Scope accommodated that need without negotiating.

[586] Dr Fitzgerald stated that Scope generally engaged part-time employees between 15–20 hours per week, and they could then be offered additional hours on request. There was a high employee turn-over rate of 13%. It was her intention to keep as many permanent part-time employees as possible and only use casual employees when part-time employees were unable to meet the demand.

5.5 St Ives Group's witnesses

Leah Miles

[587] Ms Leah Miles⁴³¹ was employed as an Administration Assistant – Operations for the St Ives Group, with responsibility for providing support and training to the employees who set the rosters for employees covered by the SCHCDSI Award, the majority of which were part-time. Ms Miles gave evidence that staff could alter their hours of work with 2 weeks' notice, which put pressure on scheduling. Similarly, she submitted clients might request time-specific respites that did not fit in with staff availability, which meant clients needed to be moved around to accommodate time-specific services. Ms Miles stated that it put the support staff in a vulnerable position because a client could cancel at any time without notice, leaving the worker with fewer hours than first rostered. She gave evidence that if the cancellation was last minute, the likelihood of staff getting their hours replaced was low, and schedulers had no control over cancellations so it was virtually impossible to guarantee a set amount of hours to staff members. Clients might also request not to have staff back if they were not compatible. When a client left hospital their needs might change and the services that they previously had might not be required.

[588] Ms Miles gave evidence that guaranteeing hours, shifts and start and finish time was extremely difficult for a scheduler in the industry as most of the factors that changed the amount of hours are out of the scheduler's control. Ms Miles commented that managing minimum hours would be more feasible but staff availability and the areas in which they needed to travel would need to be flexible. She noted that it "*would cause issues and a cost to the business from time to time [but], it would be manageable*".⁴³²

Lois Andrijich

[589] Ms Lois Andrijich⁴³³ was the General Manager People for St Ives Care, a separate arm of the St Ives Group, with responsibility for managing the home based care portion of the business. Ms Andrijich gave evidence in relation to the scheduling challenges faced in providing home based care where services regularly occurred in short blocks such as half an hour. She said the challenge of balancing the needs of 1000 clients to the availability of 350

⁴³¹ Witness statement – 12 October 2015, Exhibit 234; Oral evidence – Transcript 14 July 2016 at PN4978–PN5021

⁴³² Witness statement – 12 October 2015, Exhibit 234 at para 39

⁴³³ Witness statements – 12 October 2015, Exhibit 235; undated, Exhibit 236; Oral evidence – Transcript 14 July 2016 at PN5023–PN5081

staff in many locations was complicated by 90% of the workforce being female with caring responsibilities which changed regularly and often, as well as trying to match client locations in sequence to available staff. She said that the introduction of Consumer Directed Care by the Federal Government had placed greater focus on clients being responsible for managing their own care including choice of carer and managing their own budgets, leading to a reduction in St Ives' net profit margin of 9%. No more than 5% of shifts lasted for a duration of 4 hours. Changes to client needs resulted in cancelled shifts. A shift cancelled before 5.00 pm the day before was not payable to the care workers but cancellations after 5.00 pm the day before were either payable or could be re-rostered. St Ives had 2898 cancelled shifts in the first quarter of 2015.

[590] Ms Andrijich gave evidence that the current wording of clause 10.3(c) of the award creates operational pressure on the business by requiring that a support worker would work on set days at set times. This created significant financial pressure for aged care providers. A client cancelling without notice meant that a worker with guaranteed hours had to be paid regardless. A work around would be to employ only casual staff but the business believed that this was not good for staff and clients and preferred to provide secure employment. If St Ives moved to employ more casuals than the current 10% the acceptance of the casual conversion proposal would cause significant problems for the home care industry.

[591] During cross examination, she confirmed that her evidence concerned workers under the SCHCDSI Award only, and that the majority of home care workers were permanent part-time with fixed working hours and shift times. She said this made it difficult to be as flexible as possible to fit with the workers needs and lifestyle. The proposed reduced minimum shift hours would make re-rostering after cancellations easier than under the current set roster, with set hours. She also described the difficulties caused by set guaranteed hours, start and finish times in being able to set up a roster that was consistent, avoided unproductive hours, allocated work in an area that was close to the worker's home in order to reduce unnecessary costs such as travel time, and avoiding too many kilometres travel between clients.

5.6 Unions' witnesses

[592] The Unions (the ASU, United Voice and the HSU) relied on a second report by Dr Muurlink as well as several witness statements to oppose the claims put forth by ABI and St Ives.

Dr Olav Muurlink

[593] Dr Olav Muurlink⁴³⁴ gave a second report which reviewed scholarly work on unpredictable patterns of work beyond the control of the worker and their effect on workers' well-being. He stated in his report that Australia, compared to other countries, had little regulation pertaining to the amount of consecutive hours worked, or the minimum length of rest periods, and unpredictability in the workplace had a range of "*corollaries for employee physical, psychological and social health*".⁴³⁵ Dr Muurlink said that the literature showed there were 2 aspects of unpredictability that related to structural changes in time management – firstly, a reduction of an employee's ability to engage in positive health behaviours and,

⁴³⁴ Witness statement – 29 February 2016, Exhibit 265; Oral evidence – Transcript 15 July 2016 at PN6328–PN6468

⁴³⁵ Submission – 16 May 2016 *Predictability and control in working schedules* at p.4

secondly, a reduction in the ability of the individual to access services that follow a predictable beat. The evidence showed that working irregular and unsystematic hours had a negative effect on the physical and psychological health, and on the social life, of workers and their families and the people they care for.

Christine Gamble

[594] Ms Christine Gamble⁴³⁶ has been employed as a part-time Community Mental Health Support Worker with Uniting Care Wesley Port Adelaide (UCWPA) since 2007. Ms Gamble gave evidence that her role involved working with clients who were seriously affected by mental illness, assisting them to manage their days and working with them on strategies to help build their road to recovery. Ms Gamble gave evidence that her regular hours were from 9.00 am until 5.00 pm, 4 days a week and that she saw clients regularly over a number of years. Casual work was not offered at UCWPA because clients needed to build trust with their support worker, and the nature of their disability often made it difficult to do so. Ms Gamble said that she had an agreement with her employer that clearly stated her hours and employment status. Part-time work allowed Ms Gamble to rest and recover each week to avoid burn out and to balance her work and life and keep healthy. If her hours were reduced Ms Gamble said she would be in financial difficulty as the regularity of her hours allowed her to plan her budget and ensure she was financially secure. Ms Gamble was concerned that the proposed award variations could see a reduction in the number of core employment hours made available to employees and erode the structured approach to part-time work that currently exists.

Melissa Coad

[595] Ms Melissa Coad⁴³⁷ was employed by United Voice as the National Industry Coordinator for aged care and disability. Ms Coad gave evidence that she was responsible for the coordination of United Voices' activities in the residential aged care, home care and disability care industries, was involved in stakeholder and government forums and was engaged in the policy debate as a member of various industry groups and forums. Ms Coad commented on the funding models used in home care and residential care. In relation to home care, she discussed the current model of funding, Consumer Directed Care (CDC), and stated that reforms commencing in February 2017 would enable consumers to take their allotted funding to an eligible provider of their choice. She stated that for many providers this might mean a more certain funding income stream as they were able to attract a higher number of consumers than they were allocated under the previous funding arrangements. Ms Coad commented that amongst the more enlightened employers, there was an awareness that stability and better terms and conditions for the workers delivering the actual service was critical for a provider's survival and growth when consumers had greater choice concerning where the money went.

[596] Ms Coad stated that the CDC model incentivised employers to increase the predictability and consistency of service delivery and said that continuity and predictability was consistent with a higher quality service. She said the majority of care recipients in home care understood and would be able to negotiate a balance between their desired service and

⁴³⁶ Witness statement – undated, Exhibit 225

⁴³⁷ Witness statement – 28 April 2016, Exhibit 227

the capacity for that service to be provided by the person of their choice at the time of their choice. Ms Coad then noted that CDC did not apply to the Residential Aged Care Industry. Residential aged care places were allocated to providers in an annual Aged Care Approvals Round following a competitive process.

Mick Paddick

[597] Mr Mick Paddick⁴³⁸ has been employed as a Team Leader, Case Management (IFA) – Barwon Area at the Victorian Department of Health and Human Services (Geelong) for 10 years and had 28 years’ experience working in disability services. At the time of the hearing Mr Paddick was acting in the role of Manager, Client Services, as part of a 3 month secondment. Mr Paddick gave evidence in relation to the type of information contained in NDIS plans. Attached to his witness statement was a de-identified example of a plan and the funding provided by the NDIS for a participant. Mr Paddick gave evidence about flexibility within the NDIS plans, and stated that the plans are ultimately quite prescriptive about what and when support can be provided to a participant. He also stated that participants were “*not at liberty to vary that support from say ‘daily living’ for support to go shopping or rock climbing, or even from service provision on weekdays to weekends*”.⁴³⁹ Changes could be made to existing plans through the review process. Mr Paddick noted that changes to plan goals/needs had to be supported by evidence, and a formal review typically occurred on the 12 month anniversary for each plan; however informal planning could occur in the interim. During cross-examination Mr Paddick accepted that his example plan did not specify the roster or the hours of work required for the delivery of the specified supports, and he clarified that the plan was of middle of the range complexity.

Heather Fairweather

[598] Ms Heather Fairweather⁴⁴⁰ has been employed as a disability support worker in Yass, NSW at Valmar Support Services Pty Ltd for 10 years. She currently worked at a group house supporting clients with high need disabilities. Ms Fairweather gave evidence about the proposed award variations having a negative impact on her financial situation, the impact upon clients who needed secure and stable support, and the possibility of disability work becoming less attractive to employees and thereby causing detriment to clients. Ms Fairweather said that it was important for her to have certainty about the days of the week she worked and when she would be starting and finishing so that she could balance her family responsibilities. She said that developing strong relationships with clients was crucial, gaining clients’ trust could only occur over years of stable part-time employment. During cross-examination Ms Fairweather said that the certainty of working particular days/hours guaranteed a flow of income, but if she had to choose she would probably prefer knowing the days of the week she had to work over knowing the number of hours that she was to work, although she ranked them equally important.

⁴³⁸ Witness statement – 29 April 2016, Exhibit 237; Oral evidence – Transcript 14 July 2017 at PN5092–PN5149

⁴³⁹ Witness statement – 29 April 2016, Exhibit 237 at para 32

⁴⁴⁰ Witness statement – 19 February 2016, Exhibit 239; Oral evidence – Transcript 14 July 2016 at PN5156–PN5224

Camille Furtado

[599] Ms Camille Furtado⁴⁴¹ was employed as a Lead Organiser with the ASU Queensland Branch. She had responsibility for the Social, Community and Disability sector and had worked in the area for one year. Ms Furtado had carriage of a survey of members of the ASU Queensland Branch employed as part-time or casual employees (the Survey), which consisted of an outline of the respondents' employment background, questions requiring a brief response related to their employment situation and a section for comments. Ms Furtado gave evidence that 50 surveys were completed. Her conclusions from the results were:

- 50% of respondents worked part-time with the vast majority of those indicating that full-time work was not available to them;
- of the other 50% most were employed on a casual basis;
- part-time worker respondents indicated through their comments that they had predictable hours but that if the predictability of their shifts and rosters were removed, it would make managing their work life balance, particularly child-care arrangements, difficult;
- respondents who work casually commented that their hours could vary greatly from week to week and that this caused them stress;
- in general respondents indicated through their comments that rosters and hours of work were decided on what worked best for the employer with little to no consultation with employees; and
- respondents employed on both a casual and part-time basis noted that employers routinely requested changes in rosters with little notice, and employees had great difficulty in meeting these requests.

[600] In cross-examination Ms Furtado accepted that:

- the Survey had been distributed to members and addressed to people who worked part-time or casually, but did not actually ask respondents to indicate whether they worked on a part-time, casual or full-time basis;
- her conclusions regarding respondents' employment status was based on her own assessment of the entirety of each response;
- her conclusions on the impact of reduced shift and roster predictability on the work life balance, particularly childcare arrangements, was based on her assessment of the comments, and there was no specific question about childcare; and
- her conclusion that part-time workers indicated they had predictable hours was a very general assertion.

⁴⁴¹ Witness statement – 11 March 2016, Exhibit 240; Oral evidence – Transcript 14 July 2016 at PN5251–PN5380

Judith Bookallil

[601] Ms Judith Bookallil⁴⁴² was employed as a Disability Support Worker at Accnet21, a disability service and accommodation provider, and had worked there since 2004. Ms Bookallil gave evidence that she worked 31.5 hours a week under a written part-time work agreement, with rostered days off on Wednesdays and Thursdays. Ms Bookallil stated that continuity of permanent part-time staff at the service was important in providing satisfactory support for clients, because it enabled familiarity and stability and in particular, assisted communication with clients who were not verbal. She said the security of predictable part-time hours was important in managing her working life and enabling her to engage in community activities planned around her agreed rostered days off. She was concerned that the proposed award changes would affect the security of part-time employment and she would be unable to sustain her balance between paid work and community activities if her working times were less predictable. She was also concerned about clients losing the benefit of follow-through with key Accnet21 initiatives if part-time employment became more intermittent. She stated it would adversely impact support workers' ability to maintain and improve participants' well-being. She accepted that the NDIS had not yet come into effect where she worked in Northern New South Wales.

Susie Bady

[602] Ms Susie Bady⁴⁴³ was employed as a Recovery Support Worker at SNAP Gippsland Incorporated (SNAP), where she had worked since August 2014. SNAP provided mental health support services and employed approximately 30 to 40 employees. She was one of 3 employees at SNAP's Orbost office, where she had a case load of approximately 16 clients. Her employment was covered by the SCHCDSI Award. Ms Bady said that she had a passion for social justice, and that this was the reason for her decision to work in the social and community services industry. She was employed as a permanent part-time employee, and worked 30.8 hours per week Monday to Thursday, 9.00 am to 5.00 pm. Ms Bady stated that approximately once every 2 months she took on additional hours in order to travel between Orbost and Bairnsdale or Sale (a 2–3 hour drive) for the purpose of training or meetings with other staff members. She did not have to work additional hours on the basis of client need, as the type of work she performs was relatively consistent. When clients required change to their hours or required urgent appointments, Ms Bady was able to move appointments.

[603] Ms Bady had 2 children, who were 5 and 8 years old. She stated that while they were at kindergarten she was on the board of management, which required approximately 5–10 hours of work per month. Ms Bady also participated in a community garden. If her hours of work, and the quantum of hours to be worked were inconsistent and unpredictable, she would find it difficult to balance her work and other responsibilities, plan hours of care for her children, and provide financial support for her family. She stated that inconsistent and unpredictable work would force her to consider whether she could continue doing the type of work she currently undertook.

⁴⁴² Witness statement – 23 February 2016, Exhibit 242; Oral evidence – Transcript 14 July 2016 at PN5400–PN5455

⁴⁴³ Witness statement – 29 April 2016, Exhibit 247

Mary Hajistassi

[604] Ms Mary Hajistassi⁴⁴⁴ was employed by the South Australian Branch of United Voice as a Lead Organiser in the area of aged care and early childhood education and care. She had been in this position since June 2015, having been a union official for approximately 12 years. Her current role gave her oversight of all organising in aged care facilities in South Australia, including the planning and strategy of the union in the sector. Ms Hajistassi stated that United Voice covered the following types of employees in residential aged care facilities:

- personal care workers involved in the direct care of residents;
- lifestyle workers who provided recreational and lifestyle activities; and
- ancillary workers, such as kitchen hands, cooks, chefs, maintenance staff, handy persons, gardeners, laundry employees and cleaners.

[605] United Voice had 2916 members employed in residential aged care facilities in South Australia, and the majority of these members were employed under enterprise agreements. These enterprise agreements largely replicated the conditions of the Aged Care Award, including the provisions concerning part-time employment and rosters. She said that the majority of employees in residential aged care facilities were employed on a part-time basis. Ms Hajistassi outlined the standard consultation procedure followed by employers in residential aged care facilities, and the manner in which the union became involved in the process on behalf of its members. She stated that the requirement that employers engage in consultation about rosters could lead to compromise between employers and employees.

Kevin Denny

[606] Mr Kevin Denny⁴⁴⁵ was a Residential Support Worker at Valmar Support Services and had been employed there since 2004. He commenced his employment as a casual employee and was subsequently offered permanent part-time employment. Mr Denny gave evidence that he would choose to work a full-time workload of 38 hours a week but that Valmar only currently offered 35 hour shifts. Mr Denny expressed concern that the proposed changes to the award for permanent part-time employees would reduce the number of permanent, structured hours for part-time employees and would make part-time work more like casual work. He said that without a reasonable degree of predictability in his working hours he might be unable to remain working in disability services. In his opinion, a less structured approach to part-time work would impact adversely on the quality of relationships with clients. Mr Denny responded to the evidence of Mr Packard, the CEO of Valmar, concerning the impact on the NDIS on staff rostering. He said that clients did not have a propensity to cancel work from time to time and were not casual in changing their choice of support worker.

⁴⁴⁴ Witness statement – 29 April 2016, Exhibit 248

⁴⁴⁵ Witness statement – undated, Exhibit 256; Oral evidence – Transcript 15 July 2016 at PN5853–PN5892

Leon Wiegard

[607] Mr Leon Wiegard⁴⁴⁶ was the Branch Coordinator of the ASU, Victorian and Tasmanian Authorities & Services Branch. Mr Wiegard gave evidence that he conducted an online survey of 322 ASU members working part-time in the social and community services sector in Victoria and Tasmania. Mr Wiegard gave evidence that 189 respondents specified that they worked part-time due to family responsibilities and work/life balance. A majority of the 182 members who responded to the question about the minimum numbers of hours required to support themselves and a family said 30 plus hours per week. Mr Wiegard also gave evidence that a majority of the 172 respondents to the question about whether they had a written agreement recording their hours of work confirmed that there was a written agreement. Mr Wiegard stated that a majority of the 169 respondents to the question whether their employer kept a record of changes to their regular hours of work in writing answered that their employer did not keep a written record. Under cross-examination, Mr Wiegard confirmed that the survey was sent to any member working less than 38 hours which would include part-time and casual employees.

Veronica Keane

[608] Ms Veronica Keane⁴⁴⁷ worked as a permanent part-time Community Support Worker with Catholic Care Liverpool, and had done so since September 2001. She was classified as a Home Care Employee Level 2 under the SCHCDSI Award. She was contracted to work 10 hours per week, but worked an average of 20 hours per week. She agreed to work additional hours because she needed the money. Ms Keane stated that the most important thing about permanent employment was a guaranteed weekly income. Ms Keane supplemented her income with a part-pension.

[609] Ms Keane gave evidence that she did not work regular or consecutive hours and outlined the irregularities in her working pattern. Because there was no minimum engagement for permanent part-time employees, she might work 5 hours spread over 12 hours, and would sometimes sit in her car for over 45 minutes between shifts with no remuneration. Ms Keane gave evidence about the negative impacts arising from this irregularity, including lack of structure, long days, difficulty making and keeping personal appointments (such as medical appointments), rarely seeing family and psychological impacts.

[610] In cross-examination Ms Keane acknowledged that there was a reduction in her contracted hours from 20 to 10 hours per week in August 2015 at her own initiative because working part-time and getting a part-pension was more financially beneficial than working unpredictable hours. Ms Keane acknowledged she was reasonably comfortable with 10 hours per week, was happy to accept additional work when she could and had worked out that she would not work more than 20 hours per week due to her pension. She described the cost implications of travelling home between appointments. If she returned home between clients, even if the appointments were staggered by a number of hours, she had to cover petrol costs so it was not viable. Addressing the variations sought by ABI and St Ives Group, Ms Keane stated that her *“biggest fear ... is that employers will put me on the lowest number of contract*

⁴⁴⁶ Witness statement – 29 April 2016, Exhibit 257; Oral evidence – Transcript 15 July 2016 at PN5893–PN6004

⁴⁴⁷ Witness statement – 26 April 2016, Exhibit 258; Oral evidence – Transcript 15 July 2016 at PN6077–PN6218

hours possible, and then vary my shifts ... the most important thing for me is a stable weekly income”.⁴⁴⁸

Fran Howell

[611] Ms Fran Howell⁴⁴⁹ was employed as a part-time Residential Support Worker with Samaritans Foundation Newcastle (Samaritans); she had worked for Samaritans since 2003. Ms Howell worked 48 regular hours per fortnight rostered over 4 weeks which included weekends and sleepovers. Ms Howell gave evidence that the regularity and security of her working hours allowed her to plan and balance work and family arrangements. She said that she babysat her grandchildren for 3 days per fortnight, and those days were arranged around her regular work hours. She also supported her ageing parents-in-law with transport, and the security of her part-time work arrangement enabled this. She had serious concerns that, if the proposed award variations were made, this could erode the structured approach to part-time work that currently existed in her job. If her working arrangement was split between core and non-core hours, her ability to balance her work and family commitments would be significantly impacted.

Angela Jamieson

[612] Ms Angela Jamieson⁴⁵⁰ was employed as a Social Worker at Inner South Community Health Centre and had been employed there for over 6 years. Ms Jamieson’s employment was covered by the *Community Health Centre (Stand Alone Services) Social and Community Service Employees Multi Enterprise Agreement 2013-2015* (the Agreement). Ms Jamieson gave evidence that the Agreement required her employer to provide her with fixed days of work recorded in writing. She said that her employment was permanent part-time for 22.6 hours per week with set days and start and finish times, and her hours were based on the operational needs of her work. If her hours of work were to move around, she would not be able to make commitments such as picking her children up from school and would then have to make after school arrangements for them. Ms Jamieson outlined the process she recently went through to change her working days and hours due to family circumstances, and said did not believe the process was cumbersome or burdensome for her employer. She appreciated her employer’s support of her family commitments and allowing her to change her hours of work, noting she had not had the same experiences with all her past employers.

Elizabeth Nichols

[613] Ms Elizabeth Nichols⁴⁵¹ was a part-time multi-skilled support worker with Care Options Incorporated and had worked in disability care since 2001. Ms Nichols gave evidence that she worked a minimum of 16 or 25 hours each week depending on a 2 week roster cycle. The roster set out the start and finish times over a 2 week cycle. She worked additional shifts when asked by her employer. Ms Nichols stated that having fixed days and hours of work meant that she could plan time to attend appointments and use services, which was an important consideration as a carer for her husband. Ms Nichols expressed concern in regard to

⁴⁴⁸ Witness statement – 26 April 2016, Exhibit 258 at para 34

⁴⁴⁹ Witness statement – 19 February 2016, Exhibit 259

⁴⁵⁰ Witness statement – 29 April 2016, Exhibit 260

⁴⁵¹ Witness statement – undated, Exhibit 262; Oral evidence – Transcript 15 July 2016 at PN6257–PN6309

the variations sought because there would be no requirement to fix the start and finish times for part-time employees. She stated that the proposed variations would impact her ability to have a stable weekly income to pay for bills, groceries and medical expenses and to make medical and specialist appointments for her husband.

5.7 People with Disability Australia's witness

Matthew Bowden

[614] Mr Matthew Bowden⁴⁵² was the Co-Chief Executive Officer for PWDA, having worked for PWDA in various roles since 2003. Mr Bowden described PWDA as a “*national cross-disability rights and advocacy organisation... (which) represents the interests of people with all kinds of disability*”.⁴⁵³ PWDA was an Organisation for People with Disability, meaning that its primary membership was comprised of people with disability and organisations primarily constituted by people with disability. Mr Bowden characterised the NDIS as being premised on the principles of choice and control for people with disability. While some flexibility would be required of the disability sector workforce, Mr Bowden believed “*spontaneity of needs*”⁴⁵⁴ could be addressed by utilising existing casual employees, with the services required by the majority of those requiring disability support being regular and predictable.

[615] Mr Bowden's view was that the changes sought to part-time employment provisions would lead to insecure employment and have a detrimental effect on the NDIS by creating insecure employment and threatening to affect the quality of staff. He said there was evidence linking low-paid, unmotivated and undervalued staff to violence, abuse, neglect and exploitation of those people with disability for whom they care, and added that, notwithstanding the growth expected in the industry resulting from the introduction of the NDIS, the poor employment conditions within the sector impact on recruitment capabilities. Further erosion of these conditions would exacerbate existing problems.

5.8 ABI and NSWBC's submissions

[616] ABI⁴⁵⁵ submitted that the NDIS had fundamentally changed the landscape of the disability services sector, and there was a widespread concern that this would lead to further casualisation of the workforce, which had already begun to occur. There was a consensus that the maintenance of a permanent workforce was necessary to prevent deterioration in the quality of care provided to participants under the NDIS, but in reality rigid and inflexible requirements relating to part-time employment were frustrating attempts to stop this casualisation. The evidence showed that clause 10.3(c) was causing significant practical problems for employers, as it required an employer to agree on a specific pattern of work with each part-time employee at the commencement of employment. Employers were not able to do this having regard to the operational requirements of the industry, and were therefore forced to engage new employees on a casual basis. There was a tension between reasonable

⁴⁵² Witness statement – 22 February 2016, Exhibit 249; Oral evidence – Transcript 15 July 2016 at PN5497–PN5528

⁴⁵³ Witness statement – 22 February 2016, Exhibit 249 at para 2

⁴⁵⁴ Witness statement – 22 February 2016, Exhibit 249 at para 8

⁴⁵⁵ Final submission – 30 September 2016

predictability and fixed hours, and ABI's amended draft determination sought a new fair and relevant framework that "*gets the balance right*".⁴⁵⁶

[617] ABI submitted that the evidence painted a largely consistent picture of the experiences under the NDIS and the practical implications the reforms were having on employers' operations, which was also supported by quantitative data. The shift towards Consumer Directed Care sought to empower clients by giving them greater control over how their support services were provided, but this created challenges for employers who were trying to deliver services in an efficient way. Changes to rosters were occurring more frequently and rosters had become more complex, which had led to more casual employment and a new operating environment. There had been an increase in specific client requests, an increase in client cancellations, and diminished profitability under the NDIS pricing model. There was a high level of part-time and casual employment due to the short shifts required by individual clients. The funding model for the services meant there was a lack of certainty about programs and services. However there was a mutual desire to encourage permanent part-time employment in favour of casual employment.

[618] ABI submitted that there was an inconsistency in the terminology in the current clause 10.3 because the clause required only *reasonable* predictability of hours for part-time employees while simultaneously requiring a fixed pattern of work and hours. Since clause 10.3(c) was introduced into the SCHCDSI Award there had been undesirable outcomes, including rostering part-time employees on for short fixed shifts and then offering additional hours which could be accepted or declined. This meant employees had a reduced number of guaranteed hours and reduced guaranteed income. The amended variation sought by ABI and NSWBC would enable parties to vary hours of work where clients have the discretion to vary when their services are provided.

[619] In response to the Unions' evidence, ABI⁴⁵⁷ submitted that no evidence had been called from non-residential support workers who would not be affected by the variation because they were able to be offered a fixed work pattern, and their other lay witness evidence should be disregarded as it was either irrelevant or not direct evidence. Dr Muurlink evidence's was "*cherry-picked*".⁴⁵⁸ ABI concluded that their claim was consistent with the modern awards objective in s.134 of the FW Act and did not go beyond what was necessary to achieve the objects within the scope of s.138 of the FW Act.

5.9 Jobs Australia's submissions

[620] Jobs Australia⁴⁵⁹ supported ABI's submissions, and added the proposed variation addressed the barrier to the employment of workers on a permanent part-time basis where the work was ongoing and reasonably predictable. Jobs Australia submitted that the unions' evidence consisted of lay witnesses who were not currently employed on NDIS work, and the survey conducted by the unions had a very small sample of workers whose characteristics were not clearly defined; the evidence was therefore unreliable and should be disregarded.

⁴⁵⁶ Final submission – 30 September 2016 at para 5.6

⁴⁵⁷ Final submission – 30 September 2016 at paras 6.14–6.33

⁴⁵⁸ Final submission – 30 September 2016 at para 6.29

⁴⁵⁹ Final submission – 4 October 2016

5.10 St Ives Group's submissions

[621] St Ives⁴⁶⁰ submitted that the variation it sought addressed the need for greater flexibility in managing its workforce due to the recent changes which had given clients greater discretion over the services they engaged and when they engaged them. In relation to the variation concerning the notification of rosters, St Ives submitted this change was necessary in the current age where communication between employer and employees was frequently by email or other electronic means. The proposed reduced notice period for the provision of rosters in advance would enable greater flexibility to schedule shifts to meet demands for consumer lead services, whilst still balancing the need for employees to have sufficient opportunity to schedule their personal activities around their work roster.

[622] It was submitted that the requirement in the current part-time employment provisions for an employer and employee to agree on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day, before the employee commenced employment did not reflect the variables in the industry, such as client needs. Changes to the personal care industry in terms of funding arrangements meant that it was appropriate for the award to provide flexible part-time work arrangements that accommodate less predictable hours of work. These would achieve the modern awards objective by enabling flexible work and targeting the increase in casual employment. The variations would lead to increased employment opportunities and enable clients' needs to be met.

5.11 Unions' submissions

[623] United Voice, the HSU and the ASU (collectively the Unions)⁴⁶¹ opposed the variations proposed by ABI and St Ives because the current part-time work provisions in the relevant awards were appropriate for the conditions in the sector and met the modern awards objective. Those provisions provided a stable and predictable pattern of work for part-time workers, and to weaken these protections would cause the loss of the essential integrity of part-time employment. The Unions acknowledged concerns over the increasing rate of casualisation, but said the current state of the care sector was uncertain and its future unpredictable. Weakening the core requirements that provided predictability to part-time employees was not the appropriate response to casualisation and without any certainty about the nature of the change or its long term effects, the variation sought must be refused. The current provisions balanced the need to protect the part-time employee without preventing an employer from offering additional hours of work.

[624] Increasing the irregularity and precariousness of part-time work was not a solution to the problem of casualisation. The variation proposed could deter workforce participation for people with other responsibilities such as caring or study. The Unions submitted that the SCHCDSI Award already provides flexibility by enabling the employer and employee to agree to vary part-time hours, providing for no minimum engagement period for part-time employees, permitting broken shifts and limiting the circumstances where overtime is payable. The Unions also argued that there was no probative evidence before the Commission that the increase in casualisation of employment in the disability sector was a permanent

⁴⁶⁰ Submission – 13 October 2015.

⁴⁶¹ Final submission – 11 November 2016

phenomenon that required an award variation. There was no probative evidence before the Commission that the requirement to specify start and finish times on commencement as a contractual right reduced the ability of employers to guarantee minimum weekly hours because of the likelihood of some variation over time. There was no probative evidence before the Commission of industry-wide adjustments to the employment of part-timers in the home care sector following the NDIS. Consumer Directed Care would be limited by the *User Rights Principles* which would mean that clients would not have absolute discretion about their support services. Continuity and predictability of service was an important element of quality of service. Fostering good relationships between home care workers and clients was also important.

5.12 ACTU's submissions

[625] The ACTU⁴⁶² submitted that the employer claims would significantly reduce the security of part-time employment, and mean that part-time employment was replaced by a new category of flexible employment, which would increase the prevalence of insecure work. The claims were not necessary in order to meet the modern awards objective as there were more appropriate means of achieving flexibility (e.g. through enterprise bargaining). They argued that existing arrangements in the 2 awards in question already allowed for all the flexibility necessary, and the principal difference between current arrangements and those proposed by the employer groups was that currently employees must consent to variations to their working hours and working time. The ACTU argued the employer groups' claims were "*merely a means for expanding employer-oriented 'flexibility' into the previous sanctity of permanent employment*"⁴⁶³, and that no expert evidence or empirical data was presented by the employer group. The claim that the NDIS would introduce cost pressures necessitating the proposed changes was overstated.

[626] The ACTU⁴⁶⁴ raised concerns about the proposal for employees to set their unavailability before commencing employment. Employees might feel compelled to overstate their availability in order to secure employment. The proposed variations would enhance the power disparity between employer and employee because employees may have to accept a low number of guaranteed hours per week. As part of its common claims, the ACTU had presented evidence from experts and lay witnesses that demonstrated the negative effects that unpredictable casual work had on employees. Making part-time employment more like casual employment would mean that part-time employees would experience those adverse effects too. The claims were not being driven by employee preference or demand. The AWRS study indicated that most part-time employees are either happy with the number of hours they work or would prefer more hours; only 5.5% would prefer fewer hours.

[627] The ACTU agreed that permanent employment presented advantages to employers, employees and clients; however that was based on the current understanding of permanent employment, not the flexible model proposed. The ACTU reiterated the concerns of witnesses in the proceedings who gave evidence about the negative impacts of variable and disaggregated working time and variable income. The ACTU developed a hypothetical case-study to demonstrate that the span of hours and displacement of social activities that the

⁴⁶² Final submission – 18 November 2016

⁴⁶³ Final submission – 18 November 2016 at para 7

⁴⁶⁴ Reply Submission – 2 May 2016

ABI's claim would make possible could be greater than that of regular full-time employment, with variability similar to casual employment without an additional loading.

[628] The ACTU submitted that the cost pressures resulting from the NDIS changes were currently unknown. It predicted that the majority of client services in those industries would continue to remain consistent and highly predictable. As such, any variability in demand did not necessitate the changes sought as it could be managed through operational practices. Given the existing casualisation trends, there was no guarantee that more flexible part-time employment would prevent or diminish casual employment. The ACTU noted employer evidence that casualisation was not their preference and also went against their clients' wishes, and submitted that employers could manage variability through the service contracts with clients and refuse requests that could not be accommodated. Variability could be addressed, for example, by offering clients a window of time of worker availability rather than guaranteeing a particular time. The ACTU submitted that the Commission should not consider the level of government funding provided to the NDIS as a relevant consideration. The Commission was required to set the safety net independently. The profit margins of providers were not the Commission's concern.

5.13 ANMF's submissions

[629] The ANMF⁴⁶⁵ submitted that the proposed changes would increase flexibility for employers in exchange for increased insecurity for part-time employees. The changes would effectively make employees casual employees without a casual loading. The ANMF submitted that the proposed variations would not meet the modern awards objective.

5.14 Consideration – the ABI/NSWBC claim

Findings re the operation of the NDIS

[630] We have earlier briefly described the concept of the NDIS. Participants in the scheme (and their carers) are required to prepare a NDIS plan in conjunction with the National Disability Insurance Agency (NDIA) which, in an itemised way, sets out their support needs and the way in which these support needs are to be met. Supports may be fixed – that is, regularly required at a fixed time each day or week – or be flexible, which means the participant has scope to rearrange the supports to suit themselves within the overall budget. In the early trial phase, these plans were prepared in a highly prescriptive format, but by the time of hearing they had become far less so. An example plan that was provided to us⁴⁶⁶ set out the basic details of the participant and his/her immediate support persons and lifestyle, the participant's goals for the plan, and the supports to be provided. The supports were identified under the headings of transport to access daily activities; assistance with daily life at home and in the community, education and at work; supported independent living; improved daily skills; assistive technology; improved living arrangements; and improved life funding. Specific supports were identified in the example plan under each heading, and an annual budget (for the period 15 June 2016 to 14 June 2017) set out for each support item. For some items, a maximum number of hours of a particular service per week or per year were specified. The example plan required each identified support to be purchased as described,

⁴⁶⁵ Submission – 22 February 2016

⁴⁶⁶ Exhibit 255

and prohibited swaps from one item to another. The items in the plans are budgeted for in accordance with a “*NDIS Price Guide*” issued by the NDIA. In pricing items, the NDIA has been aggressive in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole. Labour costs are calculated by reference to the SCHCDSI Award.

[631] Once the plan is prepared, the majority of participants who are self-managed (as distinct from having their plans managed by a support agency) may then “*buy*” the services budgeted for in the plan from providers which are registered with the NDIA (although the actual payment is made by the NDIA to the provider in accordance with the plan and the NDIS Price Guide). There is no obligation to obtain all the services in a plan from a single provider, so a participant may have multiple service providers. The participant, once he or she has chosen the provider of a specific service, will then enter into a service agreement with the provider. We were provided with an example of a service agreement⁴⁶⁷, which included the following provisions of significance:

- the provider was required to “*Work with you the Participant to provide supports that suit your needs and at the times preferred by you” (underline added) and to “Consult with you regarding decisions about how your supports are provided”;*
- the participant was required to keep the provider “*informed of any changes to my support need which may impact on the supports they provide*”;
- in relation to payment for the services provided, “*The NDIA sets the prices to be claimed for each support item and [the provider] may choose to accept or decline the provision of certain support items if the price set does not cover business operating costs*”;
- in relation to variations to the participant’s plan, “*The Participant and/or their Plan nominee is responsible for informing [the provider] when their NDIA Plan has been reviewed and/or modified in any way ... [the provider] requires this information so your Service Agreement can be reviewed and modified to ensure it reflects the most current supports you require [the provider] to provide*”;
- the participant was requested to inform the provider at the time of developing or reviewing the Service Agreement if they intended using multiple service providers “*to ensure that sufficient support hours and funds are available as per the Service Agreement*” and “*Failure to provide this information may result in over-use of certain supports and impact on [the provider’s] ability to claim for supports provided*”;
- in relation to cancellations of supports by the participant, “*We understand that situations may occur that mean participants need to change or cancel support. When this happens, it is appreciated if participants provide at least 24 hours notice to reduce any impact on business... Should the Participant not provide 48 hours notice of his or her inability to participate in the service, [the provider] will be entitled to claim from NDIA for payment of such Service... When cancellations or ‘no shows’*

⁴⁶⁷ Exhibit 230

exceed 8 times per year, [the provider] must notify the NDIA so that consideration can be made to review the plan”; and

- in relation to termination of the service agreement by either party, a minimum of 4 weeks’ notice was required, and *“If the participant chooses to cease services or engages the services of another provider without giving the agreed notice, an early exit payment will be charged of up to 4 weeks”*

[632] Until mid-2016, the NDIS was implemented in various trial areas throughout the country. The full implementation rollout began in July 2016, but it is not expected to be completed until 2019. It is expected that the total number of participants in the NDIS will increase to about 460,000 by 2019, about 20 times the number of participants in 2016. Many of the new participants will not be living in institutionalised care or group homes with regimented support demands, but will require supports that are shorter in duration and more flexible in order to undertake work, education and social activities. The number of registered providers is also expected to increase significantly. In 2016 there were over 2,000 registered providers, the large majority of which had not been disability support providers prior to the advent of the NDIS.

[633] At the time of hearing, according to data collected and benchmarked by NDS, there were about 26,000 disability support workers in Australia, of which 23% were full-time, 35% were part-time, 37% were casual, and 6% were on fixed-term contracts. This workforce is predominantly female. It was estimated in 2011 that the workforce would have to double by the time of full implementation of the NDIS. There was some evidence that some employers had increased the usage of casuals in order to meet the work demands of the NDIS, against their preference to employ mainly permanent part-time employees, mainly because of the variability associated with the one-on-one attendances which are a new industry feature introduced as part of the NDIS.

Conclusions

[634] ABI’s case, as supported by Jobs Australia, was advanced on the basis that the circumstances attending the development and implementation of the NDIS meant that the current part-time employment provision in the SCHCDSI Award no longer met the modern awards objective in s.134(1) and required alteration in order to do so. Although the amended claim ultimately advanced by ABI was not directed in terms at that subset of workers employed under the SCHCDSI Award who provided services to NDIS participants, we understood that the reference in the claim to employees *“engaged to provide supports to clients in circumstances where the client has the discretion to vary when the support is provided”* was primarily if not wholly directed at employees providing flexible supports to NDIS participants.⁴⁶⁸ We have considered ABI’s case in this context.

[635] We are not satisfied at this time, having regard to the various matters specified in s.134(1), that the new provision proposed by ABI and supported by Jobs Australia is necessary to achieve the modern awards objective. We have reached this conclusion for the following reasons.

⁴⁶⁸ See ABI closing submission – 30 September 2016 at para 5.3

[636] First (and unlike the position in respect of the Hospitality Awards earlier described), the evidence does not indicate that part-time employment under the SCHCDSI Award as a whole, or as it applies to employees providing NDIS services, has become a dead letter, or that the part-time employment provision has become unworkable. The general evidence was that over a third of disability support workers were employed on a permanent part-time basis, and the individual evidence of employer and employee witnesses demonstrated that part-time employment was still playing an important role in the sector. There was some evidence that new employees were increasingly being employed on a casual basis, but we consider that it is far too early in the implementation of the NDIS to conclude that this is a permanent trend and that no or virtually no new employees will be able to be engaged on a part-time basis. The evidence makes it clear that there remains considerable uncertainty as to how the NDIS will operate and what will be the pattern of service demand from participants once the NDIS is fully implemented. We consider it to be likely that this uncertainty is a major reason for the current degree of preference for casual employment, and that once the NDIS has been fully implemented and its operation becomes more certain and stable, part-time employment will be maintained as a substantial feature of the sector. In reaching that provisional conclusion, we have taken into account that the employers who gave evidence before us all expressed the view that part-time employment was preferable if it was practicable, because it allowed for a more committed and experienced workforce to develop and it reduced employee turnover.

[637] Second, we consider that the current provision as it is applied in practice is reasonably flexible. Although the pattern of hours of work must be fixed in a written agreement established at the commencement of the employment, they may thereafter be changed by agreement to meet either temporary exigencies or permanent changes in service demand. The evidence before us did not disclose any significant difficulty in obtaining the agreement of employees to alter their hours to meet changing circumstances, although we accept that the need for the agreement to be obtained and then recorded in writing does impose an administrative burden to some extent. Further, clause 28.2(b)(iii) allows for part-time workers to work additional hours up to 10 in a day or 38 in a week or 76 in a fortnight without the payment of any overtime penalty rate, so that there is a considerable capacity to assign additional hours that may arise at short notice to employees without the cost exceeding what the NDIA price structure will allow. The evidence showed that employees are generally willing to work such additional hours if it does not interfere with fixed private commitments; for example, in the case of a person with a disability attending a social event which ran over time, the employee involved readily agreed to stay on for the additional time until it ended.⁴⁶⁹

[638] Most importantly, the SCHCDSI Award does not contain any requirement for a minimum number of hours' work per week, nor (unlike the current provisions in the Hospitality Awards) does it provide for any minimum hours per day. This latter aspect of the award was emphasised by Vice President Watson in his 2013 decision⁴⁷⁰ which added the current clause 10.3(c), in the passage we have earlier set out. That means that the agreed pattern of hours for a part-time employee can encompass short periods of service, which a number of the employer witnesses envisaged would be an increasingly common feature of the NDIS service model. In this respect, part-time employment is more flexible than casual employment under the SCHCDSI Award, since clause 10.4(c) provides, in effect, that

⁴⁶⁹ Witness statement – 26 November 2015, Exhibit 254 at para 61

⁴⁷⁰ [2013] FWC 4141

disability services workers are to be paid a one hour minimum when performing home care work and a 2 hour minimum for other types of work.

[639] Third, we do not consider that the evidence establishes that changes to the scheduling of attendances or cancellations at short notice have become such a major feature of the operation of the NDIS that it is necessary at this time for the SCHCDSI Award to be altered to allow for the employer to be able to impose unilaterally short notice roster changes on employees. The basic elements of the NDIS lend themselves to reasonably predictable workforce planning. Many of the forms of support that are funded in individualised NDIS plans are (as Mr Bowden said) regular and predictable. The service agreement between the participant and the provider of a support service allows for providers to deal with participants in a structured and consistent way, with requirements for cooperation and communication as to when services are provided, notice periods for cancellations, payment where insufficient notice of a cancellation is provided, and notification to the NDIA for a review of the plan if cancellations become excessive. Ultimately an agreement may be terminated by the provider if it becomes impracticable and financially unviable. There are some support services, such as accompanying participants to social events, which are necessarily irregular and may arise at relatively short notice, but they may be accommodated by part-time employees working additional hours as well as by the use of casual employees.

[640] Fourth, we consider it unlikely that the market for disability support services which the NDIS is establishing will give participants the degree of market power that some of the employer witnesses implicitly suggested it would. It is clear that for many types of supports, participants value support workers who provide a high quality and amenable service, and they also value having continuity in the personnel who provide the service. In that context, we cannot envisage that participants will be in a position to demand from providers as a matter of course the disability service worker they prefer at whatever time they may choose to nominate from week to week. The massive expansion in the number of participants which will occur as the NDIS is rolled out, and the concomitant expansion in the workforce which will be required in order to service these participants, tend to indicate that providers will need to, and will be in a position to, limit the extent to which participants can demand the provision of services on a discretionary and unplanned basis. Further, because the workforce will be almost entirely award-dependent as a result of the NDIA's control over prices for services, it is unlikely that providers will be able to attract the part-time workers they need to service participants without being able to offer a compensating degree of stability in the hours required to be worked. The evidence does not suggest that part-time disability work will, for example, be attractive to or suitable for the high numbers of students and other young people who work in the retail and hospitality sectors, and stability of hours is likely to have greater value to a more mature workforce.

[641] However, having regard to the evidence before us, we do consider that there is merit in clarifying that an agreed part-time work arrangement does not necessarily have to provide for the same guaranteed number of hours in each week. At the commencement of the employment, or subsequently by agreement in writing, we consider that it would be open for the employer and the employee to enter into an arrangement which provides, for example, that the employee worked 20 hours and 30 hours in alternating weeks, or that a specified higher number of hours would be worked at particular times of the year (such as during a season of sports events which the participant wished to attend). An arrangement of that nature would have the stability and predictability desired by the part-time employee, whilst allowing the part-time arrangement to meet the service requirements of particular NDIS plans. To the

extent that the current part-time provision in the SCHCDSI Award does not allow this (which we doubt), we consider that the modern awards objective would be best met in respect of the disability services sector if the provision was amended accordingly. ABI will be directed to prepare a draft determination to implement this conclusion, and we will receive further submissions from interested parties if there is disagreement about the form that the award variation should take.

[642] In addition, we note that clause 25.5(f) provides, in relation to rostered home care services, that if the client cancels the service and notice of the cancellation is provided to the employee by 5.00 pm the previous day, no payment to the employee is required, and if the requisite notice is given and the employee is required to be paid, the employer may direct the employee to work make-up time within the next fortnight. We observe that a mechanism of this nature might be adaptable to the circumstances of the cancellation of a non-residential one-on-one NDIS support service. However we understand that an application concerning clause 25.5(f) is currently to be dealt with by another Full Bench, so we will say no more about it.

[643] The ABI's application is therefore rejected. However we emphasise that the conclusions we have reached about it are made at a time when the NDIS is still a long way from full implementation and are therefore necessarily speculative to a degree. The issues raised by the ABI's application may require further review if, after the NDIS has been fully implemented, a different picture emerges.

5.15 Consideration – the St Ives Group's application

[644] We reject the St Ives Group's application concerning the part-time employment provision in the SCHCDSI Award and the Aged Care Award for reasons similar to those for our rejection of the ABI claim. The limited evidence adduced by the St Ives Group, which was confined to its own operations, was almost entirely concerned with the effect of the introduction of Consumer Directed Care by the Federal Government in relation to the home aged care sector (which is covered by the SCHCDSI Award). Consumer Directed Care is, somewhat like the NDIS, directed at clients becoming responsible for managing their own care and care budgets, including the choice of care. The issues raised were also similar to those raised in relation to the NDIS, namely the rostering difficulties that may arise from client rescheduling and cancellations. Although the evidence was that, at the St Ives Group, this gave rise to administrative difficulties and expense when there was a cancellation without sufficient notice and no alternative work could be found for the employee, we do not consider that this difficulty is to be resolved simply by transferring the burden of inconvenience onto part-time employees. This is particularly so given that St Ives Group's workforce was described as 90% female with family caring responsibilities. There was no evidence of a wider industry problem concerning home aged care, and even within the St Ives Group, it remained the case that the majority of employees were part-time employees, suggesting that the part-time employment model had not become unworkable. There was no evidence of any substantial issues in relation to work covered by the Aged Care Award. We do not consider that the variations to the part-time provisions of the SCHCDSI Award or the Aged Care Award are necessary to achieve the modern awards objective, and they are rejected.

[645] In relation to the posting of rosters, we are not satisfied that any change to the time at which rosters are required to be posted, or the requirement to physically display them in workplace, is necessary to meet the modern awards objective. However, having regard in

particular to s.134(1)(d) (“*the need to promote flexible modern work practices*”), we consider that clause 25.5(c) of the SCHCDSI Award should be varied to clarify that “*rostering arrangement and changes to rosters*” may be communicated by any electronic means of communication (for example, by text message), and that an equivalent provision to clause 25.5(c), as varied, should be included in clause 22.6 of the Aged Care Award.

6. RETAIL, FAST FOOD AND HAIR AND BEAUTY AWARDS

6.1. SDA claim re overtime for casual employees

[646] The SDA⁴⁷¹ has sought variations to 3 awards, the *General Retail Industry Award 2010*, *Fast Food Industry Award 2010*, and the *Hair and Beauty Industry Award 2010* to apply overtime penalty rates to casual employees who work in excess of ordinary hours in a day or a week. A separate variation sought with respect to the same subject matter in the *Pharmacy Industry Award 2010* has been the subject of agreement between the interested parties (the PGA, the SDA, Business SA, the HSU, the NSWBC and APESMA), and has been referred to another Full Bench for finalisation.

[647] In the *General Retail Industry Award 2010* (Retail Award) the relevant provisions of clause 29 concerning overtime are as follows:

29. Overtime and penalties

29.1 Reasonable overtime

- (a) Subject to clause 29.1(b) an employer may require an employee other than a casual to work reasonable overtime at overtime rates in accordance with the provisions of this clause.
- (b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
 - (i) any risk to employee health and safety;
 - (ii) the employee's personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace or enterprise;
 - (iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and
 - (v) any other relevant matter.

29.2 Overtime

- (a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

⁴⁷¹ Submission – 13 May 2016

- (b) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter.
- (c) The rate of overtime on a Sunday is double time, and on a public holiday is double time and a half.
- (d) Overtime is calculated on a daily basis.

[648] The SDA has proposed that clause 29.2 be varied to provide as follows:

“29.2 Overtime

- (a) Overtime shall be payable to all full-time, part-time and casual employees for hours worked in excess of the ordinary hours or [sic] work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28.
- (b) Overtime shall be paid at time and a half for the first two hours and double time thereafter.
- (c) Overtime shall be paid to casual employees for hours worked in excess of 38 hours per week.
- (d) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first two hours and double time thereafter.
- (e) The rate of overtime on a Sunday is double time, and on a public holiday is double time and a half.
- (f) Overtime is calculated on a daily basis.”

[649] Clause 26 of the *Fast Food Industry Award 2010* (Fast Food Award) currently provides:

26. Overtime

The rate of overtime shall be time and a half for the first two hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid for at the rate of double time and a half. Casual employees shall be paid 275% on a Public Holiday.

26.1 An employee shall be paid overtime for all work as follows:

- (a) In excess of:
 - (i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Before an employee's rostered commencing time on any one day; or

(c) After an employee's rostered ceasing time on any one day; or

(d) Outside the ordinary hours of work; or

(e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3.

26.2 Where an employee works overtime on a Sunday and that work is not immediately preceding or immediately following ordinary hours, then that employee must be paid double time with a minimum payment of four hours at such rate.

[650] The SDA's proposed variation to clauses 26.1 and 26.2 is as follows:

"26.1 Full-time, part-time and casual employees shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period for full-time and part-time employees; or

(ii) 38 hours per week for casual employees; or

(iii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days) for full-time and part-time employees; or

(iv) five days per week for casual employees; or

(v) eleven hours on any one day for full-time, part-time and casual employees; or

(b) Before an employee's rostered commencing time on any one day; or

(c) After an employee's rostered ceasing time on any one day; or

(d) Outside the ordinary hours of work; or

(e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3.

26.2 Where a full-time, part-time or casual employee works overtime on a Sunday and that work is not immediately preceding or immediately following ordinary

hours, then that employee must be paid double time with a minimum payment of four hours at such rate.”

[651] The current clause 31 of the *Hair and Beauty Industry Award 2010* (Hair and Beauty Award) relevantly provides:

31. Overtime and penalties

31.1 Reasonable overtime

(a) Subject to clause 31.1(b) an employer may require an employee other than a casual to work reasonable overtime at overtime rates in accordance with the provisions of this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

- (i) any risk to employee health and safety;
- (ii) the employee’s personal circumstances including any family responsibilities;
- (iii) the needs of the workplace or enterprise;
- (iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and
- (v) any other relevant matter.

31.2 Overtime and penalty rates

(a) Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Saturday work

A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.

(c) Sunday work

A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday.

(d) Employment on rostered day off

Where it is mutually agreed upon between the employer and the employee (such agreement to be evidenced in writing), an employee may be employed on their

rostered day off at the rate of double time for all time worked with a minimum payment as for four hours' work.

[652] The SDA's proposal is that clause 31.2(a) be varied to provide:

“31.2 Overtime and penalty rates

- (a) Overtime hours worked by a full-time, part-time or casual employee in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first two hours and double time thereafter.”

6.2 Ai Group claim re casual minimum engagement in the Fast Food Award

[653] The Ai Group⁴⁷² has proposed that the Fast Food Award be varied to allow an employer and a casual employee to agree to an engagement of less than the minimum of 3 hours currently provided in clause 13.4. Clause 13.4 currently provides:

13.4 The minimum daily engagement of a casual is three hours.

[654] The Ai Group proposal is that clause 13.4 be varied to provide:

“13.4 The minimum daily engagement of a casual is three hours. An employer and employee may agree to an engagement for less than the minimum of three hours.”

6.3 Evidence

[655] The SDA described the variations it sought as “*uncontroversial*”⁴⁷³ and did not adduce any evidence in support of them.

[656] The Ai Group relied upon the Joint Employer Survey which entered the evidence via the witness statement of Benjamin Waugh (which we have earlier summarised in Chapter 3) insofar as it demonstrated that over 78% of employees of the 57 employer respondents operating in the fast food sector were engaged as casuals, and insofar as some of the fast food sector respondents reported that the current 3 hour minimum engagement period was excessive because they really only needed casuals to work for 2 hours. The Ai Group also relied upon the evidence of Krista Limbrey, the HR Business Partner NSW/ACT for McDonald's Australia Limited (which has also been summarised in greater detail in Chapter 3) as demonstrative of the following propositions:

- the large majority of McDonald's almost 100,000 employees (directly-employed and franchise-employed) were casuals, and a majority of these were under the age of 18 (and presumably students);
- the peak periods at most restaurants was breakfast from 7.00 am to 9.00 am, lunch from 12.00 pm to 2.00 pm and dinner from 5.30 pm to 7.30 pm;

⁴⁷² Submission – 14 October 2015

⁴⁷³ Submission – 13 May 2016 at para 3

- food court restaurants tended to close at about 5.00 pm to 6.00 pm Monday to Friday;
- on weekdays before 4.00 pm, very few employees under 18 were available to work, but a very high proportion were available to work between 4.00 pm and 8.00 pm, but declined thereafter;
- if a McDonald's store was able to roster casuals for periods less than 3 hours, it might be able to roster more employees at peak periods to meet customer demands; and
- McDonald's operated under an enterprise agreement, but a variation to the Retail Award would affect the BOOT for the purpose of future enterprise agreement negotiations.

6.4 SDA submissions

[657] The SDA⁴⁷⁴ submitted that its overtime claims sought to give effect to the modern awards objective, maintain the intended purpose and function of the casual loading and support the integrity of the principle of the 38 hour working week for all employees established by the Australian Conciliation and Arbitration Commission in 1986. The casual loading was not intended to compensate for, or absorb overtime payments for work performed in excess of 38 hours per week, or work performed outside the ordinary span of hours. The non-payment of overtime for casuals undervalued their work and promoted casualisation of the workforce, because it made it cheaper to employ casual to perform additional hours. The 4 yearly review was the first award review to be conducted since s.134(1)(da)(i) was introduced into the FW Act requiring consideration to be given to the need for additional remuneration for employees working overtime.

[658] The SDA submitted that casual employees were further disadvantaged when working overtime because hours worked in addition to the first 38 hours did not attract superannuation payments. The less favourable treatment of casuals meant that the modern awards which did not compensate them for overtime could not be said to be providing a fair and relevant minimum safety net. The SDA noted that ss.62(2)–(3) of the FW Act did not specifically entitle casuals to refuse to work overtime in the same way that permanent employees can. Many casual employees are therefore unnecessarily and unfairly disadvantaged compared to their permanent counterparts.

[659] The SDA opposed the Ai Group's claim to vary the casual minimum engagement provision in the Fast Food Award. When the Fast Food Award was made in 2008 it did not contain a minimum engagement period for casuals, but the SDA successfully sought a variation to the award in 2009 to insert a 3 hour minimum. An application by the NRA in 2010 to reduce the minimum engagement to 2 hours was unsuccessful. The evidence led in support of the Ai Group's current application was limited, and insofar as the evidence concerning McDonald's was concerned, it was not covered by the Fast Food Award.

⁴⁷⁴ Submission – 13 May 2016

[660] The SDA submitted that, despite the Ai Group's submission that the variation would be facilitative, in practice it would eliminate minimum shifts in the industry because it would place casual employees in a vulnerable position where they would be forced to either accept a short shift or risk not being offered a shift at all. The fast food industry generally attracted young workers with little experience who would have little bargaining power to assert their entitlement to a 3 hour minimum engagement. There were no restrictions or controls on the Ai Group's proposed provision to prevent exploitation. There was no evidence presented that employees would prefer to work shorter shifts. Nor was there evidence that employers did not require work to be performed for 3 hours at a time. The SDA noted that operators did not close their establishments between meal times, and there was work that could be performed between peak trading times and after hours. The SDA submitted that the Ai Group had not provided cogent reasons for the Commission not to follow the previous Full Bench decision in relation to this issue.

6.5 Ai Group submissions

[661] The Ai Group⁴⁷⁵ opposed the SDA's overtime claim in respect of the Fast Food Award. It submitted that the SDA's claim would mean that the overtime entitlements in the Fast Food Award would apply to all types of employees but in certain circumstances the rates would differentiate between permanent and casual employees. The Ai Group submitted that consideration of whether overtime entitlements should be extended to casuals was separate to the consideration of whether the casual loading was adequate. Casual employment was an important form of employment, and increasing the cost of employing casuals would have a negative impact on employment. However there was no causal link between a lack of overtime provisions and a high rate of casual employment in the industry.

[662] The Ai Group submitted that the need to provide additional remuneration for employees working overtime under s.134(1)(da) needed to be balanced with the other aspects of the modern awards objective. The Ai Group disagreed with the SDA's submission that the lack of overtime for casuals undermines the 38 hour week. While the provisions of s.62 of the FW Act did not create an entitlement for casuals to refuse to work overtime, the Ai Group submitted that clause 26.4(a) of the award already protects casuals from being unilaterally required to work overtime. The SDA's claim differentiated between when a permanent employee and casual employee would be entitled to overtime; if a permanent employee's hours could be averaged over 4 weeks the same flexibility should apply to casuals.

[663] In relation to its own claim to vary the Fast Food Award, the Ai Group⁴⁷⁶ submitted that the current 3 hour minimum engagement period for casuals was not the result of a merit-based process. The variation it sought would make minimum engagement periods apply more flexibly. Facilitative mechanisms for reduced minimum engagement periods by agreement were not new, and a number of other modern awards currently contained facilitative provisions for casual minimum engagement periods. The proposed variation would not permit an employer to unilaterally introduce a shorter minimum engagement period or eliminate minimum engagement periods, and the provision proposed included adequate protections for employees. The variation would meet the modern awards objective by creating more employment opportunities in the sector, especially for students. It was necessary because

⁴⁷⁵ Final Reply Submission – 10 October 2016

⁴⁷⁶ Final Submission – 13 June 2016

individual flexibility agreements could not be used to reduce the minimum shift length which, for many employers, exceeded the period they needed casuals to work for.

6.6 HABA submissions

[664] The HABA⁴⁷⁷ opposed the SDA's overtime claim in relation to the Hair and Beauty Award. It submitted that casual employees were already entitled to specific penalty rates for each day of the week as prescribed by the current clauses 13 and 31 of the Hair and Beauty Award. The SDA had not explained the effect of the changes it sought or addressed the proper interpretation of the current award provisions. The HABA had interpreted the SDA's claim to mean that casuals would become entitled to the higher rate prescribed in clause 31.2(a) which they were not currently entitled to. The HABA submitted that a casual employee should not be afforded every entitlement that a permanent employee receives unless it is accounted for in the casual loading. There was no requirement to align the entitlements of casual and permanent employees. There was no evidence to suggest that the lack of overtime entitlements for casuals had led to an increase in casual employment in any industry. While the SDA's submission focussed heavily on the operation of s.134(1)(da), that was only one of the factors that the Commission was required to consider when determining whether a modern award met the modern awards objective, and the FW Act did not mandate that employees be paid overtime rates. Employees were already paid additional rates for working weekends and unsocial hours. The HABA also noted that in the hair and beauty industry, weekend work is the norm. The integrity of the 38 hour week was appropriately maintained by the protections in ss.62(2) and (3) of the FW Act. While there was no unqualified right for a casuals to refuse to work overtime, there was no evidence to suggest that casuals in the hair and beauty industry are being required to work unreasonable hours. The SDA had not called any evidence to demonstrate things like work patterns in the industry, the work hours of casual employees, the types of employees and employers in the industry, the level of casual employment in the industry, or the anticipated impact of the claim. The HABA concluded that, based on the material provided, the Commission could not conclude that the variation sought was necessary to achieve the modern awards objective.

6.7 ABI submissions

[665] ABI⁴⁷⁸ opposed the SDA's overtime claims. It characterised the SDA's claims as erroneously interpreting s.134(1)(da) as mandating overtime rates for all employees under all awards. The existing requirement for employees to agree to work overtime was a sufficient safeguard against employers unilaterally requiring employees to work over 38 hours per week. It was not correct that a lack of overtime provisions had increased casual employment; the retail industry required a large number of casuals to target peak trading times like Christmas shopping, and employed a large number of students and people seeking temporary employment.

[666] ABI submitted that the composition of the casual loading should be considered on an award by award basis to determine whether any other penalty rates or loadings have been absorbed. The provision of overtime for casuals in the Retail Award had previously been

⁴⁷⁷ Final Reply Submission – 20 October 2016

⁴⁷⁸ Reply Submission – 18 October 2016

considered by the Commission in 2010⁴⁷⁹, with the conclusion being that that casuals were not entitled to overtime for work in excess of 38 hours. ABI submitted that this decision was consistent with a tradition of casuals not being entitled to overtime, and the SDA's claims would represent a fundamental shift in industry practices which would lead to considerable a considerable increase in wage costs.

6.8 Consideration

(a) *SDA claim re overtime for casual employees*

[667] In our earlier discussion concerning overtime penalty rates for casuals under the Hospitality Awards, we identified 2 generally applicable propositions:

- (1) Casual employees who work in excess of ordinary hours in a single day, or over 38 hours per week in a particular week or on average over the course of a roster cycle, are subject to the same disabilities as full-time employees – that is, fatigue and a general restriction of opportunities to engage in family, social, community and other activities.
- (2) The standard casual loading of 25% in modern awards does not include any element of compensation for the disabilities associated with working overtime.

[668] There is nothing in the history of the development of the Retail Award, the Fast Food Award or the Hair and Beauty Award which indicates that these general principles have any lack of applicability to the sectors which they cover. There was no explicit consideration of the issue of whether casual employees should be entitled to overtime penalty rates under these awards in the award modernisation process conducted by the AIRC in 2008–09, and in this respect the award provisions which were made appear to have reflected the weight of pre-existing State and federal award regulation as well as the objective of not disadvantaging employees or increasing costs to employers. In relation to the exposure drafts of these 3 awards (as well as the Pharmacy Award) which were published in December 2008, the award modernisation Full Bench of the AIRC said⁴⁸⁰:

“[284] We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies. ...

[285] In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.

[286] The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main

⁴⁷⁹ [2010] FWA 8806

⁴⁸⁰ [2008] AIRCFB 1000

federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.

[287] Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate to existing instruments for the relevant parts of the industry but which adopt different standards from one part to another. We have addressed submissions concerning the application of allowances and hours provisions and made other changes consistent with the approach to such matters in the main part of this decision.”

[669] Clause 26.2 of the Fast Food Award was later given specific consideration by the award modernisation Full Bench in the context of applications by the NRA and the Ai Group to vary that provision to adjust weekday evening loadings, exclude casual employees from Saturday ordinary-time penalty rates and to reduce Sunday rates.⁴⁸¹ The Full Bench said (emphasis added):

“[23] Since making this award the Commission has reviewed the penalty payments applying in the restaurant industry. Those penalty payments are found in the *Restaurant Industry Award 2010*. For fast food operations that open into the evening there is logic in adopting a similar approach to penalty payments. We have decided to vary cl.26.2(a) to provide for a 10% loading to be payable after 9.00 pm and a 15% loading to be payable after midnight. *Casual employees are to receive the relevant loading in addition to the 25% casual loading.*

[24] In relation to Saturday work, the NRA and AiGroup seek to vary cl.26.2(b) so as to limit the payment of Saturday penalties to full-time and part-time employees. *It is a common feature of awards generally including awards in the restaurant industry that casual employees receive relevant loadings in addition to casual loadings.* We do not intend grant the application.

[25] The NRA and AiGroup seek an alteration in cl.26.2(c) to bring about a reduction in the penalty payable for ordinary hours worked on a Sunday by full-time and part-time employees from 75% to 25%.

[26] We have reconsidered the level of this loading having regard to the Sunday penalty rates in relevant pre-reform awards and NAPSAs and in particular the penalties now applicable in the restaurant industry. *In all the circumstances we consider that a loading of 50% for full-time and part-time employees and 75% for casuals is fair and appropriate.*”

[670] Although the Full Bench engaged in no consideration of overtime penalty rates, the reasoning above indicates that the Full Bench did not consider that the casual loading

⁴⁸¹ [2010] FWAFB 379

compensated for the disabilities associated with evening or weekend work or that those disabilities did not apply to casual employees equally to full-time and part-time employees.

[671] In 2010 the SDA made an application to vary the Retail Award pursuant to s.160 of the FW Act. Section 160 empowers the Commission to make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error. The SDA application among other things, sought that clause 29.2 be varied to add: *“In addition overtime will also be paid for hours in excess of 38 hrs in a week for a casual employee, or in excess of hours prescribed in clause 12.1(a) for a part time employee”* on the basis that the Retail Award was ambiguous as to whether overtime penalty rates were payable to casuals. The Commission (Watson VP) rejected the application and said:

“[16] The SDA seeks to ensure that the clause creates an entitlement to overtime for casuals who work more than 38 hours. In my view there is no such entitlement in the current provision and the current clause is not ambiguous. In any event I am not persuaded that it would be appropriate to make the change even if there was an ambiguity in the clause.”⁴⁸²

[672] Notwithstanding the reference in the decision to it not being “appropriate” to grant the SDA’s application, it is clear that the SDA did not advance a merits case and relied upon the alleged existence of ambiguity as the sole basis for its case. Once it was determined that no such ambiguity existed (a conclusion with which we agree), there was no proper basis for the application to succeed.

[673] The decisions to which we have referred were all made before the enactment of s.134(1)(da) of the FW Act. We have earlier, in Part 4.12 of Chapter 4, discussed the proper approach to be taken in relation to this provision. In short, the provision does not (relevantly) compel the inclusion of overtime penalty rates in a modern award, nor does it require *“the need to provide additional remuneration for ... employees working overtime...”* to be given determinative weight in the Commission’s consideration as to what is necessary to achieve the modern awards objective; however this *“need...”* must be evaluated and given due weight, having regard to all other relevant factors.

[674] As with the Hospitality Awards, the 3 awards in question here all provide for overtime penalty rates to be paid to full-time and part-time employees. There was no submission that the provision of overtime penalty rates to full-time and part-time employees in the awards was not necessary to meet the modern awards objective. There was no evidence, nor has it been submitted, that casual employees under the awards are not subject to the same disabilities as full-time and part-time employees when they work in excess of ordinary hours in a day or in excess of 38 hours per week. Section 62 of the FW Act gives casual employees the right to refuse to work hours in excess of 38 per week where the request or requirement is unreasonable, but that is the same right as for full-time and part-time employees under the 3 awards who have an entitlement to overtime penalty rates. It might have been submitted that because, in determining whether additional hours are reasonable or unreasonable, s.62(3)(d) requires account to be taken of *“whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours”* that casual employees not in receipt of overtime

⁴⁸² [2010] FWA 8806

penalty rates have wider scope to contend that a request to work overtime is unreasonable, but we doubt whether this has any practical benefit in actuality. The provisions in the awards for penalty rates for evening and weekend work apply equally to full-time, part-time and casual employees. Accordingly, on the face of the 3 awards, it is inexplicable why full-time and part-time employees have the benefit of overtime penalty rates but casual employees do not, and the awards cannot be said to constitute a fair and relevant safety net of terms and conditions without overtime provisions that apply equally to all employees.

[675] We do not consider that a requirement for employers under the 3 awards to pay overtime penalty rates for casuals would result in the imposition of a significant costs burden upon them. Most casuals in the industries covered by the awards do not work full-time hours. Ms Limbrey's evidence concerning the McDonald's businesses, for example, showed that about 87% of their casual employees worked 20 hours or less per week.

[676] For these reasons, we conclude that it is necessary to vary the awards to provide for overtime penalty rates to apply to casuals in order to meet the modern awards objective. In reaching this conclusion, we have taken into account all the matters specified in s.134(1), but we have placed particular weight on s.134(1)(da)(i), and we have also considered the effect of casual overtime rates on employment costs and the operation of businesses generally pursuant to s.134(1)(f). Each award should provide that casual employees should receive the same overtime penalty rates as full-time and part-time employees performed in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle. In respect of daily hours, the position should be as follows:

- (1) In the Retail Award, overtime penalty rates hours should apply to hours worked outside the span of hours for each day specified in clause 27.2(a), or for hours worked by in excess of 9 hours per day, provided that one day per week a casual employee may work 11 hours without attracting overtime penalty rates (consistent with clause 27.3).
- (2) In the Fast Food Award, a casual employee should receive overtime penalty rates for hours worked in excess of 11 hours in a day, consistent with clause 25.3.
- (3) In the Hair and Beauty Award, hours worked in excess of 10½ hours in a day should attract overtime penalty rates consistent with clause 28.3.

[677] In each case overtime penalty rates are to be applied to the ordinary hourly rate of pay, with the casual loading also to be applied to the ordinary hourly rate of pay. Overtime rates should not compound upon the casual hourly rate of pay.

[678] We direct the SDA to draft determinations varying the 3 awards to give effect to our decision. We will then give other interested parties an opportunity to make submissions about the form of the variations.

Casual minimum engagement in the Fast Food Award

[679] The current casual minimum engagement period in the Fast Food Award has been the subject of a proper merits consideration on 2 occasions. Shortly after the award came into

effect on 1 January 2010, the award modernisation Full Bench dealt with an application by the SDA to add a casual minimum engagement period of 3 hours, there having been no such requirement when the award first came into operation. The Full Bench determined⁴⁸³:

“Casual engagement

[12] The SDA seeks the insertion of a minimum engagement for casual employees of three hours. We consider this to be reasonable and consistent with existing provisions and we will make the variation.”

[680] Notwithstanding this Full Bench decision, later the same year the NRA made an application for the reduction of the 3 hour minimum engagement period. This application was dealt with in a decision of Fair Work Australia (FWA) (Watson VP) issued on 10 November 2010.⁴⁸⁴ The variation sought was described as follows:

“[2] The application seeks to reduce the minimum daily engagement for casual employees in clause 13.4 of the Award from three hours to two hours for casual employees with a minimum engagement of one and a half hours for secondary school students performing work between 3.30pm and 6.00pm Monday to Friday.”

[681] The evidence which the NRA led in support of its application was summarised as follows:

“[11] The parties led very little evidence in support of their respective cases.

[12] The NRA led evidence from one witness, Mr Darren Grimwade, the owner of a Pizza Capers franchise in Burpengary Queensland. He said that his opening hours are 12.00pm - 3.00pm and 4.30pm - 9.00pm (10.00pm on Friday and Saturday nights). He said that all of his employees are casual employees and that several school students are usually engaged for the peak period of 5.30pm - 7.30pm each day.

[13] Mr Grimwade said that the three hour minimum casual engagement would result in an estimated six percent increase in labour costs. He gave evidence that as a result of the introduction of the three hour shift minimum for casual employees he is no longer able to offer casual employees two hour shifts for the peak trading period of 5.30pm - 7.30pm. He said that the work his young casual employees have performed has mostly been their first real job, it has given them valuable workplace experience and enabled them to gain important customer and interpersonal skills. He said that he has had two or three parents request the retention of two hour shifts and when this has not been possible they have indicated that their children will not be available to work a longer shift. Mr Grimwade conceded that his business was different to several other specified fast food employers whose peak periods covered a longer period than 2 hours.”

⁴⁸³ [2010] FWAFB 379

⁴⁸⁴ [2010] FWA 8595

[682] Vice President Watson then referred to the decision of the award modernisation Full Bench earlier that year to add the minimum engagement period in the following terms (footnotes omitted):

“[27] In this matter the award modernisation Full Bench considered that a case had been made out based on pre-existing instruments and all of the submissions of the parties to insert a three hour minimum engagement period for casuals covered by this Award. In doing so it applied similar statutory considerations to the modern awards objectives. In my view this background imposes a significant onus on the applicant to demonstrate why a different conclusion should now be reached.”

[683] Vice President Watson concluded:

“[28] The evidentiary case advanced by the applicant can best be described as flimsy. It involves evidence of one employer in one state who conceded that his business is different to others in that state and other states. It cannot be concluded on this evidence that there is a general problem in the industry. The absence of any evidence from employers who have operated with a three hour minimum engagement period as to the impact of the proposal on their businesses and their employees makes it impossible to reach a conclusion that the variation is necessary to achieve the modern awards objective. Further, the absence of evidence of difficulties beyond this single employer suggests that other employers in the industry, including those who have been bound by similar and less flexible provisions for many years have found a way to operate successfully with the minimum engagement period. The same conclusion can also be implied by the support for the three hour minimum by other employers and employer associations, including the AI GROUP which took the major running of employer interests in this industry in the award modernisation process.

[29] The nature of the evidence also falls well short of establishing that the modern awards objective cannot be achieved if the three hour minimum engagement period is retained. It establishes that one employer may face an increase in labour costs by being required to engage casuals for a longer period, or pay them for such period, when there may not be an operational need for a three hour engagement. There is little consideration of other alternatives such as employing less casuals for the longer period or redeployment of other casual employees. The only evidence of a loss of employment opportunities is limited to a suggestion that some parents, on behalf of school aged employees, do not support a three hour engagement and may suggest that they not continue to make their children available for work. There is no evidence of the extent of this concern or the reasons behind it. It may be nothing more than a preference or choice commonly made by casual employees as to their availability for work. There is no response to the SDA evidence on the importance of minimum engagement periods to casual employees. The evidence of the applicant does not address the balance that is required with award provisions of this type to provide reasonable safeguards for employees against unfair engagement practices and reflect operational and employee needs. Nor was there any attempt to present cogent reasons why the variation should be made by reference to employment practices across the fast food industry.

...

[31] The same conclusion necessarily arises from the bare evidentiary case advanced by the applicant in this case. In my view the applicant has failed to establish that the variation is necessary to achieve the modern awards objective.”

[684] We do not consider that Ai Group’s application before us has advanced the issue any further than did the NRA application in 2010. There was no evidence that the 3 hour minimum engagement period has caused the loss of any employment opportunities for casual employees. The only evidence of substance was that of Ms Limbrey in relation to the McDonald’s business, which is covered by an enterprise agreement and consequently to which the Fast Food Award does not apply. The massive number of casual employees employed by McDonald’s directly and through its franchised businesses refutes any proposition that the 3 hour minimum engagement period (which is reproduced in McDonald’s enterprise agreement) inhibits the engagement of casual employees. Ms Limbrey identified the businesses as having 3 peak hour periods of 2 hours each during the day (breakfast from 7.00 am to 9.00 am, lunch from 12.00 pm to 2.00 pm and dinner from 5.30 pm to 7.30 pm), but the first 2 of these would not be suitable to be worked by school students during weekdays, whether they formed part of a 2 hour shift or a 3 hour shift (as Ms Limbrey’s evidence concerning employees’ available hours demonstrated), and there was no evidence that McDonald’s had any difficulty in obtaining school students to work over the peak dinner period. Ms Limbrey’s evidence that McDonald’s businesses might roster more casuals to work over the peak periods if the minimum engagement period was only 2 hours was purely speculative, and does not assuage our concern that the business would use a reduced minimum engagement period to substitute 2 hour shifts for existing 3 hour shifts, thus making casual employees worse off.

[685] The limited material of relevance in the Joint Employer Survey that suggested that some employers did not need to engage casual employees for more than 2 hours was not persuasive. Again, the widespread use of casual employment demonstrated by the Joint Employer Survey indicated that the casual provisions of the Fast Food Award were highly attractive to employers.

[686] The actual award variation advanced by the Ai Group may be criticised in the same way as the NRA proposal was criticised by Vice President Watson in his 2010 decision – namely that it “does not address the balance that is required with award provisions of this type to provide reasonable safeguards for employees against unfair engagement practices”. The general concept of casual employees agreeing to reduced minimum engagement periods is itself problematic, since the continued engagement of casuals at all is dependent upon them agreeing to the terms of each engagement (subject only to any applicable award obligations binding on the employer). Ai Group’s proposed provision does not require any minimum engagement period to be agreed in substitution for the standard 3 hour period at all, meaning that it would facilitate the complete removal of minimum engagement periods and thus open the door to the exploitation of casual employees. Further, the proposed provision is explicitly targeted at school-aged students, who may be regarded as a vulnerable group not necessarily capable of protecting their own interests. The Ai Group has not proposed any protective mechanisms in this respect, such as a requirement for parental approval or any restrictions on the extent to which its proposed facilitative provision could be utilised.

[687] We do not consider that any basis has been advanced to depart from the decisions of the award modernisation Full Bench or Vice President Watson in 2010 or that Ai Group's proposed variation would achieve the modern awards objective of a fair and relevant safety net. The proposed variation is rejected.

7. HORTICULTURE, PASTORAL AND WINE INDUSTRY AWARDS

7.1. AWU claim – overtime for casuals in the Horticulture Award

[688] The AWU has sought a variation to clause 22.1 of the *Horticulture Award 2010* (Horticulture Award) to “clarify”⁴⁸⁵ that casual employees are entitled to the overtime rates provided for in clause 24 of the current award when working outside of ordinary hours. Its application followed the Fair Work Ombudsman (FWO) identifying an ambiguity as to whether casual employees were entitled to overtime under the Horticulture Award.⁴⁸⁶ The AWU claim was supported by the NUW.

[689] Clause 22.1 of the Horticulture Award currently provides:

22.1 The ordinary hours of work for all full-time and part-time employees other than shiftworkers will not exceed 152 hours over a four week period provided that:

(a) The ordinary hours will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.

(b) The ordinary hours will be worked between 6.00 am and 6.00 pm except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.

(c) The ordinary hours will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.

(d) All time worked by full-time and part-time employees in excess of the ordinary hours will be deemed overtime.

[690] Clause 24.1 of the Horticulture Award provides for time off in lieu of overtime. Clause 24.2 provides:

24.2 Payment of overtime

(a) The rate of pay for overtime will be 150%, except for overtime worked on a Sunday.

(b) The rate of pay for overtime worked on a Sunday, except during harvest period, will be 200%.

⁴⁸⁵ Submission – 5 August 2016 at para 1

⁴⁸⁶ Submission – 14 October 2015 at para 5

(c) Should employees be required to work on a Saturday and the majority of such employees elect not to work on the Saturday but rather on the Sunday then such work performed on that Sunday will be paid for at the rate prescribed for Saturday work.

(d) During harvest period, the first eight hours of overtime in a week may include five hours work on a Sunday at the rate of 150% but all Sunday work in excess of the eighth overtime hour worked in the week, or in excess of five hours on a Sunday, will be paid at the rate of 200%.

(e) All employees required to work on a Sunday will be paid for a minimum of three hours.

[691] The AWU's proposed variation as advanced in its submissions of 17 July 2015⁴⁸⁷ was subsequently amended. As finally advanced⁴⁸⁸, the proposal was that clause 22.1 be amended to provide as follows:

“22.1 The ordinary hours of work for all employees other than shiftworkers are as follows:

(a) The ordinary hours of work for full-time and part-time employees will not exceed 152 hours over a four week period and will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of full-time and part-time employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.

(b) The ordinary hours of work for casual employees will be the lesser of 38 hours per week or the hours required to be worked by the employer and will be worked between Monday and Sunday inclusive.

(c) The ordinary hours for all employees will be worked between 6.00 am and 6.00 pm except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.

(d) The ordinary hours for all employees will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.

(e) All time worked in excess or outside of the ordinary hours will be deemed overtime.”⁴⁸⁹

[692] It may be noted that the witness statements filed in respect of the AWU's claim were made on the basis of an earlier version of that claim which, the employer groups contended,

⁴⁸⁷ Submission – 17 July 2015 at p.3

⁴⁸⁸ Transcript – 11 July 2016 at PN1089–PN1095

⁴⁸⁹ Submission – 5 August 2016 at p.14

would require the payment of overtime penalty rates for all work performed on weekends. As discussed later, it has been necessary for us to consider the employer evidence with that qualification in mind.

7.2 AWU evidence and submissions

[693] The AWU relied on the evidence of Adam Algate, Keith Ballin, Ron Cowdrey and Kim Shepherd to assert that many employers in the horticulture industry interpret the Horticulture Award to mean that casual employees are not entitled to overtime rates for work in excess of 38 hours per week, and only receive an ordinary time rate and that it should remain thus so.

Adam Algate

[694] Mr Adam Algate⁴⁹⁰ was an organiser employed by the AWU based in Mildura who looked after members at 7 horticultural sites, comprising of almond farms, dried fruit farms and orange packing. He gave evidence that 3 of these sites were covered by enterprise agreements, and the remaining sites were covered by the Horticulture Award. At the 3 sites covered by enterprise agreements, only at one of the sites were employees entitled to overtime. The majority of casual employees at this site were labour hire workers who did not receive the enterprise agreement rates anyway, while the second site paid overtime rates which were below the award rates and the third site only paid overtime rates to employees if they had been working consistently for a period of nine months. Mr Algate estimated that around 80% of the employers in his area did not pay the proper award rates, and he had often encountered problems in the industry including sub-standard living conditions, employees paying large portions of their earnings back for accommodation and transport, and the bullying and harassment of employees. He stated that casual employees in the horticultural industry normally worked at least 60 hours per week during the harvest period, and that the normal working pattern was 12 hours per day for 7 days each week, but that during peak periods employees could be working for 16 hours per day. A number of workers had reported being told if they did not want to work for the ordinary-time rates they would not get any overtime hours.

Keith Ballin

[695] Mr Keith Ballin⁴⁹¹ was the Central District Secretary for the AWU in Bundaberg. He gave evidence that his experience has been that workers in the horticultural industry were often exploited, and provided an example of an employment document given to a backpacker in 2015 which stipulated that employees would be charged \$20 to be picked up from a farm if they got sick, that they had to keep their own time and wages records, and they had to give 2 weeks' notice or forfeit full wages. He said that under the pre-reform Queensland award, the *Fruit and Vegetable Growing Industry Award – State 2002*, casual employees had been entitled to overtime rates, and so he was subsequently shocked that the Horticulture Award did not contain overtime rates for casual employees. He found it very difficult to find employees prepared to speak out about industrial issues such as not getting paid overtime rates because of fear of losing their jobs.

⁴⁹⁰ Witness statement – 13 October 2015, Exhibit 173

⁴⁹¹ Witness statement – 9 October 2015, Exhibit 174

Ron Cowdrey

[696] Mr Ron Cowdrey⁴⁹² was an organiser employed by the AWU. He gave evidence that the horticultural industry had a heavily casualised workforce predominantly consisting of foreign workers on 416, 457 or 417 visas. Mr Cowdrey gave evidence that most employees were employed by labour hire companies, and often worked in harsh conditions doing very physically demanding work. He stated that most employees worked more than 38 hours per week and the members he spoke with indicated they were not paid overtime rates. He said that most employers did not even pay the minimum award conditions, and he was aware of members not paid any wages at all. In his experience, workers in the horticultural industry were exploited because they were predominantly overseas workers.

Kim Shepherd

[697] Mr Kim Shepherd⁴⁹³ was an AWU organiser in the ski industry. He gave evidence of a comparative nature to the effect that that many casuals employed who are covered by the *Alpine Resorts Award 2010* have complained about their current lack of overtime entitlements and the inequity of having to work alongside permanent employees who perform the same duties and have access to overtime entitlements.

AWU Submissions

[698] The AWU submitted that the proposed variation to clause 22.1 of the Horticulture Award was necessary to resolve an ambiguity in the provision which had been identified by the FWO.⁴⁹⁴ This ambiguity arose because the ordinary hours of work clause did not include a period over which hours were averaged, meaning that the ordinary hours of a casual employee could not conclusively be determined. The AWU submitted that this did not accord with s.147 of the FW Act, which required modern awards to include terms specifying or providing for the determination of the ordinary hours of work for, relevantly, each type of employment permitted by the award.

[699] The AWU submitted that the weekly ordinary hours of work for a casual employee under clause 10.4(a) were “*the lesser of an average of 38 hours per week or the hours required to be worked by the employer*”⁴⁹⁵, and this was to be interpreted as meaning that any hours in excess of these were overtime. The AWU submitted that there was currently an anomaly in the payment of overtime for casual employees, as casual shiftworkers were entitled to overtime rates when the work is outside the span of ordinary hours pursuant to clause 22.2(h). There was no sound rationale to exclude casual employees from overtime penalty rates where full-time and part-time employees were entitled to these rates. The exclusion of casual employees from the overtime penalty rates would result in a reduced rate of pay for casual employees regularly performing overtime work, and it would therefore incentivise employers to use cheaper casual employees rather than full-time or part-time employees to perform overtime work.

⁴⁹² Witness statement – 13 October 2015, Exhibit 175

⁴⁹³ Witness statement – 12 October 2015, Exhibit 172

⁴⁹⁴ Submission – 14 October 2015 at para 5

⁴⁹⁵ Submission – 14 October 2015 at para 9

[700] The AWU noted that prior to 2010, casual employees in Queensland were entitled to overtime penalty rates under the *Fruit and Vegetable Growing Industry Award – State 2002*. Data collected by the Queensland Government did not illustrate any identifiable link between overtime entitlements for casual employees and the value of production figures, and there had not been any dramatic increase in the value of production for fruit and nuts or vegetables in Queensland after the introduction of the Horticulture Award. The purpose of overtime rates was to compensate employees for the disabilities associated with working additional hours and to discourage management practices that were regarded as being subversive of public policy and of the public interest. Casual employees in the horticulture industry were usually paid at the Level 1 rate under the Horticulture Award, which was the same as the National Minimum Wage Rate. The AWU submitted that the National Minimum Wage Rate was not intended to apply to employees working beyond the 38 hour week.

[701] The AWU submitted that the Commission should give little weight to the NFF’s witness evidence, because insofar as that evidence concerned profit margins in the agricultural sector, it failed to consider other important economic information such as the sector’s production levels, profitability levels and export statistics. Australian Government economic data demonstrated that employers in the agricultural sector had performed strongly in recent years.

[702] The AWU submitted that its amended variation removed the concern expressed by employers in the proceedings that the effect of its proposal was to establish weekend penalty rates for ordinary hours worked on weekends.

7.3 NFF evidence and submissions

John Dollisson

[703] Mr John Dollisson⁴⁹⁶ was the CEO of Apple and Pear Australia Ltd and the Deputy Chair of Voice of Horticulture (VOH). He gave evidence that varying the Horticulture Award to provide overtime and weekend penalty rates for casual employees would result in increased employment costs, a greater regulatory burden, reduced workplace flexibility and productivity, and fewer employment opportunities. VOH had commissioned Alice de Jonge, Senior Lecturer at Monash University, to analyse the results of a survey VOH had distributed to its membership, which showed that if the industry was required to pay overtime and weekend penalty rates to casual employees, labour costs would increase by a further 29%. Mr Dollisson stated that depending on the type of produce, labour costs as a percentage of total production costs could range from between 25% to 65%, so even marginal labour cost increases would reduce the level of economic activity in the horticultural industry.

[704] In cross-examination, Mr Dollisson was taken to data from the Australian Bureau of Agricultural and Resource Economics and Sciences which suggested that there was a dramatic increase in the net value of farm production across the whole of agriculture in 2014/15 of 41% and in 2015/16 of 15%. Mr Dollinson conceded this point, but said that in his apple and pear business he made “*more money in the years we have a lower volume than we do in the years we have a greater volume, because we’re basically supplying an oversupplied*

⁴⁹⁶ Witness statement – 22 February 2016, Exhibit 185; Oral evidence – Transcript 11 July 2016 at PN854–PN1077

domestic market and if we have a short crop prices increase, if we have a large crop prices decrease, because we have no alternative for our market”.⁴⁹⁷

Alice De Jonge

[705] Ms Alice De Jonge⁴⁹⁸ was a Senior Lecturer at the Department of Business Law, Monash Business School. Ms De Jonge was engaged to analyse and write-up results of a survey distributed by VOH to its members and member organisations. Ms De Jonge stated that a total of 540 survey responses were received. In cross-examination she acknowledged that if the objective of the survey was to give a complete economic picture of the horticulture industry it was not an appropriate survey, but said it was relatively well targeted at its purpose of obtaining information about the labour used by farmers. She agreed that according to the survey, the predominant form of employment was casual and that in peak season, the average number of hours worked was 50 hours per week.

Brock Sutton

[706] Mr Brock Sutton⁴⁹⁹ was a third generation vegetable farmer in the Lockyer Valley region, where his business operates all year round to supply chain stores and supermarkets. He stated that he employed 47 employees directly, and also utilised labour hire firms due to the seasonal nature of harvesting. The number of workers required could change significantly depending on many factors such as the season, the product and the type of work that was needed. Mr Sutton gave evidence that of his direct employees, 23 were overseas employees, and casual employees were employed predominantly to undertake the packing and other field work that was required. He stated that harvesting was usually done by labour hire companies, although he wished to reduce this and have more direct employees to improve the quality of work and to ensure they were treated well. He said a requirement to pay casual employees overtime would affect his ability to compete for orders from customers such as Coles and Woolworths, and that his industry cannot operate during a standard week like other workplaces.

Donna Mogg

[707] Ms Donna Mogg⁵⁰⁰ was the Workplace Relations Manager for Growcom, which provides a range of relevant services to help members, clients and partners achieve greater success in the Queensland horticulture industry. Ms Mogg outlined that prior to 2010, Queensland growers operated under a State award that allowed ordinary hours of work to be done on any day of the week, with overtime rates applying to work over 38 hours per week. Ms Mogg believed the current award provisions did not afford the same flexibility. She said environmental factors such as weather, pest and disease and crop variety affected when and how the work must be done. Over 250 horticulture enterprises in Queensland had agreements in place containing “*Banked Hours*” and/or “*Voluntary Hours*” clauses, and the modern Horticulture Award reflected these by excluding casual employees from overtime provisions. In cross-examination, when it was put to Ms Mogg by the AWU that the horticulture industry

⁴⁹⁷ Transcript 11 July 2016 at PN961

⁴⁹⁸ Witness statement – 22 February 2016, Exhibit 191; Oral evidence – Transcript 11 July 2016 at PN1388–PN1430

⁴⁹⁹ Witness statement – 22 February 2016, Exhibit 187; Oral evidence – Transcript 11 July 2016 at PN1103–PN1190

⁵⁰⁰ Witness statement – 21 February 2016, Exhibit 190; Oral evidence – Transcript 11 July 2016 at PN1276–PN1383

in Queensland survived when it was required to pay overtime to casual employees under the State award prior to 2010, Ms Mogg suggested that overtime was not being paid and more employees were being employed instead.

Andrew Bulmer

[708] Mr Andrew Bulmer⁵⁰¹ ran a horticultural business, and gave evidence that the business involved planting and harvesting 52 weeks of the year and operated 7 days per week. It was heavily reliant on a casual labour force to meet requirements in the peak season. Mr Bulmer stated that under the current arrangements staff could work extra hours and earn extra income in the harvest season, but that it would not be profitable to pay overtime to casual employees or penalty rates on weekends, and that a large number of casual employees would leave the business if their hours were capped at 38 hours per week. Because the business was in a regional area, it was already difficult to attract and retain employees, and the proposed amendments would make this more difficult. Mr Bulmer gave evidence that the horticulture industry was unique in the way that the weather dictated how the business was run, and said the proposed amendments to the Horticulture Award to introduce overtime for casuals would be counterproductive to the business and might force the business to downsize and employ less people.

Steve Chapman

[709] Mr Steve Chapman⁵⁰² operated a berry and cherry growing business in the Yarra Valley, Victoria and employed approximately 100 casual workers during the harvest season. He gave evidence that the casual workers were comprised of working holiday makers and local workers who were predominately second generation migrants who, during harvest time, worked approximately 50–60 hours per week. Mr Chapman said that more than 50% of their turnover went to wages, and that the majority of wage costs were in picking and packing. His view was that if overtime and penalty rates were applied to the industry, it would become unviable overnight. He said that a punnet of raspberries sold at wholesale for around \$3, of which the labour comprises \$1.50, and if he was required to pay overtime then berries were not viable to pick as this had to be done daily or they became unsuitable for the fresh market. There was no frozen berry industry in Australia as the cost of harvest labour exceeded the price received. He also said that if pickers were limited to 38 hours per week, there would be insufficient labour available to meet harvest needs since casuals wanted to work as many hours as they could when the work was available.

Kylie Collins

[710] Ms Kylie Collins⁵⁰³ operated a mango and avocado farm in Dimbulah, North Queensland. Her farm harvested 500 tonnes of fruit each year, 28 employees and 5 family members work on the farm, and 23 of the 28 casual employees were working holiday makers on 417 and 462 visas. Casual employees were employed predominantly between December and April for harvesting, and in June and July for pruning trees. She said that the requirement to pay overtime and penalty rates for casuals would have a significant impact as weather

⁵⁰¹ Witness statement – 22 February 2016, Exhibit 153

⁵⁰² Witness statement – 20 February 2016, Exhibit 154

⁵⁰³ Witness statement – 16 February 2016, Exhibit 155

conditions meant there was no choice but to work as long as possible whilst it was sunny because they did not know when the rain was going to stop the harvest. Ms Collins said that her employees wanted to work as much as they possibly could during the harvest period as it only went for a short amount of time.

John Cranny

[711] Mr John Cranny⁵⁰⁴ was a pineapple farmer with 160 hectares in Yeppoon. He employed 14 workers, 5 of whom were full-time, 9 were casual and over 50% were overseas workers. Mr Cranny gave evidence that his business was affected by seasonal conditions such as floods, cyclones, droughts and high temperatures and distinct peaks in production, and stated that the requirement to pay overtime and penalty rates to casuals would have a significant impact, as “*pineapples react to the weather and do not know if it is a weekend or a week day*”⁵⁰⁵ and, due to weather events, large peaks in work might be followed by a short week. Labour costs made up over 50% of his costs, and increased labour costs would have a significant effect on the viability of growing pineapples in Australia.

Mick Dudgeon

[712] Mr Mick Dudgeon⁵⁰⁶ was a cherry farmer from South East Tasmania who employed up to 30 casual employees during a 3 week period to pick the cherries, and another 30 to pack the cherries over a 5 week period. He gave evidence that adverse weather could reduce the opportunity to pick cherries at their best with hot weather dehydrating the cherries and rain causing them to split. The price for cherries dropped dramatically as the quality diminished to a point where it became unviable to pick them. Once cherries were picked, the aim was to pack them and ship them within 1–2 days of picking. This placed enormous pressure on growers to pick the cherries when they were ripe, which might be on the weekend or a public holiday. He said 85% of the workers were on work or student visas and were looking to maximise the amount of work they could do to support their travel or study, with little interest in weekends or public holidays (apart from a few religious people who took a day off for church). Mr Dudgeon said if casual rates were increased to time and a half and double time, he would not be able to afford to employ people to pick and pack cherries, as no one would pay the price necessary to pay for the labour. If overtime rates were introduced work could not be done on the weekends, which would increase the risk of crop loss due to weather. His view was that overtime rates were a significant threat to the long term viability of his business.

Susan Finger

[713] Ms Susan Finger⁵⁰⁷ was a Yarra Valley apple orchardist who employed 4 full-time employees and one permanent part-time employee, with up to 5 casual employees working in the packing operation 2 days per week from May until January. Ms Finger gave evidence that the seasonal activities include harvest (February–May), pruning (May–July) and hand thinning (November–December). Due to the seasonal nature of the work it had to be carried

⁵⁰⁴ Witness statement – 19 February 2016, Exhibit 156

⁵⁰⁵ Witness Statement – 19 February 2016, Exhibit 156 at para 6

⁵⁰⁶ Witness statement – 19 February 2016, Exhibit 157

⁵⁰⁷ Witness statement – 16 February 2016, Exhibit 158

out regardless of weekends and public holidays. A requirement to pay overtime would put her business under extreme financial stress and threaten its sustainability. Ms Finger stated that should her business be faced with mandatory overtime, the solution would be to employ more casual workers so that there was no need to roster overtime. This would reduce the hours of each worker to “office hours”⁵⁰⁸, which could lead to problems sourcing workers, as they would receive less hours and income.

Vicki Forsyth

[714] Ms Vicki Forsyth⁵⁰⁹ owned an agricultural contracting business in Northern Tasmania. She and her partner worked full-time in the business, together with 2 other full-time employees and one part-time employee. During the harvest season from February to June a further 19 casual employees were employed. Ms Forsyth gave evidence that due to weather patterns, harvesting the crop quickly in peak seasons was essential, and this meant that long hours were worked for up to 6 days with a rotational seventh day off. Ms Forsyth said that the payment of overtime and penalty rates for weekend work was impractical due to the unpredictability of weather and conditions for harvesting, and would threaten business viability.

Chris Fullerton

[715] Mr Chris Fullerton⁵¹⁰ farmed 5000 hectares in South East Queensland, growing pineapples and macadamias. He employed 7 family members and 40 other employees directly. He said the AWU’s proposed variation would substantially increase labour costs, which was significant because the business already operated on very small margins. If the variation was adopted, his entire operation would need to be reconsidered, and it might be necessary to change to less labour intensive crops, which would result in decreased employment opportunities.

Rhonda Jurgens

[716] Ms Rhonda Jurgens⁵¹¹ farmed 200 hectares in the Bowen region and grew tomatoes. The season covered 10 months of the year. Her business employed 4 full-time family members on the farm, as well as 20 casual workers directly and 65 through a labour hire firm, all of whom were on visas. She stated that the number of workers changed significantly depending on the season, and this could result in requiring extra workers at any time and fluctuations in the amount of work. A requirement to pay overtime rates to casual employees would have a significant impact on her business, as “*when the crops have to come off we cannot wait until Monday to harvest*”⁵¹². She said increasing wage costs, already amongst the highest in the world, would make the industry uncompetitive and limit options for expanding export markets and increasing jobs. Casual workers wanted as much work as possible when the work was available, and if casual workers’ hours were limited to avoid the payment of penalty rates and more working holiday makers were employed, it would not help local casual

⁵⁰⁸ Witness statement – 16 February 2016, Exhibit 158 at para 16

⁵⁰⁹ Witness statement – 16 February 2016, Exhibit 159

⁵¹⁰ Witness statement – undated, Exhibit 160

⁵¹¹ Witness statement – undated, Exhibit 161

⁵¹² Witness statement – Exhibit 161 at para 12

workers. The result would be less employment of local workers, curtailed growth of businesses, an increased administrative burden, reduced quality of produce by forcing processing on weekdays, and making the industry much less competitive globally.

Nick Leitch

[717] Mr Nick Leitch⁵¹³ operated 2 farms that grow hops in Tasmania and Victoria. He gave evidence that casual employment provided him with the flexibility he needed to operate efficiently with a seasonal workforce that fluctuated dramatically. The majority of the casual workforce was employed during the harvest period and the nature of the work required flexibility in terms of rostering and shift start and end times. During the harvest period he employed up to 130 casuals at each of his 2 farms, and that during the low season over winter that reduced to approximately 18 casuals on each farm. Mr Leitch gave evidence that during harvest some casuals may work up to 12 hour shifts, and that the majority of these casuals were not looking for part-time or full-time employment. He said that making overtime available to casuals contradicted the nature of casual employment in the industry, and that it would restrict rostering and staffing flexibility, impose a significant financial cost and create additional administrative pressures.

Clint Edwards

[718] Mr Clint Edwards⁵¹⁴ was a hops farmer in North East Tasmania, and employed one full-time employee and 45–50 casual seasonal workers. He said that weather played a big part in his ability to manage his business, and that weekend work was required when unfavourable weather persisted. Mr Edwards gave evidence that overtime on weekends would completely eradicate flexibility and increase both employer and employee stress, and the increased costs could not be recouped by its clients due to fixed contract arrangements. If overtime payments were required, he would not offer extra weekend work because it would not be viable, and would try to work longer hours during the week. During his cross-examination by the AWU, Mr Edwards confirmed it would be a problem if his business had to pay casual employees overtime rates, even if it was only when they worked over 38 hours per week. He said there would be one or 2 weeks each year when that happened.

Tracey McGrogan

[719] Ms Tracey McGrogan⁵¹⁵ was the Human Resources Manager of a Victorian family owned business growing tomatoes and capsicums. She described the industry as very competitive and heavily impacted by selling price, and said the only way to remain viable was to reduce production costs in circumstances where all the business's biggest expenses had increased yearly over the last 5 years. Crops were grown on an annual cycle, which resulted in higher labour demand during summer, and environmental factors could create spikes in production. A flexible casual workforce was required to meet these demands. Labour was the largest overhead for the business, and she believed the implementation of overtime and weekend penalties for casuals would result in an increase to this cost of approximately 10%.

⁵¹³ Witness statement – 12 February 2016, Exhibit 162

⁵¹⁴ Witness statement – 18 February 2016, Exhibit 184; Oral evidence – Transcript 11 July 2016 at PN799–PN850

⁵¹⁵ Witness statement – 15 February 2016, Exhibit 163

Brendan Miller

[720] Mr Brendan Miller⁵¹⁶ was an apple and cherry grower from Tasmania and employed about 15 casuals who work approximately 4 days per week. He said that he would not be able to offer more hours on the weekends if the weekend penalty rates were introduced. The product they produced was often over-produced, so there was a very small margin for profit, and many producers were in the middle of a price war between supermarkets and relied on exports to relieve the pressure. Mr Miller gave evidence that due to the cherry harvest season falling over Christmas and the apple harvest falling over Easter, the introduction of penalty rates would make him uncompetitive with Northern hemisphere producers who had a much lower wage cost. During the harvest season, fruit picking might involve work 6 days a week. The wages bill was already a huge cost and they could afford any more increases.

Stephen Pace

[721] Mr Stephen Pace⁵¹⁷ operated a farm in North Queensland and employed 40 workers, comprising 12 full-time employees and 28 casual employees, with 70% of these employees being on working holiday visas. Casual employees were predominantly employed to harvest and plant crops. Mr Pace gave evidence that the payment of overtime and penalty rates for casual employees would have a significant impact on his business because fruit crop maturity was governed by weather conditions, meaning that fruit had to be harvested at certain times. He said that in his experience most casual employees wanted to work extra hours regardless of the rate of pay because they realised that it was seasonal work. Increased labour costs would have a significant impact, as there were very small profit margins in horticulture crops, meaning any changes would seriously impede the ability to grow labour intensive crops in the future.

Pennie Patane

[722] Ms Pennie Patane⁵¹⁸ worked in a business in Western Australia that grew potatoes, onions, carrots and broccoli. Labour is required all year, and the business employs 30 casual employees, 95% of whom held working holiday visas. Ms Patane said that the business would prefer to have full-time employees but could not source them in the local area. A requirement to pay overtime and penalty rates to casual employees would significantly impact the business because working to a 7.6 hour day would not be efficient. Ms Patane gave evidence that labour costs accounted for 43% of the production price currently, and that would increase to over 51% as a result of the proposed changes. She believed this increase would jeopardise the business's ability to export, which would result in needing to scale back the business.

Andreas Rehberger

[723] Mr Andreas Rehberger⁵¹⁹ operated a farm in Bundaberg growing mangoes, pineapples, pumpkins and passionfruit. He stated that the harvest season covered approximately 40 weeks of the year with 3 family members working on the farm and over 100 casual employees

⁵¹⁶ Witness statement – 22 February 2016, Exhibit 164

⁵¹⁷ Witness statement – 18 February 2016, Exhibit 165

⁵¹⁸ Witness statement – undated, Exhibit 166

⁵¹⁹ Witness statement – undated, Exhibit 167

employed annually through a local backpacker hostel who were working holiday makers on 417 and 462 visas. He said that the business had little ability to limit the hours of work in order to avoid paying overtime and penalties, as the fruit harvest and packing had to be carried out at every opportunity. Labour costs were the bulk of the business's operating costs, and any increase could cripple the business or destroy the industry. Mr Rehberger said that to stay viable and competitive the business had to expand and develop its operation, which had enabled them to employ over 100 people annually, but changes to the award were compromising the viability of the business.

Ross Turnbull

[724] Mr Ross Turnbull⁵²⁰ owned a fruit growing business in Victoria and gave evidence that labour costs accounted for approximately 74% of the total production cost structure of peaches, apples and pears and approximately 88% for cherries. His business used labour hire contractors for the supply of casual workers due to seasonal requirements. He outlined the challenges faced in the agricultural industry, explaining that many factors outside of the control of growers influenced their business viability. He said it was difficult for growers to achieve a financial return that corresponded with the risk, investment and effort associated with their business, and believed the award needed to provide a sensible, fair and simple wages structure that balanced employee needs with the employer's need for a reasonable return on investment.

Tim Wolens

[725] Mr Tim Wolens⁵²¹ farmed 400 hectares in South East Queensland and Bundaberg growing pineapple and sugarcane. He harvested approximately 5000 tonnes of pineapples, which was harvested all year round, and 5000 tonnes of sugar, which was harvested from August to November. He employed 25 employees directly and 20 through a labour hire firm; of those employees there were 25 full-time employees and 20 casual employees. Around 40% of his workers were working holiday makers on 417 and 462 visas. Mr Wolens gave evidence that casual employees were predominantly employed to harvest and plant. Seasonal conditions such as rain could mean that harvesting and planting stopped at a particular time. A requirement to pay overtime rates and penalties for casual employees on the same terms as full-time employees would have a significant impact on his business because this would not allow his farm to meet customers' requirements if harvesting was restricted by time or financial costs. It would result in losing his ability to compete with importers based on price and the closing of his farm, which had been in his family for 5 generations.

Ann Young

[726] Ms Ann Young⁵²² ran a farm growing stone fruit in Swan Hill, Victoria. She gave evidence that the cost of casual labour took up one-third of gross revenue, and she estimated that one-third of the total labour cost would be for overtime if introduced. Her farm used casual labour for tasks only when they were required, as it was not sustainable or economically viable to employ full-time staff. Introducing overtime would risk the business

⁵²⁰ Witness statement – undated, Exhibit 168.

⁵²¹ Witness statement – undated, Exhibit 169

⁵²² Witness statement – 15 February 2016, Exhibit 170

becoming unviable and could increase costs to as much as 50% of gross income, in circumstances where profits were marginal. In her region the horticulture industry generated \$243,734 million per annum, and the 2011 census showed that the Swan Hill Local Government area had 18.3% of the workforce employed in agriculture, with 9.3% in fruit and nut growing, which did not include itinerant workers. Ms Young stated that she was informed by the Rural Financial Counselling Service that 50% of district horticultural growers were accessing household support because their income levels were so low.

Andrew Young

[727] Mr Andrew Young⁵²³ was a vegetable grower in the Robinvale area, seasonally growing salad crops, who employed 4 permanent employees and each season employed between 20–30 casuals, who work 35–55 hours a week. Wages accounted for about 30% of the business's cost and Mr Young stated he was concerned about paying penalty rates to casuals. A requirement to pay overtime would require a restructure of workload to avoid paying it. More employees would be required and average wages would decrease, while labour cost would increase by \$114 per employee.

NFF submissions

[728] The NFF⁵²⁴ submitted that farmers in the horticultural industry did not operate in a standard business environment where work could be limited to preconceived notions of standard hours as it was the environment which dictated the work roster, not the employer. Retailers and wholesalers determine the price paid for horticultural produce, not the farmer and it is for those reasons the principles underpinning the payment of penalty rates were inapplicable to the horticultural sector. In relation to the AWU claim as originally advanced, the NFF expressed a concern that the variation would result in a requirement to pay overtime to casual employees for work performed outside the 6.00 am to 6.00 pm span of hours on Monday to Friday and for work on weekends.

[729] The NFF referred to the decision of FWA in *Fanoka Pty Ltd & Anor*⁵²⁵ in which it was determined that it was in the interests of both parties to accommodate arrangements whereby employers could offer work in excess of 38 hours per week, and employees could agree to additional work at the ordinary rate of pay. The Full Bench decision in *Re Social, Community, Home Care and Disability Services Industry Award 2010*⁵²⁶ which granted overtime entitlements to casual employees was to correct an unintended anomaly in that particular modern award and was not applicable to the horticultural industry. The hours of work and overtime entitlements of casual employees had been extensively considered during the award modernisation process due to the different conditions in the schedules of the pre-modern awards. Further, during the award modernisation process the Minister for Employment and Workplace Relations had made a request that, where an award covered horticultural work, FWA should provide for roster arrangements and working hours sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work could be performed. During the award modernisation process, the AWU did not object to the NFF

⁵²³ Witness statement – 22 February 2016, Exhibit 171

⁵²⁴ Submission – 22 February 2016 at para 90

⁵²⁵ [2010] FWA 2139

⁵²⁶ [2014] FWCFB 379

proposal of the exclusion of casuals from overtime payments. Indeed, the AWU consented to the variation to the hours of work and overtime clauses in the Horticulture Award to reflect the longstanding position in the pre-reform *Horticulture Industry (AWU) Award 2000*. There was no uncertainty regarding the interpretation of the *Horticulture Award* and the FWO understood that casual employees were not to be paid overtime

7.4 ABI evidence and submissions

[730] ABI adduced evidence from 2 witness statements in regards to the AWU claim regarding overtime rates. These 2 witnesses also gave evidence in relation to the common claims, and that evidence is summarised in greater detail in Chapter 3.

Richard Roberts

[731] Mr Richard Roberts⁵²⁷ gave evidence that if his company was required to pay his hundreds of casual workers overtime, it was highly probable that it would result in less work spread over a greater number of workers, and that the company would have to consider increasing the use of mechanised processes to save labour costs.

Peter McPherson

[732] Mr Peter McPherson⁵²⁸ gave evidence that there was no overtime payment for casuals in his business's enterprise agreement, as casual employees were paid a 30% loading (except pieceworkers). He said that overtime for casual employees would not fit within the operational requirements of the horticulture industry, and if such provisions were inserted this would create a significant economic and administrative burden for the company, leading to workers having their employment terminated, or costs passed on to consumers, or both.

Submissions

[733] ABI submitted that the AWU had not presented a sufficient evidentiary case to justify the grant of its claim. There was no evidence from casual employees themselves which explained how proposed variation would affect their hours. The AWU's own witnesses supported employers' interpretation of the current provisions in the Horticulture Award that overtime rates were not applicable to casual employees.

7.5 Ai Group evidence and submissions

[734] The Ai Group⁵²⁹ submitted that the proposed variation to clause 22.1(b) would result in the averaging of a casual employee's ordinary hours no longer being permitted. If the Commission were to allow for averaging of ordinary hours over a period of time, the Ai Group argued that it should be over a minimum period of 12 months. The AWU proposal would result in a determination of the ordinary hours of work of a casual employee, impose an additional restriction as to the times within which a casual employee might perform ordinary hours of work, and limit the maximum number of ordinary hours that might be performed in a

⁵²⁷ Witness statement – 22 February 2016, Exhibit 176

⁵²⁸ Witness statement – 22 February 2016, Exhibit 188; Oral evidence – Transcript 11 July 2017 at PN1196–PN1267

⁵²⁹ Submission – 21 August 2016

day by a casual employee. The Ai Group adduced evidence from Paula Colquhoun from the Mitolo Group. Her evidence concerning the ACTU common claims is summarised in Chapter 3. In relation to the AWU's claim, Ms Colquhoun said that under the enterprise agreements Mitolo had entered into, casual employees had generally signed agreements to voluntarily work additional hours and forego overtime and penalty rates.⁵³⁰ She said that if overtime was made applicable to casual employees, there would be a significant increase in labour costs which could not be passed on to customers and would have a negative financial impact on the business.

7.6 AWU claim – consideration

[735] It is apparent that the current provisions of the Horticulture Award were derived substantially from provisions of the federal pre-reform *Horticultural Industry (AWU) Award 2000* (2000 Award) as it applied to respondents to that award, although it rationalised a range of other pre-reform awards and State award provisions transmitted into NAPSAs which contained diverse provisions.⁵³¹ The 2000 Award provided for different provisions applicable to “Schedule A” respondents on the one hand and “Schedule B” and “Schedule C” respondents on the other. The 2000 Award did not appear to exclude casual employees of Schedule A employers from the overtime entitlements that were enjoyed by full-time employees. Clause 13.2.6 identified the entitlements which the casual loading was paid in substitution for “*Annual Leave, Leave Loading, Public Holidays, Personal Leave, Notice of Termination & Redundancy and lack of continuity of employment*”, and this did not include overtime penalty rates. Clause 26.1 provided, for Schedule A employers, that ordinary hours were not to exceed 40 in a week “*without the payment of overtime*”. In the case of “*employees on blocks*” (the meaning of which expression was not defined), ordinary hours were to be worked over 5 days, Monday–Saturday (with this extended to 5½ days in identified fruit picking seasons). For packing hours employees, ordinary hours were to be worked in 8-hour days, Monday–Friday. Clause 28.1 provided, in respect of employees of Schedule A employers, for overtime penalty rate entitlements for employees on blocks and packing house employees. For employees of Schedule B and C employers, the position was more ambiguous. The ordinary hours provision in clause 26.2.1, which provided for 152 ordinary hours over a 4 week period (except for shift workers), was expressed to apply only to weekly employees. Clause 28.2.1, which dealt with overtime, did not expressly exclude casual employees, but established the default position as being that time was to be taken off in lieu of overtime worked, but allowed the employee to elect to be paid for overtime provided this election was made clear at the time the overtime was offered. Under clause 28.3, there was a requirement for all employees covered by the award to work reasonable overtime, with a right to refuse in specified circumstances.

[736] The question of overtime entitlements appears to have gained some attention during the award modernisation process, but not in a way which was the subject of any express consideration by the award modernisation Full Bench. In its *Award Modernisation Statement* of 23 January 2009, the Full Bench published the exposure draft for the modern Horticulture Award, and noted “that major industry organisations encountered difficulties in addressing some complex and important issues concerning classifications, rates of pay and allowances”

⁵³⁰ Transcript 16 March 2016 at PN2832–PN2833

⁵³¹ [2009] AIRCFB 50 at [30]

concerning that award and another award.⁵³² Following further submissions and consultations, the Full Bench in its *Award Modernisation Decision* of 3 April 2009⁵³³ said (footnote omitted):

“[60] We have revised the ordinary hours and overtime provisions of the exposure draft. The provisions in the *Horticulture Award 2010* are generally in line with the relevant provisions of the *Horticultural Industry (AWU) Award 2000*, as it applies to what are referred to as the Schedule A respondents to that award. We have also included more extensive provisions for pieceworkers and included piecework provisions we consider are consistent with the requirements of the consolidated request. A number of other provisions have been altered to make the interaction with the NES clearer.”

[737] In its subsequent *Award Modernisation Decision* of 2 September 2009⁵³⁴, which primarily concerned transitional provisions, the Full Bench noted (emphasis added):

“[99] A number of employer representatives including the Horticulture Australia Council, the National Farmers’ Federation (NFF) and the Ai Group submitted that the operation of the *Horticulture Award 2010* should be delayed for two years pending the review of modern awards provided for in item 6 of Schedule 5 to the Transitional Act. *They all expressed concern about the cost of implementing the award, particularly the provisions relating to piecework, casual loading, span of ordinary hours, overtime and penalty rates.* It was suggested that, due to the wide range of provisions in award-based transitional instruments, two years will be needed to properly identify the effect of the new award and to develop proposals for variations. No union responded to those submissions, although the AWU did file a submission setting out its position in relation to transitional provisions generally.

[100] We note that since the *Horticulture Award 2010* was made on 3 April 2009 the Minister varied the consolidated request on 2 May 2009. That variation amended cl.45(b) which relates to modern award provisions dealing with the calculation of pay for piecework employees while on leave.

[101] Given the scale of the cost increases referred to in the employers’ submissions, which at this stage at least have not been contradicted, *we have concluded that a number of the modern award provisions may require re-examination. We mention in particular the piecework provisions and provisions relating to hours of work, overtime and penalties.* Despite that conclusion it would not be appropriate to simply postpone the operation of the provisions for two years. *The appropriate course is for one or more of the employer groups to lodge an application to vary the modern award.* If that is done we will establish a program to determine the application before the end of the year.

⁵³² [2009] AIRCFB 50 at [29]

⁵³³ [2009] AIRCFB 345

⁵³⁴ [2009] AIRCFB 800

[102] In the meantime we shall vary the award to include the model transitional provisions, including the phasing schedule. On any view, because of the existing diversity of award provisions, the model provisions will be needed.”

[738] It is evident from the above passage that the employer groups were concerned that the overtime provisions of the proposed Horticulture Award would impose costs upon them that had not previously been applicable, although it is not clear whether this concern related to casual employment.

[739] The next development was that, as discussed in the Full Bench’s *Award Modernisation Statement* of 10 September 2009⁵³⁵, the Minister’s award modernisation request pursuant to which the award modernisation process was conducted in accordance with s.576C of the WR Act was varied in respect of the Horticulture Award:

“[4] The 26 August variation in relation to the horticulture industry inserted the following two paragraphs in the consolidated request:

‘Horticulture industry

50. The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.

51. Where a modern award covers horticultural work, the Commission should:

- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
- provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.”

[740] By reference to its invitation for parties to file applications to vary the modern award in paragraph [101] of its 2 September 2009 decision, the Full Bench then said:

“[6] Assuming that an application is made to vary the *Horticulture Award 2010*, interested parties will have an opportunity to make comments on the 26 August variation of the consolidated request before any change is made to the award.”

[741] Applications were subsequently made by the NFF, the Ai Group and the Horticulture Australia Council (HAC) to vary the Horticulture Award. These were dealt with in a decision issued by the award modernisation Full Bench on 23 December 2009.⁵³⁶ The application made jointly by the NFF and the Ai Group dealt with pieceworkers and sought, among other things, that pieceworkers be excluded from the operation of the ordinary hours of work,

⁵³⁵ [2009] AIRCFB 835

⁵³⁶ [2009] AIRCFB 966

rostering and overtime provisions of the award.⁵³⁷ It also sought that clauses 22.1 and 22.2 (concerning ordinary hours of work) and clauses 24.1 and 24.2 (concerning overtime) be varied, and proposed provisions which are the same as the current provisions. The proposed ordinary hours provisions seem to have been derived from the corresponding provision of the 2000 Award applicable to Schedule B and Schedule C employers. This application was supported by the AWU, except for 2 aspects relating to pieceworkers. The HAC application concerned a wider range of issues which it is not presently necessary to identify.⁵³⁸

[742] In its decision the Full Bench said generally:

“[12] The NFF and AiGroup contended that the principal award was the Horticulture Award 2000. That award has three schedules, designated A to C respectively. The schedules contain different conditions of employment. The award was made primarily by reference to the provisions applying to Schedule A respondents, a position advanced in the consultations by the AWU. In these proceedings the AWU accepted that Schedules B and C have more extensive geographic and industrial application. It agreed with the NFF and AiGroup that it would be more appropriate if the modern award were to be based on the conditions in those schedules rather than the conditions in Schedule A. The HAC submitted that its application was based on the provisions in 11 instruments – two pre-reform awards and nine NAPSAs.

[13] There is no single existing instrument which could be said to apply generally in the industry. Further, it is necessary, when considering the various provisions, to have regard to the totality of the provisions in any particular instrument. There is no definitive information as to the application of the individual awards or NAPSAs. Whilst the provisions of all of the instruments are relevant to some degree, we think greatest weight should be given to the Horticulture Award 2000. That award is a major award. It operates, with respect to Schedule A, in Victoria, South Australia and New South Wales, with respect to Schedules B and C to named employers in Victoria and members of two Victorian employer associations, the Tasmanian Farmers and Graziers Association and the AiGroup.”

[743] Insofar as the applications concerned ordinary hours of work and overtime, the Full Bench determined as follows:

“[17] In relation to hours of work and overtime provisions, there are two approaches before us. First, there are the provisions in the joint application which are not opposed by the AWU. Secondly, there are the provisions proposed by the HAC, which the AWU opposes. The AWU submitted that the provisions the HAC seeks go beyond what would be justified by the variation to the consolidated request, that the HAC is seeking to reargue issues already determined by the Full Bench and, contrary to the established approach to award modernisation, the HAC is cherry picking from the range of existing instruments. The NFF and AiGroup supported the AWU characterisation of the HAC proposals. They submitted that, while they would prefer greater flexibility, they have confined their application to the matters contained in the 26 August 2009 variation to the consolidated request. In our view the variation

⁵³⁷ Ibid at [4]

⁵³⁸ Ibid at [5]

proposed by the HAC extends beyond the scope of the variation to the consolidated request. In the circumstances it would not be appropriate to reopen consideration of provisions which have only recently been decided upon. We add, although not strictly relevant, that the provisions sought do not appear to be consistent with the weight of current regulation. We will vary the hours of work provisions as proposed in the joint application.”

[744] The end result was that provisions in the 2000 Award which did not properly define the ordinary hours of work for employees of Schedule B and C employers, and left it unclear whether they were entitled to overtime, were transmitted into the Horticulture Award with the consent of the NFF, the Ai Group and the AWU without there being any explicit consideration of how those provisions were, for relevant purposes, meant to operate. That has left the position in the Horticulture Award quite unclear. Except perhaps in relation to shiftworkers, clause 22 does not identify the ordinary hours of casual employees. Clause 10.4(a) defines the ordinary hours of casual employees as being “... *the lesser of an average of 38 hours per week or the hours required to be worked by the employer*”, but in relation to the former situation there is no period over which the average is to be calculated, meaning that the ordinary hours are ultimately incapable of identification. That has 2 consequences. First, the Horticulture Award does not comply with s.147 of the FW Act, which relevantly requires a modern award to “*include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award*” (underlining added). Second, although the overtime provisions in clause 24 do not in terms exclude casual employees, the lack of any proper definition of their ordinary hours means that there is no foundation upon which any payment of overtime may be calculated.

[745] Employer groups and their members in the industry have interpreted the Horticulture Award as excluding casuals from any entitlement to overtime. This interpretation is substantially based on clause 22.1(d) which, as set out earlier, provides “*All time worked by full-time and part-time employees in excess of the ordinary hours will be deemed overtime*”. However the exclusion of any reference to casuals in this provision is not determinative of the position, since clause 22.1 is only concerned with the ordinary hours of full-time and part-time employees (other than shift workers) and does not deal with casual employment at all.

[746] Certainly the evidence clearly demonstrates that employers covered by the Horticulture Award do not, as a matter of fact, pay overtime penalty rates to casual employees. That is the case notwithstanding that the 2000 Award at least required Schedule A employers to pay overtime to certain categories of casual employees, and at least one pre-reform State award of significance, the Queensland *Fruit and Vegetable Growing Industry Award – State 2002*, also required casuals to be paid for overtime.

[747] One aspect of the Horticulture Award which received little attention in the evidence and submissions was clause 15–Pieceworkers (although it did receive considerable attention in the 23 December 2009 decision of the award modernisation Full Bench⁵³⁹ as a result of the variation to the Minister’s award modernisation request to which we have earlier referred). Clause 15 sets out a facilitative mechanism by which employees, including casual employees, may agree with their employer to be paid piecework rates that “*must enable the average*

⁵³⁹ [2009] AIRCFB 966 at [18]–[22]

competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee” (clause 15.2). Critically, clause 15.5 provides that, relevantly, the overtime provisions of clause 24 do not apply to an employee who is paid piecework rates. The evidence and submissions before us did not disclose the extent to which casual employees under the Horticulture Award are paid piecework rates in lieu of hourly rates. Presumably this must occur to a significant degree given the attention given to piecework in the award modernisation process. It does mean that the AWU’s overtime claim would have no effect on casual employees on piecework rates and their employers. However, whatever may be the extent of the utilisation of piecework rates, the evidence before us establishes that the AWU claim would affect significant numbers of employers and their casual employees.

[748] As indicated, we accept the submission of the AWU that the Horticulture Award does not properly prescribe the ordinary hours of employment for casual employees, and therefore does not comply with s.147. This requires rectification. Further, as a matter of general principle, for essentially the same reasons set out in Chapter 4 in connection with the Hospitality Award, we consider that it is necessary to achieve the modern awards objective of a fair and relevant safety net for a modern award which prescribes overtime penalty rates for weekly employees to also prescribe them to casual employees. In reaching that conclusion, we have similarly taken into account the consideration specified in s.134(1), and have placed particular weight upon s.134(1)(da)(i) and (f). The identified principle requires application to the Horticulture Award. However, this requires considerable caution having regard to the particular circumstances applicable to this award.

[749] We consider that evidence adduced by the NFF and ABI convincingly demonstrates at least the following propositions:

- (1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.
- (2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is.
- (3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.
- (4) The most likely response of horticultural employers to the imposition of any onerous overtime penalty rate requirement will be to try to avoid its incidence. Most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments, and employ more casuals to cover the hours. However this could be counter-productive because it was likely that the lower incomes per worker this would produce would

reduce the supply of persons willing to work casually in the industry. The alternatives mentioned were to move to less labour intensive crops or reduce output.

[750] Additionally the evidence of the AWU demonstrated what we, from our collective experience, already know to be the case, namely that award non-compliance in the horticultural industry is widespread. Therefore the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance.

[751] It is necessary to bear these matters in mind in the application of overtime penalty rates to casual employees under the Horticulture Award in order to ensure that any variation is not counter-productive and frustrates the achievement of the modern awards objective. We acknowledge the evidence adduced by the AWU to the effect that the horticultural industry is currently in a phase where outputs and profits are generally good. However modern award provisions need to be crafted in a way that makes them sustainable at all stages of the business cycle. We also acknowledge that the AWU's amended proposed variation removed any concern that the Horticulture Award would impose weekend penalty rates for ordinary hours worked by casual employees on weekends which did not currently exist. This resolves major concerns expressed by a number of the NFF's witnesses. Nothing in this decision is intended to change the current situation with respect to ordinary-time weekend casual rates.

[752] In respect of daily hours of work, we consider that the ordinary hours of casual employees should be no more than 12 hours per day, and that overtime penalty rates should be payable for work performed in excess of 12 hours. A 12 hour day is consistent with the facilitative maximum daily hours permitted for full-time employees under clause 22.1(c), and we think is reasonable having regards to the physical demands of harvesting work and the work requirements of employers. There is an additional question as to whether the ordinary daily hours of casual employees should be limited to the period of 6.00 am to 6.00 pm, as it is for full-time and part-time employees under clause 22.1(b), with any work performed outside these hours to be paid at overtime rates. We are not satisfied that the evidence or submissions have properly assisted us in respect of this issue. We will invite further submissions about this from interested parties.

[753] In respect of weekly ordinary hours, the position should remain that the hours for casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. There remains 2 critical issues to be resolved: first, over what period may the 38 weekly hours of casual employees be averaged and, second, should overtime penalty rates be payable for work in excess of those hours? We consider that those issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time.

[754] In *Fanoka Pty Ltd T/A Fairview Orchards & Anor*⁵⁴⁰, which concerned the approval of a large number of enterprise agreements applying to horticultural employers in Queensland pursuant to the applicable provisions of the *Fair Work (Transitional Provisions & Consequential Amendments) Act 2009* (Cth), FWA (Richards SDP) determined that

⁵⁴⁰ [2010] FWA 2139

provisions which allowed employees, voluntarily and at their own initiative, to work additional hours at ordinary time rates would represent “a tangible benefit for the employees”.⁵⁴¹ We doubt that this proposition has much practical content with respect to casual employees. Where a casual is engaged on a daily basis, the employer has the capacity under any facilitative provision to dictate the terms of engagement, so that any employee who did not volunteer in writing to work additional hours at ordinary time rates would not be engaged.

[755] We consider that a better solution to the difficulty would be to allow an averaging period of sufficient length to allow long hours of work to be performed in short periods of time without attracting overtime penalty rates. We are provisionally minded to allow weekly hours to be averaged over a period of 8 weeks, so that overtime penalty rates would only be payable if the employee worked in excess of 304 hours over an 8 week period. However because this was, again, an issue not extensively explored in the evidence and submissions, we will allow interested parties an opportunity to make further submissions about this (and, if necessary, to adduce further evidence) before we make a final decision. We will also direct the parties to confer in order to endeavour to reach an agreed outcome. A member of the Commission will be made available to assist if interested parties request this to occur.

7.7 The NFF claim – minimum engagement for dairy operators in the Pastoral Award

[756] The NFF⁵⁴² has sought a variation to the *Pastoral Award 2010* (Pastoral Award) to reduce the minimum period of engagement from 3 hours to 2 hours for part-time and casual dairy operators. Clauses 10.3(e) and 10.4(f) of the Pastoral Award currently provide:

10.3 Part-time employment

...

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

...

10.4 Casual employment

...

(f) On each occasion a casual employee, other than a casual pieceworker, is required to attend for work, casual employees are entitled to a minimum payment of three hours’ work at the appropriate rate.

⁵⁴¹ Ibid at [33]

⁵⁴² Submission – 5 August 2016

[757] The NFF's propose that clause 10.3(e) be varied to provide:

“An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift. Provided that part-time employees engaged as daily operators will be rostered for a minimum of two consecutive hours on any shift.”

[758] Clause 10.4(f) would be varied to provide:

“On each occasion a casual employee, other than a casual pieceworker, is required to attend for work, casual employees are entitled to a minimum payment of three hours' work at the appropriate rate. Provided that casual employees engaged as daily operators are entitled to a minimum payment of two hours' work at the appropriate rate.”

7.8 NFF evidence and submissions

[759] In support of its case that the current 3 hour minimum engagement exceeded the time required for milking, the NFF provided the Commission with data collected from the “CowTime Program”.⁵⁴³ The CowTime Program comprises data collected from approximately 100 farms, and reported an average milking time between 2.26 and 2.78 hours depending on the type of dairy. The NFF submitted a number of witness statements in support of its application to reduce the minimum engagement for dairy operators.

Simon Fiddelaers

[760] Mr Simon Fiddelaers⁵⁴⁴ was a dairy farmer in Victoria with 1100 cows which are milked twice a day for over 11 months of the year. His farm had 6 full-time employees and 8 casual employees as well as 2 family members who worked on the farm. Mr Fiddelaers gave evidence that the casual employees do the milking and cleaning up and that milking takes 2 hours twice a day. Mr Fiddelaers gave evidence that the 3 hour minimum engagement had changed the way that they engaged staff by having a list of jobs to do if a casual employee had half an hour spare. He said that it was time consuming to create the list and employees did not always want to stay and fill in time. The 3 hour minimum engagement had a financial impact in that it cost more for milking.

Cheryl McCartie

[761] Ms Cheryl McCartie⁵⁴⁵ gave evidence on behalf of TJ van Brecht and CF McCartie. Together they farmed 217 hectares in Tasmania, milking 450 cows twice a day every month. The business had one full-time employee and one casual employee. Milking the cows took from one hour twice per day to 2¾ hours twice per day depending on the month of the year. For the 2 months per year that it required one hour twice per day, Ms McCartie usually did the milking as employing a casual employee for one hour was too expensive. Ms McCartie stated that the 3 hour minimum engagement period has changed the way the business engaged staff, and it could not afford to employ another casual employee despite its desire to do so.

⁵⁴³ Submission – 12 October 2015 at para 34

⁵⁴⁴ Witness statement – 12 October 2015, Exhibit 150

⁵⁴⁵ Witness statement – 9 October 2015, Exhibit 151

She said the minimum engagement period resulted in a loss of productivity, as employees were paid for 3 hours but worked between 2 and 2¾ hours. She further stated it had impacted on the farm family personally as the family had less time off.

Anne Wearden

[762] Ms Anne Wearden⁵⁴⁶ owned and operated a dairy farm with her husband in northern Victoria. Ms Wearden gave evidence that she had one full-time employee and also employed a school student on the weekends and some nights after school. The student arrived halfway through milking and, because of the minimum engagement period of 3 hours, he either helped with the milking or did other jobs, even though he did not want to stay that long as he had other commitments. She said that the minimum engagement period meant having to choose between suffering financially to assist the school student or deny him the opportunity of work.

Leigh Shearman

[763] Ms Leigh Shearman⁵⁴⁷ owned a dairy farm in Goolmanger, NSW, and employed a number of casual employees, part-time employees and 2 school based employees. Ms Shearman gave evidence that she liked to employ school students to help with daily milking of cows, however due to school finishing times, milking had to start before they arrived to start work. The milking took 2–2½ hours, but employees had to be paid for 3 hours per shift under the award. She attempted to find other duties to fill up the 3 hours, but they were limited. Ms Shearman said that farmers need flexibility, particularly on weekends when only milking cows is required, and that if they could pay for actual time rather than a minimum of 3 hours, they would save \$130 per week, with the saving coming from paying less wages to “*mainly the younger school based kids*”.⁵⁴⁸ In cross-examination by the AWU, Ms Shearman said that in her experience, casual employees were less skilled than permanent employees because they spend less time with a herd and therefore did not know the routines.

Susan Wearden

[764] Ms Susan Wearden⁵⁴⁹ and her husband farmed 150 hectares of land in Victoria on which they milked 350 cows twice daily. She said that during the peak seasons (August to December and February to May) milking took between 2½ and 3 hours, and during the low seasons (mid-December to mid-February and June to mid-August) it took between 1½ and 2 hours, because there were fewer cows to milk. The shorter milking period occurred during the hottest part of the year and, because the milking conditions were not as pleasant for milkers or cows, an “*all in*” approach was taken in order to get the milking completed as quickly as possible. It was Ms Wearden’s evidence that each of her 4 staff members were, for a variety of reasons, adversely affected by the 3 hour minimum engagement period. The nature of the dairy industry was that work was predominantly performed in the early morning and evening, and that she looked for flexibility that served both employees and her business.

⁵⁴⁶ Witness statement – undated, Exhibit 152

⁵⁴⁷ Witness statement – 12 October 2015, Exhibit 177; Oral evidence – Transcript 11 July 2016 at PN193–PN313

⁵⁴⁸ Transcript 11 July 2016 at PN303–PN305

⁵⁴⁹ Witness statement – 15 April 2015, Exhibit 178; Oral evidence – Transcript 11 July 2016 at PN333–PN429

Noel Campbell

[765] Mr Noel Campbell⁵⁵⁰ was a dairy farmer who operated a dairy farm in Yannathan in South-East Victoria. He had been the President of the Australian Dairy Farmers since 2012. He said that the 3 hour minimum engagement period added “*unnecessary costs and difficulties to Australian dairy farmers*”.⁵⁵¹ The uptake of technology had reduced the need for staff to work longer hours but there was little gain to farms if staff had to be engaged for a minimum period of time. The nature of the dairy industry dictated peaks and troughs depending on the time of year and the amount of milk the cows produced. Mr Campbell stated that during busy periods on his dairy farm, 2 staff members were required twice a day for the milking of cows (as opposed to any duties before or after) for approximately one hour and 45 minutes. Mr Campbell also gave evidence that he was unable to employ an additional staff member to assist with rearing calves as the task only took 1½ hours and it was financially unviable to pay the 3 hour minimum engagement period.

Submissions

[766] The NFF⁵⁵² submitted that there had been no minimum engagement period in the pre-reform awards applicable to the dairy industry, including the *Pastoral Industry Award 1998*, (with the exception of casuals not given prior notice that they were not required in Tasmania). The 3 hour minimum engagement did not meet the modern awards objective in relation to the dairy industry, in particular milking, because it usually took less than 3 hours. Milking had to be carried out twice a day, and milking time varied depending on the season, number of cows, the technology used and the weather conditions.

[767] The NFF contended that the 3 hour minimum engagement was a barrier to job creation and had resulted in the loss of employment for some employees due to the high cost in paying an employee for a minimum of 3 hours’ work when they might only be required for 2 hours’ work. The 3 hour minimum engagement was inconsistent with the need to promote social inclusion through increased workforce participation, especially for young workers or those with family responsibilities. A 2 hour minimum engagement period would also promote increased flexibility for employees seeking casual and part-time employment.

7.9 AWU submissions

[768] The AWU⁵⁵³ opposed the NFF claim, and submitted that that a reduction in the minimum engagement period was clearly inconsistent with the requirement to provide a fair and relevant safety net of employment conditions for low paid workers. Dairy operators were not entitled to weekend penalty rates or additional amounts for working early in the morning or in the evening, and ordinary hours could be worked any day of the week to a maximum of 152 hours over a 4 week period. A reduction in the minimum engagement period might discourage workforce participation in this industry for local workers who were otherwise eligible to receive a Newstart Allowance. Dairy operators with less than 12 months experience in the industry were paid at the National Minimum Wage, and a reduction in the

⁵⁵⁰ Witness statement – 12 October 2015, Exhibit 246

⁵⁵¹ Witness statement – 12 October 2015, Exhibit 246 at para 2

⁵⁵² Submission – 12 October 2015

⁵⁵³ Submission – 30 August 2016

minimum engagement would mean adult dairy operators would have a guaranteed amount of \$44.25 for a casual employee and \$35.40 for a part-time employee,⁵⁵⁴ where a single person on the Newstart Allowance would receive a work-day rate equivalent of \$52.34.⁵⁵⁵ The conditions for employees in the dairy industry were already sub-standard compared to other industries in Australia, and it was unsurprising that the industry faced a significant labour shortage as a consequence.

[769] The AWU sought to refute the NFF evidence concerning the average time taken to complete all tasks related to milking. The AWU tendered an ABARES “*Australian dairy – financial performance of dairy farms’ survey*”⁵⁵⁶ which indicated that it took in excess of 4 hours per milking to complete milking and associated tasks in a smaller dairy farm. The AWU submitted that the ABARES survey data was more relevant than the CowTime survey as the sample size was 3 times greater, included the time taken for cleaning, and was collected from 2011–12 to 2013–14, whereas the CowTime survey was undertaken in 2009 with a sample size of 100.

7.10 NFF claim – consideration

[770] We are not satisfied that it is necessary to reduce the minimum engagement period for casual and part-time dairy operators from 3 hours to 2 in order to meet the modern awards objective for the following reasons:

- (1) Once ancillary tasks are taken into account, a 3 hour minimum engagement period bears a reasonable relationship to the average time it takes to conduct the milking task, as the data from the ABARES survey relied upon by the AWU and the CowTime survey relied upon by the NFF demonstrated. We accept that the witness evidence adduced by the NFF showed that at certain times of the year milking could take under 3 hours, but that is not the only consideration relevant to the establishment of a minimum engagement period.
- (2) While the NFF adduced extensive evidence from the perspective of employers, there was virtually no evidence from the perspective of employees who perform the milking task and are paid under the Pastoral Award for their work. In Chapter 3 of this decision we outlined the purpose of minimum engagement periods in awards to ensure that the remuneration paid for employment was not at an exploitative level having regard to the time and cost associated with attending for work. As was pointed out by the AWU, employees performing milking work under the Pastoral Award are already low paid, and they work flexibly across the working day and week without the payment of penalty rates for any ordinary hours worked. A reduction in the minimum engagement period for existing employees is likely to lead to a direct reduction in their pay, as the evidence of Ms Shearman demonstrated. We do not consider that the reduction claimed would constitute a fair balancing of the interests of employer

⁵⁵⁴ Submission – 30 August 2016 at para 10 (based on 2016–17 rates)

⁵⁵⁵ Submission – 30 August 2016 at para 34 (based on 2016–17 rates)

⁵⁵⁶ ABARES ‘Australian dairy – financial performance of dairy farms, 2011 - 12 to 2013-14’ – page 20, TAB 2 of Exhibit 186; cited in Submission – 30 August 2016 at para 3

and employee having regard in particular to “the needs of the low paid” (s.134(1)(a)).

- (3) For prospective employees, the evidence did not persuade us that the 3 hour minimum engagement period has led to denial of employment opportunities (with one exception which we discuss later). On the other hand, noting the AWU submission comparing the amount of the Newstart Allowance and the pay that would be derived from a 2 hour minimum engagement period, we are concerned that the grant of the NFF’s proposed variation would significantly reduce the incentive to work in dairying operations, and this would be inconsistent with the consideration in s.134(1)(c) concerning the need to promote social inclusion through workforce participation.

[771] We do not consider therefore that the minimum engagement period for casual and part-time employees in dairying operations should be reduced from 3 hours to 2 hours on an across-the-board basis. However we do consider that the NFF’s evidence (particularly that of Ms Wearden and Ms Shearman) did demonstrate that the 3 hour minimum engagement period might inhibit the employment of school students, because school hours did not permit school students to attend dairy farms to assist with milking before the milking had begun. Casual dairy farm work would provide a valuable employment entry point, as well as additional income, for school students in rural areas, and we do not consider that the modern awards objective is served if such employment is inhibited. We will therefore reduce the minimum engagement period to 2 hours for junior employees who are school students. We will direct the NFF to prepare a draft determination to give effect to our decision, and the AWU and any other interested parties will be given an opportunity to make further submissions about the form of the variation.

7.11 SAWIA claim – casual minimum engagement in the Wine Industry Award

[772] The SAWIA⁵⁵⁷ has sought a variation to clause 13.3 of the *Wine Industry Award 2010* (Wine Industry Award) to reduce the minimum period of engagement of casual employees from 4 to 2 hours of work. Clause 13.3 of the Wine Industry Award currently provides:

13.3 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours’ work.

[773] The SAWIA’s proposed variation is as follows:

“13.3 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of two hour’s [sic] work.”

7.12 SAWIA evidence and submissions

[774] The SAWIA adduced evidence from 5 witnesses in support of its claim. This evidence mainly concerned 2 aspects of winery operations: first, the effect of weather conditions on grape harvesting and pruning and, second, the effect of variable tourist demands on cellar door operations.

⁵⁵⁷ Draft determination – 17 July 2015

Jeremy Dineen

[775] Mr Jeremy Dineen⁵⁵⁸ was the Chief Winemaker and General Manager of Josef Chromy Wines in Northern Tasmania. He said that during peak operational periods from March to May and during pruning, the winery employed up to 80 casual vineyard workers. The current 4 hour minimum engagement period was problematic for cool climate vineyards that had variable weather. Pruning and harvesting were expensive and were at risk of inclement weather and unexpected weather events, and Mr Dineen said that the winery would no longer call in casual employees if there was any risk of rain, because they could not risk having to pay 60–80 casual employees for 4 hours work if work had to be abandoned after 2 hours because of rain. During the pruning season there were 5 to 10 days where up to 30 casual employees had to be sent home early, and during the harvest season 3 to 7 days where up to 60 casual employees had to be sent home early, due to unexpected inclement weather, which was the equivalent of up to \$20,000 in wages for work not actually performed. Mr Dineen said that on sloping vineyards, even light rain could be highly problematic and give rise to potentially dangerous work conditions. Rain could also dilute the grapes and add to their weight, which could lead to a loss in wine quality. There had been an increase in machine harvesting because of the 4 hour minimum engagement period, but for some grape varieties hand picking was preferred for product quality reasons.

Steven Todd

[776] Mr Steven Todd⁵⁵⁹ was the General Manager for Kay Brothers, a small family-owned winery in McLaren Vale which employed 13 staff members across cellars (production), vineyard, cellar door sales and management and administration. Mr Todd gave evidence that the winery employed 4 casual employees at the cellar door, some of whom only worked on weekends, and these casual employees were sometimes required to attend essential staff training and meetings on extra days. Mr Todd said that the 4 hour minimum engagement period exceeded the duration of training and meetings, and that the winery was required to find work for casual employees to fill in time. He regarded this as an inefficient use of time which increased training costs. He also said that the minimum engagement period limited the number of cellar staff that could be rostered on for group or coach bookings, as it was not viable to roster a casual employee for 4 hours when the actual session took no more than 2½ hours. As a result, the winery was unable to accept group books unless they could be booked in 2 consecutive sessions. Mr Todd considered that a 2 hour minimum engagement would allow the winery to more easily roster and conduct important staff training and meetings and offer more shifts to casual cellar door employees.

[777] In cross examination by United Voice, Mr Todd stated that most employees were engaged for shifts longer than 4 hours, and casual staff typically worked a full day from 9.00 am to 5.00 pm during the week or from 11.00 am to 5.00 pm on the weekend. He agreed that if the cellar door became unexpectedly busy there was the flexibility for a casual staff member to stay longer. Mr Todd said that the winery did not have any records of the number of declined bookings, and agreed that until 5.00 pm on Friday night the winery would take a booking for the next day.

⁵⁵⁸ Witness statement – 7 October 2015, Exhibit 298; Oral evidence – Transcript 14 August 2016 at PN2032–PN2146

⁵⁵⁹ Witness statement – 8 October 2015, Exhibit 180; Oral evidence – Transcript 11 July 2016 at PN510–PN573

Anthony Grundel

[778] Mr Anthony Grundel⁵⁶⁰ was the General Manager and a Director of Murray Street Vineyards, a small winery based in the Barossa Valley. The winery consisted of 2 vineyards, a tasting room, cellar door sales and production facilities. Mr Grundel was responsible for overseeing all aspects of the winery and business operations. The winery employed 12 full-time and 8 casual employees across the winery, cellar door and functions, and employed 3 additional casual employees between January and June. The tasting room and cellar door operated from 10.00 am to 6.00 pm, 7 days per week. The employees working there were required to clean, wash up and cover lunch breaks during tastings, and during vintage employees were also needed for cleaning and washing in the cellar production facility at the completion of shifts. Mr Grundel said that these were short jobs and would not take more than 2 hours to complete, but would provide particularly local secondary school students an opportunity to gain valuable work experience and be introduced to the local industry. He said that the 4 hour minimum engagement would mean that it was not viable to provide these jobs to casual employees, and instead the jobs had to be filled by existing staff. Prior to 2010, the winery was covered by the *Wine and Spirit Industry (South Australia) Award*, which had a 2 hour minimum engagement for casual employees. Mr Grundel gave evidence that if the minimum engagement for casual employees was 2 hours then the winery would be happy to provide shorter casual jobs. In addition, it would assist with the rostering of breaks and provide flexibility to other staff members who might want to leave early on occasions. On cross examination, he said that the sort of person who would be able to do a 2 hour shift on short notice was likely to be semi-retired, a parent or a person wanting to learn more about the wine industry. He was unable to identify an occasion when he had refused secondary school students employment on the basis of the 4 hour minimum engagement.

Richard van Ruth

[779] Mr Richard van Ruth⁵⁶¹ was the General Manager for Primo Estate in McLaren Vale, South Australia and had 20 years' experience in the wine industry. He was also a board member of the McLaren Vale Grape Wine & Tourism Association and a member of the SAWIA executive committee. The Primo Estate employed 8 full-time staff split between the administration and production sides of the business. Mr van Ruth said that during vintage the business typically hired 3 additional casual production staff for between 3 and 6 months each, and that they employed 2 full-time and 5 casual staff at their cellar door. The current minimum engagement of 4 hours primarily affected the cellar door operations, as typically not all staff were required to be there for 4 hours. He said that their guided wine tastings generally only took 45 minutes to complete, with staff required for only 1¼ to 1¾ hours to both prepare and clean up. It was not possible to always book two consecutive sessions to fill the 4 hour minimum engagement, so the business regularly declined large group bookings. Mr van Ruth said that if the SAWIA claim was approved then Primo Estate could offer more shifts to casual cellar door staff as they could accept more group tastings bookings, and could also add additional cellar door shifts on the weekends when visitation to the winery spiked.

⁵⁶⁰ Witness statement – 8 October 2015, Exhibit 179; Oral evidence – Transcript 11 July 2016 at PN434–PN495

⁵⁶¹ Witness statement – 12 October 2015, Exhibit 179; Oral evidence – Transcript 11 July 2016 at PN2151–PN2298

Fred Peacock

[780] Mr Fred Peacock⁵⁶² was the CEO and Proprietor of Bream Creek Vineyard and also Fred Peacock Viticulture and Consulting (a labour hire agency), both based in Tasmania. Mr Peacock employed 5 permanent employees in his vineyard and, during the peak periods from May–September and February–May, the labour hire agency engaged around 18 casual employees. Mr Peacock gave evidence that the current requirement to engage casuals for a minimum of 4 hours was very problematic because hand pruning and hand picking work was subject to sudden changes in weather. This could result in the need to stop work after 2 hours, re-engage casual employees again (with the risk of further adverse weather), and potentially require payment 8 hours’ wages for 4 hours of actual work. He had decreased the number of casual employees engaged to reduce the cost of not meeting minimum engagements. Mr Peacock believed that a 4 hour minimum engagement discouraged employers from engaging additional staff to deal with higher than expected workloads, and if the casual minimum engagement was changed to 2 hours he would engage more casual employees and thus more opportunities for paid employment would be available. In cross-examination, Mr Peacock agreed that broadly, employees wanting to work a shift shorter than 4 hours were an exception.

Submissions

[781] The SAWIA⁵⁶³ submitted that the 4 hour minimum engagement for casual employees had led to adverse outcomes in the wine industry, and in particular in relation to work performed in cellar door sales, vineyards during harvest and the cellar (production). The 4 hour minimum engagement restricted the number of large tour bookings accepted and the amount of staff working in cellar door sales. Work completed at the cellar door, such as wine tastings and cleaning up, was of a significantly shorter duration than the period of minimum engagement, meaning that it was not viable to hire additional employees. The minimum engagement meant that casual employees were required to be paid a minimum of 4 hours even if employees were unable to work due to heavy rain. This had resulted in employers reducing their casual workforce or cancelling vintage shifts prior to commencement if there was a risk of rain. There was additional cellar production work of up to 2 hours that needed to be completed during the peak operational period of vintage. The SAWIA argued that the 4 hour minimum engagement is not relevant due to the wine industry’s unique features, including its regional and seasonal nature, and dependence on weather patterns.

[782] Industries with similar operational requirements and skill sets under the Horticulture Award, the *Pastoral Award 2010*, the Restaurant Award and the Hospitality Award did not have a minimum 4 hour casual engagement. The SAWIA⁵⁶⁴ noted that while the pre-reform *Wine Industry Award - AWU - Award 1999* had a 4 hour minimum engagement, the SAWIA had never agreed to the replication of this provision and had unsuccessfully proposed a 3 hour minimum engagement. In response to the United Voice claim that casual employees could be stood down under s.524 of the FW Act if there was inclement weather, the SAWIA raised a concern that reliance on this section was likely to lead to industrial disputation.

⁵⁶² Witness statement – 19 October 2017, Exhibit 299; Oral evidence – Transcript 11 July 2016 at PN577–PN627

⁵⁶³ Submission – 12 October 2015

⁵⁶⁴ Submission – 16 September 2016

[783] The SAWIA submitted that it had advanced probative evidence to demonstrate that the current 4 hour minimum engagement resulted in the Wine Industry Award not meeting the modern awards objective, in particular having regard to “*the need to promote flexible modern work practices and the efficient and productive performance of work*” and “*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*”. A change in the minimum engagement for casual employees will not materially affect the safety net provided by the Wine Industry Award as casual employees would continue to be entitled to a number of minimum terms and conditions, including overtime and penalties, rest and meal breaks and casual conversion, and there would be an on-going need to engage casual employees for more than 4 hours in the cellar door, vineyards and the cellar.

[784] The NFF and the Ai Group supported the SAWIA submissions.

7.13 Unions’ evidence and submissions

AWU witnesses

[785] Two of the AWU’s witnesses who gave evidence in relation to the Horticulture Award also gave evidence concerning the SAWIA claim under the Wine Industry Award. Mr Cowdrey⁵⁶⁵ gave evidence that, in his experience, a farmer would only not harvest if the downpour was so heavy that they could not drive through the rain. He also stated that farmers can actually plan harvesting ahead with forecasts although he conceded that weather forecasts were not 100% accurate.

[786] Mr Algate⁵⁶⁶ said that he assisted AWU members working at 9 wineries. He stated that he had never come across employees at a winery being sent home after they started work due to rainfall, and that it would be an extremely infrequent event in the areas he looked after. In his experience in enterprise bargaining the 4 hour minimum engagement period had never been addressed by employers as a problem they wanted to address in bargaining, nor has it ever been raised as a significant problem at sites he looked after. In one of the enterprise agreements, casual employees could agree to less than a 4 hour engagement, but in his experience AWU members had never expressed a willingness to work less than 4 hours. Mr Algate gave evidence that the wine industry is becoming increasingly casualised and that a diminution in the 4 hour minimum engagement would further accelerate the decline of permanent employment. He estimated that around 50% of employees in the industry were now casual, whereas a few years ago 90% of employees would have been permanent.

United Voice submissions

[787] United Voice⁵⁶⁷ submitted that pre-reform awards covering the wine industry provided for minimum engagements of casual employees for 2 to 4 hours. The Wine Industry Award was principally based on the *Wine and Spirit Industry (South Australia) Award* and the *Wine Industry Award - AWU - Award 1999*, and the Wine Industry Award replicated the 4 hour

⁵⁶⁵ Witness statement – 13 October 2015, Exhibit 175

⁵⁶⁶ Witness statement – 13 October 2015, Exhibit 173

⁵⁶⁷ Submission – 6 October 2016

minimum engagement from the *Wine Industry Award - AWU - Award 1999*.⁵⁶⁸ The SAWIA had failed to establish why any of the modern awards to which it referred in its submissions were suitable comparators in relation to the way work is performed,⁵⁶⁹ or why the 2 hour minimum engagement was to be preferred over the 3 hour minimum engagement in some of the comparator awards. The SAWIA submission also failed to consider similar industries and work including the Manufacturing Award and the Food and Beverage Award, which provide casual minimum engagement periods of 4 hours.

[788] United Voice further submitted that the SAWIA had failed to make out an evidentiary case to support the variation is sought. There was no evidence provided about the wine industry as a whole including the proportion of casual employees engaged, the economic impact of the 4 hour minimum engagement or the benefits of a 2 hour minimum engagement. There was no basis upon which the Commission could infer that the experiences of 5 individual winery operators were representative of the entire industry. The stand down provision in s.524 of the FW Act meant that employers were not required to pay the 4 hour minimum engagement where weather genuinely made harvesting impractical and the employer could not reasonably be held responsible.

AWU submissions

[789] The AWU⁵⁷⁰ referred to the *Stevedoring Industry Award 2010* decision⁵⁷¹ to support the proposition that it was too simplistic to argue that conditions in one award should be lowered on the basis that other awards contain lower conditions. A 2 hour minimum engagement would not meet the relative living standards and needs of the low paid, and the payment for such an engagement would be lower at classification grades 1–4 of the Wine Industry Award than the current Newstart Allowance work-day rate. The SAWIA's evidence had not demonstrated any adverse economic impact of the 4 hour minimum engagement on employers; for example, there was no evidence of crops having been written off or production, business or sales had been negatively affected due to the minimum engagement period.

7.14 SAWIA claim – consideration

[790] The Wine Industry Award was developed in the award modernisation process on the basis of a draft prepared by the SAWIA, the AWU and the LHMU (as United Voice then was).⁵⁷² The 4 hour casual minimum engagement period was derived from the federal pre-reform wine industry award, the *Wine Industry Award - AWU - Award 1999*. No party appears to have raised the 4 hour minimum engagement period as an issue in the course of the award modernisation process, although other issues were raised and dealt with.⁵⁷³

[791] As earlier noted, the evidence advanced in support of the SAWIA application identified 2 major problems in the operation of the 4 hour minimum engagement period. The

⁵⁶⁸ Award Modernisation Statement [2009] AIRCFB 450; Submission – 22 February 2016

⁵⁶⁹ Submission – 6 October 2016

⁵⁷⁰ Submission – 21 November 2016

⁵⁷¹ [2015] FWCFB 1729 at [161]

⁵⁷² [2009] AIRCFB 450 at [109]

⁵⁷³ See [2009] AIRCFB 826 at [148]–[150]

first was that unexpected weather events could cause the abandonment of grape pruning and harvesting work well before 4 hours' work had been completed for safety and product quality reasons, and the possibility of this occurring meant that winery operators could become cautious about when to call in their casual workforce to carry out pruning or harvesting work. We accept that the evidence has identified a genuine problem in this respect, but it is not a problem which is necessarily widespread or common. As Mr Algate noted in respect of the Sunraysia district for example, rain was a rare event and therefore the issue did not arise. The problem identified in the evidence of Mr Dineen and Mr Peacock was confined to colder climate wineries where the grapes were grown on a sloping landscape.

[792] We do not consider that this confined problem justifies a wholesale change to the casual minimum engagement period when it is capable of resolution in a more discrete way. As earlier recited, United Voice submitted that s.524 of the FW Act provided an answer to the problem. Section 524 relevantly provides:

524 Employer may stand down employees in certain circumstances

(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

...

(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the *employer is not required to make payments to the employee for that period.*

[793] It may be accepted that s.524 provides an opportunity for a winery business to stand down employees where work must stop due to a weather event which could not reasonably

have been expected at the time that employees were engaged for the performance of work. Such a weather event could reasonably be characterised as a “*cause for which the employer cannot reasonably be held responsible*” under s.524(1)(c). However we do not consider that s.524 should be left as the sole mechanism for dealing with the discrete problem we have identified. Once a stand down is effected under s.524, the effect of s.524(3) is that no further payment is required to be made by the employer. That could mean, for example, that if a winery employer called in its casual workforce to perform harvesting work in the belief that weather conditions would be suitable, but it began raining almost immediately after work commenced, then the employer could stand down the employees at the point and not have to pay them further. That would potentially be unfair to employees, for whom attendance at work had cost time and money. Section 526 provides a mechanism for a dispute about a stand down to be arbitrated by the Commission, and s.526(4) requires the Commission in dealing with such a dispute to “*take into account fairness between the parties concerned*”. Thus (as the SAWIA submitted), resort to s.524 by an employer may lead to it being embroiled in dispute proceedings under s.526, with the requirement for fairness to be taken into account creating the potential for a range of possible outcomes.

[794] We consider that the identified problem would be better resolved by an adjustment to the minimum engagement provision which dealt with the specific situation at hand, appropriately balanced the interests of the employer and employees, and provided certainty as to the outcome. The variation would be to reduce the minimum engagement period from 4 hours to 2 hours in circumstances where a weather event not expected at the start of a pruning or harvesting shift prevents the completion of 4 hours’ work.

[795] In relation to cellar door work, the most that can be concluded from the evidence is that there are some occasions in which winery employers could engage casual employees to perform work functions which takes less than 4 hours to perform. The evidence does not go so far as to suggest that the performance of cellar door work is significantly inhibited by the current minimum engagement period, or that employment opportunities have been limited in any discernible way. Nor does the evidence take into account the interests of casual employees in receiving a minimum amount of remuneration for their work which constitutes a proper incentive to work and a proper return on the time and travel expense invested in attending for work.

[796] We do not consider that the SAWIA has demonstrated that the achievement of the modern awards objective requires the wholesale change to the casual minimum engagement period which it seeks. In particular, we note that the evidence did not address what would constitute a fair and relevant minimum engagement period outside of the 2 very specific circumstances dealt with in the evidence. We do however consider that the discrete adjustment to the minimum engagement period referred to above to deal with work interruptions caused by unexpected weather events would achieve the modern awards objective, in that it would constitute a fair and relevant basis to deal with such circumstances having regard in particular to “*the needs of the low paid*” and “*the need to promote ... the efficient and productive performance of work*”. We direct the SAWIA to draft a determination to give effect to our decision. The AWU, United Voice and other interested parties will then be given an opportunity to make submissions about the form of the variation.

8. ROAD TRANSPORT AWARDS

8.1 Passenger Vehicle Transportation Award – minimum payment for school bus drivers

Current provision

[797] Clause 10.5(d) of the *Passenger Vehicle Transportation Award 2010* (Bus Award) currently provides the following in relation to the minimum payment for casual employees.

(d) A casual employee is to be paid a minimum payment of three hours pay for each shift. A casual employee solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum payment of two hours for each engagement.

[798] In respect of the second sentence, an interpretational issue has been raised by the Fair Work Ombudsman (FWO). It is common for school bus drivers to work 2 periods during the course of a school day – in the morning, when children are driven to school, and in the afternoon, when children are driven home from school. The issue is whether the 2 working periods are to be treated as separate engagements for the purpose of the clause, so that each period is treated as requiring a minimum payment of 2 hours, or whether the whole day is a single engagement, so that only 2 hours' payment is required for the entire day.

(b) APTIA claim

[799] APTIA's⁵⁷⁴ claim involves a variation to clause 10.5(d) that is intended both to deal with the interpretational issue identified and to introduce a new facilitative provision to allow for a lesser minimum payment for school bus drivers. It has proposed that clause 10.5(d) be varied to provide:

“(d) A casual employee must receive:

- (i) a minimum payment of three hours for each shift;
- (ii) where solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum payment of two hours for each engagement/start. Provided that the employer and employee may agree to a lesser minimum payment of hours in any of the following specific circumstances:
 - (a) Where the employee has secondary employment;
 - (b) Where the employee is in receipt of other income or benefit;
 - (c) Where the employer does not have enough work for the entire shift or engagement; or

⁵⁷⁴ Submission – 12 October 2015

- (d) When the employee cannot complete the entire shift or engagement.”

[800] In relation to the interpretational issue, APTIA’s proposed variation is intended to make clear that a school bus driver may have one or 2 engagements each day and that the 2 hour minimum payment applies to each start. The APTIA’s proposed variation also seeks to provide greater flexibility by providing the capacity for an employer and employee to agree to any minimum engagement period in specified circumstances, which would allow the employer to pay casuals less than the minimum currently required.

TWU claim

[801] The TWU⁵⁷⁵ has advanced its own proposal to resolve the interpretational issue, namely that the second sentence of clause 10.5(d) should be amended to read:

“A casual employee solely engaged for the purpose of transportation of school children to and from school may be rostered to perform two separate engagements per day with a minimum payment of two hours for each separate engagement.”

8.2 APTIA evidence

[802] The APTIA called a number of witness statements in support of its claim, and also provided a bundle of documents including an Issues Paper, a *Health and Wellbeing Awareness Guide* and an industry survey.⁵⁷⁶ The Issues Paper, entitled *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, provided guidance on the range of issues related to employment discrimination against older Australians. The paper noted recent work that had been done to raise awareness of these issues and how they might be addressed. The *Health and Wellbeing Awareness Guide* was the result of a collaborative project to identify health and wellbeing issues within the bus and coach industry. The Recommendations of the Guide sought to assist organisations to be aware of health and wellbeing issues in their workforce and assist with enhancing the health and wellbeing of employees. The *Bus and Coach Driver Health and Wellbeing Survey* was used to inform the Guide. The results were set out to explain the demographics of participants, the topics covered and the responses provided.

Benjamin Doolan

[803] Mr Benjamin Doolan⁵⁷⁷ was the Managing Director of Australian Transit Group Pty Ltd (ATG) which operated regional, rural and city bus services in Western Australia and Northern Territory. ATG employed over 500 employees, mainly bus drivers. ATG was contracted with the WA Department of Transport to provide bus services, and also had bus contracts with mining companies and private schools. He said that labour costs represented at least half of the company’s expenditure.

⁵⁷⁵ Draft Determination – 17 July 2015; Submission – 26 October 2015

⁵⁷⁶ Documentary evidence – 7 March 2016

⁵⁷⁷ Witness statement – 9 October 2015, Exhibit 275; Oral evidence – Transcript 15 August 2016 at PN382–PN522

[804] Mr Doolan said ATG employed only 6 full-time drivers, and the remainder were 90% casual employees and 10% permanent part-time employees. His evidence was that up to 50% of ATG's employees who sought to work as casuals for "lesser hours"⁵⁷⁸ had a number of reasons for this, including their semi-retired status and age profile, so that they can leave when they felt like it, and that many have other jobs. He said he tried to remain flexible for these employees but was "thwarted"⁵⁷⁹ by the obligation to meet the minimum engagement periods. He believed it would be hugely beneficial if the Bus Award was amended to allow for such flexibility as it would directly benefit employees who sought lesser hours of employment and also make ATG more cost efficient and give value for money to Government and its private contractors, ensuring continuity of its business. However in cross-examination Mr Doolan conceded that his employees were not asking for minimum engagement periods to be shorter but for lesser overall hours of employment. He also confirmed that the flexibility he wanted was to engage staff for a minimum payment of 2 hours for each engagement.

Geoffrey Ferris

[805] Mr Geoffrey Ferris⁵⁸⁰ was the Group Operations Manager for the Busline Group Pty Ltd (Buslines), a company which operated rural and regional routes and school services across 12 regional towns in New South Wales. He said that Buslines employed over 430 employees, who were mainly bus drivers. Buslines contracted with the NSW Government through Transport for NSW to provide bus services, and utilised about 340 buses. Of the current employees, 84.65% were casual employees, 15.12% were full-time employees and 0.23% (one employee) was part-time. He said that casual employees were an important part of the business, as they allowed the flexibility required to manage the seasonal fluctuations of the workload including school holidays and during the day while children were at school. Mr Ferris stated that the average age of drivers was over 55, with most drivers being either in partial retirement or staying in the workforce to supplement their pension or retirement earnings, he said 55% of Buslines' employees were 60 years of age or older.

Ben Romanowski

[806] Mr Ben Romanowski⁵⁸¹ was the Managing Director of Willunga Charter Pty Ltd, which provided school services and charter services in the Willunga district in South Australia. Willunga Charter employed approximately 46 employees, who were mainly bus drivers, of whom 39 were casual employees. Casual employees played a vital role in Willunga Charter as they allowed the flexibility to manage seasonal fluctuations. Willunga Charter had reduced its full-time drivers by 50% in the last 2 years as there was not enough flexibility to cater for the overflow work. Mr Romanowski stated that in school holidays the workforce reduces to 30% of the total workforce.

[807] Mr Romanowski gave evidence that Willunga Charter operated 32 dedicated school bus services, and all of them had less than 2 hours of engagement. He said there were various circumstances where drivers have requested shorter hours of work to allow them to maintain their benefits or to fit in with other jobs in which they were employed. He gave examples of

⁵⁷⁸ Witness statement – 9 October 2015, Exhibit 275 at para 16

⁵⁷⁹ Witness statement – 9 October 2015, Exhibit 275 at para 17

⁵⁸⁰ Witness statement – 10 October 2015, Exhibit 276; Oral evidence – Transcript 15 August 2016 at PN547–PN669

⁵⁸¹ Witness statement – 9 October 2015, Exhibit 278

drivers who had requested less hours, such as those who were self-employed in seasonal businesses, retirees, employees who because of ill health were unable to work full-time, part-time carers for family members, and those who sought employment to supplement their carer's allowances and as a means of social interaction.

Shane Dewsbery

[808] Mr Shane Dewsbery⁵⁸² was the Managing Director of Tasmanian Tours and Travel (Fleet) Pty Ltd (Tassielink), which operated regional and rural bus services with limited tours and charters around Hobart, Launceston and other regional areas in Tasmania. Tassielink employed approximately 40 employees of which 70% were casual employees and 30% were permanent part-time employees. The employees were mainly bus drivers, and most of the services provided were under contract with the Tasmanian Department of Transport, which provides funding to Tassielink based on the Bus Award rates of pay. Tassielink's drivers not only picked up and dropped off school children but also picked up adult paying passengers. The bulk of Tassielink's drivers were casual employees, as the bus schedules were based around school times, with most bus drivers taking school students to school and then home in the afternoon with a gap in between. However bus drivers might get a charter job during the day, which might be a school charter or a non-school charter.

[809] Mr Dewsbery gave evidence that Tassielink had employees who sought to work "lesser hours"⁵⁸³ because they were either semi-retired, were students undertaking education and various studies, or if they earned more would have their social welfare benefits reduced. He said that the industry had an aged workforce, with the majority of drivers being over the age of 50 years who usually took up the employment as a "seachange"⁵⁸⁴ from their previous employment. Mr Dewsbery said that currently Tassielink paid a 3 hour minimum per shift, but that more flexible working hours were what his workforce had requested.

8.3 TWU evidence

[810] The TWU adduced evidence from a number of bus drivers in opposition to the APTIA claim.

Robert Giddens

[811] Mr Robert Giddens⁵⁸⁵ has been the Passenger Transport Coordinator for the Queensland branch of the TWU since 2007, and had previously worked for many years as a bus driver in Queensland. He had been involved in enterprise agreement negotiations with a number of bus service providers in Queensland. In response to the evidence and submissions of the APTIA, he expressed the view that the proposed variation to the minimum engagement provisions was unnecessary because the Bus Award, already provided sufficient flexibility for casual school bus drivers. He said that he was not aware of many school bus drivers who had sought fewer hours, and that the ability to alternate between morning and afternoon runs provided adequate flexibility. His concern was with the possibility that employers might offer

⁵⁸² Witness statement – 9 October 2015, Exhibit 279

⁵⁸³ Witness statement – 9 October 2015, Exhibit 279 at para 18

⁵⁸⁴ Witness statement – 9 October 2015, Exhibit 279 at para 18

⁵⁸⁵ Witness statement – 12 February 2016, Exhibit 270; Oral evidence – Transcript 15 August 2016 PN156–PN257

reduced casual minimum engagements on a take-it-or-leave it basis, thereby causing disadvantage to drivers.

[812] In a survey of passenger vehicle drivers conducted by the Queensland branch of the TWU, 100% of respondents said they would be worse off if their hours were reduced, and 67% said they would they would consider resigning if their hours were cut or if the minimum engagement was reduced. In cross-examination, Mr Giddens stated that he was not aware of drivers wishing to work only morning or only afternoon runs, or of any instances where a driver would perform a run lasting less than one hour. When questioned about country town operations Mr Giddens admitted that he had not worked in a country area and was not overly familiar with country town operations.

Norm Murray

[813] Mr Norm Murray⁵⁸⁶ was a casual school bus driver who had been employed for the past 7 years by Surfside Buslines on the Gold Coast. Surfside Buslines employed about 650 bus drivers operating out of 3 depots, and of those approximately 170 were employed as casual school bus drivers. Mr Murray estimated that the average age of a casual school bus driver at his depot was 60–65 years old. He said that his school bus runs accounted for 24½ hours per week, and he supplemented that income with a secondary income from umpiring cricket games. It was his belief that about 50% of casual school bus drivers had a second source of income. Mr Murray stated that he was not aware of any casual school bus drivers who had requested to reduce their hours, but believed that such a request could be accommodated by the company. He said that if he was offered fewer than his current hours, he would not continue to work as a bus driver because he would receive roughly the same financial benefit from Centrelink. In cross-examination Mr Murray said that Surfside Buslines could not currently get enough school bus drivers because 20 hours per week of work was insufficient, so that the company had to call in permanent drivers to cover those shifts on their days off at a rate of double time.

Tom Edwards

[814] Mr Tom Edwards⁵⁸⁷ was a casual school bus driver employed for the past 8 years by Kangaroo Bus Lines at Burpengary in Queensland. Kangaroo Bus Lines employed about 110 drivers of whom approximately 80% were casual employees. Approximately 20 drivers were engaged solely as casual school bus drivers. Mr Edwards' estimate was that the average age of a bus driver employed by Kangaroo Bus Lines was about 55 years old.

[815] Mr Edwards said that he undertook a combination of school bus runs, urban and charter work and special call outs for Jetstar and Virgin. His hours varied from 20 to 60 per week. Mr Edwards said that this pattern of work applied to the majority of drivers employed by Kangaroo Bus Lines. Of the drivers performing school bus runs only, Mr Edwards estimated that about half were on a pension. They typically performed a morning and afternoon run and, if they requested to perform fewer hours, the company would be likely to accommodate that request. In cross-examination Mr Edwards stated that a number of drivers had requested to work less hours, and had negotiated with the employer to do so.

⁵⁸⁶ Witness statement – 18 February 2016, Exhibit 271; Oral evidence – Transcript 15 August 2016 PN268–PN335

⁵⁸⁷ Witness statement – 16 February 2016, Exhibit 272; Oral evidence – Transcript 15 August 2016 PN338–PN368

Matthew Zander

[816] Mr Matthew Zander⁵⁸⁸ was a 22 year old casual school bus driver employed by Bribie Island Coaches in Queensland. Bribie Island Coaches employed about 43 drivers of whom about 65% were employed on a casual basis, and about 80% performed school bus runs only. Mr Zander estimated that the average age of the drivers employed by the company was late 40s to early 50s.

[817] Mr Zander worked 30 hours a week, performing morning and afternoon runs each weekday, with each run taking 3 hours. The majority of drivers employed by the company performed morning and afternoon runs of 2 hours each, making a total of 20 hours per week. Mr Zander knew of only 2 drivers who had requested to split their shifts, and this had been accommodated by the company. Mr Zander was not aware of any drivers having secondary employment. Mr Zander was looking to make a career as a bus driver, and would not follow that path if he were to be engaged for anything less than 2 hours per engagement.

Steve Pink

[818] Mr Steve Pink⁵⁸⁹ has worked as a bus driver since 2007, and was currently employed by Buslink on the Sunshine Coast as a casual school bus driver. Buslink operated 3 depots, and employed approximately 40 drivers at the Kunda Park depot where Mr Pink was based. The majority of drivers were engaged to perform school bus runs only, with some drivers performing charter work as well. Mr Pink estimated that the average age of bus drivers employed by the company was 58–60 years old. He was not aware of any school bus runs performed by Buslink employees which were less than 2 hours in length, and the majority of drivers were engaged for a minimum of 20 hours per week. Mr Pink worked a second job on weekends, and said that if the minimum engagement provisions of the Bus Award were altered to require a lesser minimum engagement, he might no longer work in the bus industry due to the adverse impact it could have on his income.

8.4 APTIA submissions

[819] The APTIA⁵⁹⁰ submitted that its proposed variation would better define what constituted an “*engagement*”⁵⁹¹ for the purpose of the casual minimum payment clause by referring to it as a “*start*”⁵⁹², and would allow flexibility between an employer and employee to agree upon a reduced minimum engagement where an employee sought to reduce work hours to suit their personal circumstances. It submitted that the evidence demonstrated that employees had sought reduced hours to protect pension entitlements, because they held second jobs or simply because they only wished to work fewer hours. The Bus Award should be amended to facilitate this so that it remained relevant to the older demographic group which made up the bulk of the school bus driver workforce and enhanced employment opportunities for persons in that group.

⁵⁸⁸ Witness statement – 18 February 2016, Exhibit 273

⁵⁸⁹ Witness statement – 20 February 2016, Exhibit 274

⁵⁹⁰ Submission – 5 August 2016

⁵⁹¹ Submission – 5 August 2016 at para 5

⁵⁹² Submission – 5 August 2016 at para 5

[820] It was submitted that the TWU's proposed clause was ambiguous and confusing because it had as its premise that all school bus drivers undertook 2 engagements each day. Some bus drivers only worked one shift per day, so the clause should not prescribe 2 single engagements.

8.5 TWU submissions

[821] The TWU⁵⁹³ submitted that the APTIA's proposed variation, if granted, would mean that the Bus Award would fail to provide a fair and relevant minimum safety net. The variation would negatively impact employees, without there being evidence that it would increase workforce participation or promote flexible work practices. The APTIA's assertions about the potential increase in employment opportunities were speculative and unsubstantiated. The Bus Award already allowed a single engagement per day, so the proposed variation would not provide greater flexibility. The APTIA has not provided examples of situations where greater flexibility was required. The variation proposed had the capacity to adversely affect low paid employees who relied on their income from school bus driving work to support themselves.

[822] In relation to the interpretational issue raised by the FWO, the TWU submitted that its proposed variation would best resolve any ambiguity by making it clear that the 2 hour minimum applied to each separate engagement in a day.

8.6 Consideration

[823] In relation to the interpretational issue, there was no disagreement that the 2 hour minimum payment applied separately to each block of work carried out by a school bus driver in a single day, and was not intended to encompass all the work done by a school bus driver in a day. Thus, if the driver performed work in the morning driving children to school, the driver was entitled to a 2 hour minimum payment, and if the driver performed work in the afternoon driving children home from school, the driver was entitled to a separate 2 hour minimum payment. We agree that that is the correct approach.

[824] However we are not satisfied that the draft variation proposed by either party makes the position entirely clear. The APTIA draft replaces the potentially ambiguous term "*engagement*" with the term "*start*", which is even more unhelpful. The TWU variation has the defect, as the APTIA submitted, of appearing to assume that all school bus drivers work in the morning and in the afternoon, when that is not necessarily the case. Our provisional view is that the TWU draft should be adopted in modified form as follows (with additional words in italics):

“A casual employee solely engaged for the purpose of transportation of school children to and from school may be rostered to perform *one engagement or two separate engagements* per day, with a minimum payment of two hours for each separate engagement.”

⁵⁹³ Reply submission – 24 February 2016

[825] We will provide the APTIA and the TWU an opportunity to provide further submissions in relation to this proposed variation.

[826] In relation to the APTIA's proposal for a facilitative provision to allow for shorter minimum payments for school bus drivers, we are not satisfied that this provision is necessary to meet the modern awards objective for the following reasons:

- (1) The minimum payment provision already provides for a very short minimum engagement, and any further reduction would likely render the provision a nullity and allow for exploitative employment arrangement to arise. That is particularly the case because most casual bus drivers already meet the first two of the circumstances prescribed in the APTIA's proposed clause – that is, they have secondary employment and/or have other income including from social security benefits. The proposed provision would lend itself to a situation whereby the employer could simply require casual employees to agree to a reduced minimum payment in order to continue to be engaged in the future.
- (2) The evidence did not demonstrate that the grant of the proposed variation would expand employment opportunities. Indeed, it seems to us that this could not be the case because the pool of school bus work to be performed at any given time is finite, and demand for school bus services cannot be expanded at the initiative of the employer. Thus the grant of the application would only have the result of transferring existing hours of work and income by those who currently have longer engagements to those who agree to shorter engagements.
- (3) There was no probative evidence that there was any significant demand by employees to work engagements of less than 2 hours. The employer witnesses made numerous references to employees wanting to work “lesser hours” or “shorter hours”, but it was not made clear what expressions like this actually meant. The fact that the bus industry has successfully recruited large numbers of casual employees in the older age groups who are prepared to work part-time because they are semi-retired or have other employment does not suggest that the current provision is operating as an inhibition upon workplace participation.
- (4) A number of the employer witnesses who gave evidence appeared to be confused about what the Bus Award currently provides. Mr Doolan from ATG wanted to be able to engage drivers for a minimum of 2 hours, which the Bus Award currently allowed him to do with respect to school bus work. Mr Dewsbery from Tassielink paid all his drivers for a 3 hour minimum engagement, when for school bus drivers this was not necessary. Only Mr Romanowski from Willunga Charter gave evidence that the school runs his business carried out took less than the 2 hours for which casual drivers had to be paid, but he did not say that the business was unable to recover the cost of the 2 hour minimum payment.

[827] The APTIA claim is therefore rejected.

8.7 Ai Group claim – part-time employment in the Road Transport (Long Distance Operations) Award

[828] The Ai Group⁵⁹⁴ is seeking to introduce a provision in the *Road Transport (Long Distance Operations) Award 2010* (Long Distance Award) to enable employees to be employed on a part-time basis. The Long Distance Award currently only allows for full-time and casual employment.

[829] The Ai Group's proposed part-time provision was as follows:

“10.3 Part-time employment

- (a) A part-time employee is an employee who is engaged to work an average of less than 38 ordinary hours per week, calculated over a period of not more than 28 days.
- (b) At the time of engagement an employer and employee must reach agreement on:
 - (i) the employee's weekly maximum number of ordinary hours of work; or
 - (ii) the maximum weekly average number of ordinary hours of work calculated over a period of not more than 28 days.

The terms of the agreement may be varied by consent.

- (c) An agreement reached in accordance with clause 10.3(b) and any variation to it must be recorded in writing and retained by the employer.”

[830] The Ai Group did not adduce evidence in support of its proposed variation, except that it sought to introduce some material that was advanced in support of a similar application which was made unsuccessfully in the course of the Transitional Review. This was admitted on the limited basis that it indicated that some persons supported that application at the time of the Transitional Review.⁵⁹⁵ The Ai Group primarily advanced its claim at the level of principle, and submitted:

- its earlier claim for part-time employment in the Transitional Review was rejected because of the narrow scope of that review and not because it was found to be inherently inappropriate to have a part-time provision in the Long Distance Award;
- there was currently an inconsistency between the Long Distance Award and the NES that was prohibited by s.55 of the FW Act, in that s.65 gave employees a right to request flexible working hours, including the right to request to work part-time to

⁵⁹⁴ Draft determinations, 17 July 2015; Submission – 26 October 2015; Amended draft determination – 23 December 2015

⁵⁹⁵ Transcript 29 November 2016 at PN594

assist the employee to care for the child, but the Long Distance Award did not permit part-time work;

- the award flexibility provision in clause 7 of the Long Distance Award did not facilitate part-time employment, since it allowed agreements about when work is performed, not the number of ordinary hours of work to be performed;
- there was no identifiable rationale for excluding part-time employment in the long distance road transport sector, given that employees in virtually all other industries covered by a modern award including the *Road Transport and Distribution Award 2010* can work part-time;
- a limited analysis of a sample of 55 enterprise agreements in the sector, of which about half covered the TWU, noted that each of the agreements considered contained part-time employment provisions, which indicated that there was some demand in the sector for part-time employment;
- the need to promote social inclusion through workforce participation was a factor weighing in favour of the application because of the low levels of female participation in the industry and the high proportion of workers aged over 45; and
- it had traditionally been considered difficult to accommodate part-time arrangements in the industry, but the move towards splitting long distance trips into two portions with an intermediate changeover point allowed drivers to return home at the end of a trip, which at least facilitated part-time employment by the day.

[831] NatRoad⁵⁹⁶ supported the Ai Group claim.

8.8 TWU's evidence and submissions

[832] The TWU opposed the Ai Group's claim and called 2 witnesses to support its case in that respect.

Grant Hosking

[833] Mr Grant Hosking⁵⁹⁷ had approximately 42 years' experience driving interstate for different companies, and had been employed by Toll Group (Toll) as a linehaul driver for the past 25 years, predominantly performing a run between Melbourne and Sydney which accounted for 5 nights per week. He described the hours it took to perform his duties, including pre-departure vehicle checks, actual driving time and refuelling and checking the vehicle on completion of the run. He said that of a total of approximately 12 hours of work for each trip, he was only paid for his driving time of about 9½ hours. He also performed change-over trips, which involved driving to a point halfway between the origin and the destination, swapping trailers with another driver and returning to his starting-point depot. During cross-examination, he was asked whether he was required to stay overnight in a depot when on a change-over run, and he said that on the particular run that he performed he was able to return

⁵⁹⁶ Transcript 19 November 2016 at PN708

⁵⁹⁷ Witness statement – 21 February 2016; Oral evidence – Transcript 15 August 2016 at PN54–PN117

home on the same day, but that there were other change-over runs, such as the Sydney to Dubbo run, where drivers were required to take a 10 hour break at a purpose-built depot in Dubbo. Mr Hosking stated that this was the way Toll and most other companies operated.

[834] Mr Hosking expressed several concerns about the impact on full-time employment if part-time provisions were inserted into the Long Distance Award. He said that under the current Toll Linehaul Enterprise Agreement, drivers could request to participate in part-time/job share working arrangements only once they have completed 15 years of service, and felt this protection could be eroded by part-time provisions in the award. He also stated his concern that there may be an expectation or willingness on the part of part-time employees to work in excess of their agreed hours, but that part-time would receive only their base rate of pay when they took annual leave, and that employers would abuse any part-time provision and only offer part-time employment in the future.

Brad Osland

[835] Mr Brad Osland⁵⁹⁸ had been employed by the Toll Group as a linehaul driver for 23 years and had performed a run between Brisbane and Sydney for the past 16 years. He also described the hours which he worked, which included driving time of approximately 11½ hours, as well as about 1½ hours checking and preparing the vehicle prior to the run, and about 45 minutes refuelling and checking the vehicle on completion of the run. Despite working a total of about 13 hours on this run, Mr Osland said that as a long distance driver he was only paid for the actual driving time.

[836] Mr Osland had considered the Ai Group's draft determination to introduce part-time employment into the Long Distance Award, and expressed his concern that employers might employ drivers on a part-time basis but would have them working full-time hours, so that in effect they would be a casual employee. He said that companies would adopt a "*take-it-or-leave it approach*"⁵⁹⁹ which might result in a part-time employee accepting jobs so that they would have work and would end up working full-time hours, but with entitlements paid at the part-time base amount.

TWU submissions

[837] The TWU⁶⁰⁰ submitted that Ai Group's proposed variation was opposed for 2 reasons. Firstly, no case had been advanced supported by any evidence that would justify the conclusion that the award did not meet the modern awards objective and that a substantial change, by way of the introduction of part-time employment, was warranted. Secondly, it would have undesirable consequences which would mean that was not a fair minimum safety net conditions. The structure of the Long Distance Award made it difficult to establish a fair framework for part-time employment that would not be abused. The proposed provision would have a lack of predictability as to the hours of work, which would be incompatible with many of the circumstances which were relied upon as justifying and requiring the introduction of part-time employment, and that the award already contained a reasonable amount of flexibility in terms of the way in which employees were able to be utilised.

⁵⁹⁸ Witness statement – 21 February 2016, Exhibit 269

⁵⁹⁹ Witness statement – 21 February 2016, Exhibit 269 at para 15

⁶⁰⁰ Transcript 29 November 2016 at PN716–PN717

8.9 Consideration

[838] The long distance road transport sector has traditionally been characterised by very long hours of work and the requirement to spend long periods away from home, thus making it unamenable to part-time employment. However we accept Ai Group's submission, for which some support could be derived from the evidence of Mr Hosking, that there may be limited opportunities for the introduction of part-time employment in the sector on trips where the driver does a changeover with another driver at an intermediate point and is then able to return back to his or her home destination on the same day or shift. Such part-time work opportunities may be attractive to older drivers who wish to wind down the amount of driving hours they perform in a week, or to potential drivers who wish to work for only a few days in the week because they have other family, employment or study commitments. While the demand for such work is likely to be limited, we see no reason in principle why it should not be facilitated by an appropriate part-time employment provision being placed in the Long Distance Award. Such a provision would facilitate the achievement of the modern awards objective by making the Long Distance Award relevant to those who may appropriately be engaged to perform part-time work, and in particular would tend to promote social inclusion through participation in the road transport workforce.

[839] We do not find persuasive Ai Group's argument that the Long Distance Award is currently inconsistent with the NES because, by not including part-time employment provisions, it does not permit requests for part-time hours made pursuant to s.65 of the FW Act to be accommodated. Section 16(5) of the FW Act permits such a request to be refused on "*reasonable business grounds*", and it would seem to us that if the request cannot be implemented under the terms of the applicable modern award, that would constitute a reasonable business ground to refuse it. However it is not necessary for us to reach a concluded view about this because, as a matter of merit, we consider that the Long Distance Award *should* contain a provision which allows any request for part-time employment to be accommodated to some degree.

[840] We accept the submission of the TWU that the provision proposed by the Ai Group would be vulnerable to abuse and could be used in a way which undermined the already limited minimum terms and conditions of the Long Distance Award. Clause 13.3 of the Long Distance Award allows for 2 alternative methods of payment, by the hour and by the kilometre. As a matter of practice, the latter method is overwhelmingly preferred by the industry. A full-time employee paid by this method is paid the cents per kilometre rate provided for his or her classification in clause 13.4, and may under clause 13.3(d) receive an additional payment for loading and unloading duties and any applicable allowances. There are no overtime rates, so that the cents per kilometre rate stays the same no matter how many kilometres are driven. Under clause 13.2 the driver is guaranteed, on a fortnightly basis, twice the minimum weekly rate specified for each classification in clause 13.1. This guaranteed payment usually has little significance, since drivers will almost always earn a greater amount on the cents per kilometre rate because of the length of the distance which they drive, but the minimum weekly rates are important because NES leave entitlements are paid by reference to those rates.

[841] It can readily be seen that, under the Ai Group's proposed provision, an employer could be employed on a nominally part-time basis but actually required to perform full-time driving duties on the cents per kilometre rate. The driver would be disadvantaged because,

when the driver took their leave entitlement, he or she would be paid at only a pro-rated weekly minimum rate, not the full weekly minimum rate to which full-time drivers are entitled. The driver could also be reduced to the base part-time hours whenever there was any shortage of work, thus semi-casualising their employment. This potential for abuse must be given significance because the long distance road transport industry is characterised by intense competition, commercial pressure from supply chains and a high degree of award non-compliance. To this extent we accept as valid the concerns expressed in Mr Osland's evidence and the TWU submissions.

[842] For these reasons, we do not accept that the Ai Group's proposed part-time employment provision is appropriate for the circumstances of the Long Distance Award. We consider that an appropriate provision should have at least the following protective features:

- part-time employment may be for 1, 2 or 3 fixed working days or shifts as prescribed in a written part-time employment agreement;
- if the employee is paid on the hourly rate method, the employee must receive a minimum payment of 8 hours per day or shift; if the employee is paid on the cents per kilometre method, the employee must receive a minimum payment for 500 kilometres per day or shift (consistent with the position which applies for a casual employee under clause 10.3(d));
- leave entitlements are to be paid on the basis of the minimum prescribed payment; and
- a part-time employee cannot be directed to perform any days/hours additional to those prescribed in the part-time employment agreement; the employee may agree to work additional days/hours, but these must be paid for at the casual hourly or cents per kilometre rate, as applicable.

[843] We direct that interested parties confer in order to develop a part-time employment provision to give effect to our decision. The Commission will conduct a conference to facilitate this process at the request of interested parties. If no agreement can be reached, we will determine the form of the part-time employment provision to be placed in the Long Distance Award.

9. BUILDING AND CONSTRUCTION AWARDS

9.1 Calculation of the casual hourly rate in the Building and Construction General On-site Award

The issue

[844] A significant issue has arisen concerning the calculation of the quantum of the casual hourly rate in the *Building and Construction General On-site Award 2010* (Building Award). The controversy, in short, is whether the casual loading should be calculated by reference to the hourly rate payable to Daily Hire employees (which includes a “*follow the job*” loading) or by reference to the hourly rate payable to Weekly Hire employees (that does not include the “*follow the job*” loading).

[845] This issue was raised in connection with applications made by the MBA and the CFMEU to vary the casual employment provisions during the conduct of the Transitional Review of the Building Award. In the decision in that review, the Commission (Watson SDP) said:

“There exists a broader debate as to any overlap of the factors contemplated by the ‘follow the job’ loading and the casual loading, as reflected in the submissions of the MBA and refuted by the CFMEU. That question was not fully ventilated in the current proceedings and no basis was established for considering that issue for the purposes of the 2012 Review.”⁶⁰¹

[846] The issue has arisen again in the 4 yearly review and has been referred to this Full Bench for determination.

[847] Clauses 14.2 and 14.5 of the Building Award, which concern the ordinary rate of remuneration of casual employees, provide:

14.2 A casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal/carer’s leave, paid community service leave, notice of termination and redundancy benefits.

14.5 A casual employee must be paid a casual loading of 25% for ordinary hours as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer’s leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.

[848] It may be observed there is no precise identification of the ordinary rate upon which casually-loaded rate is to be calculated (and the Building Award contains no rate table which quantifies the casual hourly rate for each classification). Normally that would not be a difficulty in an award because it would be presumed that the casual hourly rate consisted of the ordinary hourly rate for a full-time employee plus the casual loading of 25%. However the Building Award, in addition to full-time, part-time and casual employment, contains a fourth

⁶⁰¹ [2013] FWC 4576 at para 188

type of employment, namely daily hire employment. The incidents of this type of employment are set out in clause 11 as follows:

11. Daily hire employees

A **daily hire employee** means a tradesperson or labourer engaged subject to the following provisions:

11.1 One day's notice of termination of employment will be given on either side or one day's pay will be paid or forfeited.

11.2 Notice given at or before the usual starting time of any ordinary working day will expire at the completion of that day's work.

11.3 A tradesperson will be allowed one hour prior to termination to gather, clean, sharpen, pack and transport tools.

11.4 Nothing in this clause will affect the right of an employer to dismiss an employee without notice for misconduct or refusing duty.

[849] Clause 19.1 sets out the minimum weekly and minimum hourly ordinary rates for each classification. Clauses 19.3(a) and (b) then set out the method of calculation of the hourly rate for daily hire employees and weekly hire employees respectively as follows:

19.3 Hourly rate calculation

(a) Daily hire employees – follow the job loading

- (i) The calculation of the hourly rate will take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.
- (ii) For this purpose the hourly rate, calculated to the nearest cent (less than half a cent to be disregarded), will be calculated by multiplying the sum of the appropriate amounts prescribed in:

clause 19.1—Minimum wages;

clause 21.2—Industry allowance;

and where applicable,

- clause 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance,

by 52 over 50.4 (52/50.4) rounded to the nearest cent, adding to that subtotal the amount prescribed in clause 21.1—Special allowance, and dividing the total by 38.

Provided that in the case of a carpenter-diver, the divisor will be 31, and for refractory bricklayers and their assistants the allowance contained in clause 21.8—Refractory bricklaying allowance, will be added to the hourly rate.

(b) Weekly hire employees

The hourly rate will be calculated by adding the amounts prescribed in:

- clause 19.1—Minimum wages;
- clause 21.1—Special allowance;
- clause 21.2—Industry allowance;

and, where applicable:

- clauses 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance;
- clause 21.11—Air-conditioning industry and refrigeration industry allowances;
- clause 21.12—Electrician’s licence allowance; and
- clause 21.13—In charge of plant allowance;

and dividing the total by 38.

[850] Clause 19 does not set out any method of calculation of the casual hourly rate. Clause 3 contains a definition of the expression “*ordinary time hourly rate*” for daily hire employees, weekly hire employees, apprentices, trainees, lift industry employees, forepersons and supervisors and leading hands, but not for casual employees.

[851] There were 3 different positions adopted by interested parties who made submissions about this issue.

MBA position

[852] The MBA⁶⁰² submitted that the ordinary casual hourly rate should be the weekly hire hourly rate calculated in accordance with clause 19.3(b) and in addition the 25% casual loading. To give effect to its position the MBA proposed that the definition of “*ordinary time hourly rate*” in clause 3 be varied to add the following (in italics):

“ordinary time hourly rate means:

- ...

⁶⁰² Submission – 17 July 2015; Submission in reply – 26 February 2016

- *for casual employees the hourly rate calculated in accordance with clause 19.3(b) and clause 14.5;...*

[853] Additionally, it also sought that clause 14.5 be amended to read:

“14.5 A casual employee must be paid a casual loading of 25% of the ordinary time hourly rate for ordinary hours as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer’s leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.”

[854] The MBA submitted that the casual rate should not be calculated by reference to the daily hire rate, because the “*follow the job*” loading, which was an important element of the daily hire rate, compensated for insecurity in employment as did the casual loading, so that this would constitute double counting.

HIA position

[855] The HIA’s⁶⁰³ position was that the casual hourly rate should be the hourly rate for the relevant classification in clause 19.1 plus the casual loading; and the special allowance, the industry allowance, and any other applicable allowances would then added. In this respect, its position differed from that of the MBA, which submitted that the relevant allowances would be added before the addition of the casual loading. The HIA provided a witness statement of Ms Annica Cloete⁶⁰⁴, their Workplace Advisor. Attached to her statement was an annexure⁶⁰⁵ outlining the method by which the casual rates of pay under the Building Award were calculated by the HIA showing that there was a lack of clarity in the Building Award as to the appropriate approach of calculating pay. It therefore proposed that a new subclause 19.3(c) be added to the Building Award as follows:

“(c) Casual Employee

The hourly rate will be calculated by adding the minimum wage calculated in accordance with clause 19.1 for the appropriate classification plus a casual loading of 25%, and the allowances prescribed in:

- clause 21.1—Special allowance;
- clause 21.2—Industry allowance;

and, where applicable:

- clauses 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance;

⁶⁰³ Submission – 12 October 2015

⁶⁰⁴ Witness Statement – 12 October 2015; Exhibit 306 at Attachment D

⁶⁰⁵ Submission – 12 October 2015 at Attachment B

- clause 21.11—Air-conditioning industry and refrigeration industry allowances;
- clause 21.12—Electrician’s licence allowance; and
- clause 21.13—In charge of plant allowance;

and dividing the total by 38.”

CFMEU position

[856] The CFMEU⁶⁰⁶ was opposed to the variations proposed by the MBA and the HIA, and contended that if they were adopted they would lead to a reduction in the existing minimum casual rates of pay for the majority of tradespersons and labourers covered by the Building Award. It also contended that the HIA’s position was contrary to the position stated by a Full Bench at an earlier stage of the 4 yearly review that casual loadings were calculated on the ordinary hourly rate of pay inclusive of all-purpose allowances.

[857] The CFMEU’s position was that the casual rate should be calculated by applying the casual loading to the daily hire hourly rate calculated in accordance with clause 19.3(a). It compared the position of daily hire employees, who were usually engaged for a project and had a one day notice period, and casual employees, who were engaged by the hour on an intermittent and irregular basis with a 4 hour minimum engagement period, and who were significantly more vulnerable to lost wages and time than a daily hire employee.

Consideration

[858] We accept that the Building Award does not currently state with clarity the method by which casual hourly rates are to be calculated, and this uncertainty means that it does not achieve the modern awards objective in this respect. The long-established method of calculating the casual hourly rate for a particular classification is to add the 25% casual loading to the ordinary hourly rate for weekly hire employees. We see no reason to take a different approach in relation to the Building Award. We reject the CFMEU position that the casual hourly rate should be calculated by reference to the daily hire hourly rate, since this will have the effect of incorporating the “*follow the job*” loading into the casual rate. This loading was specifically developed for daily hire employees to compensate them for a notional period of unemployment in between working on particular projects. It is not relevant to casuals who are engaged by the day and not for a project. The 25% casual loading includes an element of compensation for the itinerance and lost time which are common features of casual employment⁶⁰⁷, and there would therefore be a degree of double counting if casual employees also received a “*follow the job*” loading. We also reject the HIA submission that all-purpose allowances should be excluded from the calculation of the ordinary hourly rate before the addition of the casual loading. There is no reason to adopt an approach in respect of the Building Award different to that taken to modern awards generally in the *4 yearly review of modern awards* decision of 30 September 2015, where the Full Bench said “The general approach will remain as expressed in the exposure drafts, namely that the casual loading will

⁶⁰⁶ Submission in reply – 22 February 2016

⁶⁰⁷ *Metals Casuals Case*, Print T4991 at paras 184–192

be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances”.⁶⁰⁸

[859] For these reasons we consider that the issue concerning the calculation of the casual hourly rate should be resolved in accordance with the approach proposed by the MBA. However we are aware that another Full Bench which is dealing with a range of substantive issues concerning the Building Award is considering a restructuring of the allowances in the award, including the possibility of subsuming a number of allowances into the industry allowance. Accordingly we will defer making a final variation to the Building Award to give effect to our decision until that issue has been finalised.

9.2 Joinery and Building Trades Award – casual minimum engagement

HIA, MBA and Ai Group claims

[860] Clause 12.3 of the *Joinery and Building Trades Award 2010* (Joinery Award) currently provides for a minimum daily engagement period of 7.6 hours as follows:

12.3 A casual employee is engaged by the hour with a minimum daily engagement of 7.6 hours.

[861] The HIA, the MBA and the Ai Group⁶⁰⁹ have all proposed that the minimum engagement period be reduced to 4 hours, so that clause 12.3 would read:

“12.3 A casual employee is engaged by the hour with a minimum daily engagement of 4 hours.”

[862] The HIA, the MBA and the Ai Group made a number of written submissions in support of their claims but did not provide any industry-specific evidence or witness statements in support of the proposed variation to the Joinery Award.

[863] It was submitted that reducing the minimum casual engagement period in the Joinery Award would meet the modern awards objectives by encouraging collective bargaining, promoting flexible work practices and reducing employment costs. The current provision established an excessive minimum engagement period which was anomalous having regard to other awards in the building and construction industry and modern awards generally.

[864] The HIA submitted that the higher minimum engagement period in the Joinery Award was out of step with other construction based awards, and was not considered during award modernisation. It was also inconsistent with the 3 hour minimum engagement that currently applied to part-time employees covered by the Joinery Award.

[865] The Ai Group submitted that the modern Joinery Award reflected the pre-reform *National Joinery and Building Trades Products Award 2002*⁶¹⁰ which also contained a 7.6

⁶⁰⁸ [2015] FWCFB 6656 at para 110

⁶⁰⁹ HIA Submission – 22 July 2016 at Attachment A; MBA Submission in reply – 25 July 2016 at para 5; Ai Group Submission in reply – 22 July 2016 at paras 17-18

⁶¹⁰ AP817265CRV

hour engagement for casual employees. Previous decisions about this issue did not consider the merits of reducing the minimum engagement period. The Joinery Award was inflexible compared to other modern awards because of its higher minimum engagement period. In the construction and manufacturing industries it was more common to have 3 or 4 hour minimum engagement periods. Reducing the minimum engagement period would be consistent with the modern awards objective because it would promote flexible and efficient work practices. It would reduce costs for employers who currently pay for labour they may not require. The reduced costs might encourage employment and encourage social inclusion through workforce participation.

[866] The MBA submitted that the requirement to pay a 7.6 hour minimum engagement period was inconsistent with the irregular nature of casual employment. It was also inconsistent with the modern awards objective because it did not promote flexible work practices. The 7.6 minimum engagement was calculated based on a 38 hour work week, which was anomalous because casuals may not be required for a full week. The 7.6 hour minimum represented an additional cost to employers covered by the Joinery award which did not apply elsewhere in the building and construction industry. The variation it sought was necessary because the existing provision provided no incentive to bargain and deterred the employment of casuals. It was an inflexible award provision that had led to people missing out on work and created a barrier to employment for women.

CFMEU submissions

[867] The CFMEU⁶¹¹ submitted that the rationale for the current 7.6 hour minimum engagement was that casual employees in off-site joinery shops were traditionally employed for the full day, and that claims for the reduction of the minimum engagement clause in the Joinery Award had been previously considered on 5 occasions and that the matter was settled. The CFMEU drew attention to the *Metal Casuals Case*⁶¹² where the Full Bench confirmed that there is no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions, and that different combinations of provisions may meet the modern awards objective. No evidence had been adduced by the HIA, MBA or Ai Group concerning the use of casual employment in the joinery industry, and this was necessarily fatal to the claim.

9.3 Consideration

[868] There was no evidence before us about the extent of casual employment in the joinery industry or the purposes for which casual employees are used (if at all) or which identified any particular difficulty with the operation of clause 12.3. We therefore cannot be satisfied that clause 12.3 as it currently stands is not meeting the modern awards objective. That the minimum engagement period is higher than that in many other awards is not by itself demonstrative of the proposition that clause 12.3 cannot legitimately form part of a fair and relevant safety net of terms and conditions. The claim is therefore rejected.

⁶¹¹ Submission in reply – 22 February 2016

⁶¹² Print T4991

10. BLACK COAL MINING INDUSTRY AWARD

10.1 Ai Group claim and submissions

[869] The Ai Group⁶¹³ has proposed that the *Black Coal Mining Industry Award 2010* (Black Coal Award) be varied to remove the current restriction in clause 10.1(c) upon the employment of casuals other than in staff classifications, so that casuals might be engaged across all classifications of the award, including production and engineering classifications.

[870] Clause 10.1 currently provides:

10.1 An employer may employ an employee in any classification included in this award in any of the following types of employment:

(a) full-time;

(b) part-time; or

(c) in the case of classifications in Schedule B—Staff Employees, casual.

[871] The Ai Group proposal is to vary clause 10.1(c) by deleting the current wording and replacing it with the word “(c) *casual*”.⁶¹⁴

[872] The Ai Group did not adduce any evidence in support of its claim, but advanced it as a matter of principle. It submitted that the introduction of casual employment for engineering and production employees under the Black Coal Award was necessary for the award to meet the modern awards objective, because the award safety net could not be said to be fair and relevant without the capacity to use casual employees in production and engineering roles. Employers consequently had to resort to enterprise agreements or common law contracts to obtain the use of casual employees. The only other modern awards which did not allow for casual employment were the *Fire Fighting Industry Award 2010*, the *Maritime Offshore Oil and Gas Award 2010* and the *Seagoing Industry Award 2010*. The last 2 awards covered offshore/seagoing work and as such could not permit casual or part-time employment. There was no similar basis upon which to deny casual employment in the black coal mining industry.

[873] The Ai Group provided a sample of 40 enterprise agreements covering black coal mining employers, of which 31 covered the CFMEU. Each of the agreements included casual employment provisions for the engagement of production and engineering employees. This demonstrated, it was submitted, that casual employment provisions were often sought through the bargaining process, that casual employment provisions were considered desirable or necessary, that casual employment was being used or contemplated by employers, and that the provisions satisfy the better off overall test. There was no inherent operational difficulty with engaging casuals in the black coal industry, and casual labour was currently sought after and utilised. Any safety issues were accommodated by clause 12.3 of the Black Coal Award,

⁶¹³ Submission – 14 October 2015

⁶¹⁴ See Draft determination of 17 July 2015

which relevantly allowed the employer to direct the employer to “*carry out such duties as are within the limits of the employee’s skills, competence and training ... provided that the duties are within safe working practices and statutory requirements*”. The proposed variation would not adversely affect the relative living standards and needs of the low paid because there are virtually no low paid employees in the black coal mining industry.

[874] It was submitted that the absence of casual employment provisions in the Black Coal Award might currently encourage collective bargaining, but this should not preclude the variation being made, because the availability of casual employment in the award might encourage employers and employees to bargain in order to develop provisions that are relevant to their enterprise. It was further submitted that casual employment provisions would enable increased workforce participation by providing flexible work arrangements. It pointed to the Productivity Commission’s 1998 report on the black coal mining industry, which noted that the restrictions on casual and part-time employment restricted productivity in the industry. In situations where employees go on leave or resign without notice, employers cannot currently fill those vacancies on a temporary basis because there are no casual employment provisions. Employers must rely on overtime, which employees may accept or decline, and ultimately this adversely affects productivity.

10.2 CFMEU submissions

[875] The CFMEU⁶¹⁵ opposed the Ai Group’s proposed variation. It submitted that:

- the Ai Group had not advanced a case that satisfied the principles established by the *Preliminary Jurisdictional Issues Decision*⁶¹⁶ including the requirement to present probative evidence;
- casual employment had never been a feature of employment in the black coal mining industry other than for staff employees;
- a claim to vary the industry award to allow casual employment had been rejected by the AIRC in 1999, and no further claim had been made to introduce casual employment for operational employees since that time until the award modernisation process;
- no evidence in the form of statistical data about the prevalence of casual employment in the industry had been provided;
- enterprise agreements were very different from modern awards because they were tailored and regularly reviewed through bargaining processes, and the existence of casual provision in enterprise agreements did not signify a need to change the safety net in the Black Coal Award;
- expanding casual employment would expand insecure work because casuals did not have guaranteed hours of work or on-going job security; and

⁶¹⁵ Reply submission – 22 February 2016

⁶¹⁶ [2014] FWCFB 1788

- the Ai Group had failed to demonstrate that the grant of its claim was necessary to meet the modern awards objective, and the claim should therefore be rejected.

10.3 Consideration

[876] The pre-reform instrument which covered production and engineering employees in the black coal mining industry before the modern award was the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997*⁶¹⁷, which was made in the course of the award simplification process under the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). In 1999 the AIRC (Harrison C) rejected an application by the Coal Mining Industry Employer Group (CMIEG) to vary the award to include, among other things, provisions for casual employment.⁶¹⁸ The CMIEG appealed, among other things, this aspect of the decision, but the decision was affirmed in this respect by the AIRC Full Bench in 2000. The Full Bench said:

“[63] We have considered the evidence and material before the Commissioner and the submissions in the appeal. We note that the employers’ proposed clause does not deal with issues such as the training of casual employees and the work to be performed by such employees. We also note the material and submissions regarding the special circumstances of employment in the coal mining industry. The Commissioner decided that a proper case had not been made out for the introduction of casual employment in the industry. In so deciding, he noted from the *Award Simplification Decision* that there is no requirement that an award contain provisions in respect of each of the allowable award matters and that claims for new award provisions might be dealt with by application in the usual way under Part VI of the Act. In our view, the decision reached by the Commissioner regarding casual employment was reasonably open upon the evidence and material before him. We consider that the scope for temporary employment in the industry has been considerably extended by the new part-time work provisions. In the event that further changes are necessary in light of the operation of the new measures, an appropriate application to vary the award may be made.”⁶¹⁹

[877] In the course of the award modernisation process in 2008, the CMIEG submitted that casual employment provision should be included in the modern Black Coal Award to be made. In its *Award Modernisation Statement* of 12 September 2008⁶²⁰ the Full Bench said

“[40] No provision for casual employment has been included in the exposure draft, contrary to the proposal of the coal mining employers. There is no provision for casual employment in the key federal awards. An attempt to have casual employment included in the main federal award has previously been rejected by the Commission and that rejection was not disturbed on appeal. In light of those decisions we do not consider it appropriate to make provision for casual employment in the draft. While it would be open to the employers to mount a case in the conventional way, it is not practical for that to occur as part of the award modernisation process.”

⁶¹⁷ Print P7386

⁶¹⁸ Print R4611

⁶¹⁹ Print S6142

⁶²⁰ [2008] AIRCFB 717

[878] The Full Bench subsequently accepted the CMIEG’s submission that casual employment should be available to staff employees.⁶²¹

[879] Although the introduction of a casual employment provision in the Black Coal Award for production and engineering employees has merit as a matter of broad principle, the lack of any evidence before us does not permit us to formulate a provision that would achieve the modern awards objective. It is obvious that there are number of significant issues which would arise for consideration in connection with the introduction of casual employment in the Black Coal Award, not least the safety-critical nature of the industry and the current prevalence of full-time employment, and we cannot be satisfied that simply introducing casual employment on an across-the-board basis without any restrictions or qualifications that address those issues would be consistent with the objective. We note the existence of casual employment provisions in a number of enterprise agreements, but in the absence of any evidence concerning the extent to which casual employment is used under these agreements, what duties and functions casuals perform, what patterns of hours are worked, and how safety issues are dealt with, it is not possible to assess what significance this has. Further, the Ai Group’s case leaves unaddressed whether there are persons who are available to perform casual coal mining work in regional areas and how casual employment would work in remote and fly in-fly out mine locations.

[880] The Ai Group application is therefore rejected. As the Award Modernisation Full Bench did in 2008, we invite employers in the industry to make a further application and “mount a case in the conventional way” – that is, a case supported by industry evidence which addresses the issues we have identified.

⁶²¹ [2008] AIRCFB 1000 at [161]

11. RAIL INDUSTRY AWARD

11.1 RTBU claim

[881] The RTBU⁶²² has sought a variation to the clause 6.4 of the revised exposure draft of the *Rail Industry Award 2010* (Rail Industry Award) published on 2 November 2015 to clarify that the casual loading of 25% will be paid when overtime and penalty rates are also applicable. Clause 6.4 of the exposure draft currently provides:

“6.4 Casual employees

- (a) A casual employee is an employee who is engaged and paid as a casual employee.
- (b) A casual employee’s ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer.
- (c) Casual loading
 - For each ordinary hour worked, a casual employee must be paid:
 - (i) the ordinary hourly rate; and
 - (ii) a loading of 25% of the ordinary hourly rate,for the classification in which they are employed.
- (d) The loading constitutes part of the casual employee’s all purpose rate.
- (e) The casual loading is paid instead of annual leave, paid personal/carer’s leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment.”

[882] The equivalent provision in the current Rail Industry Award is clause 10.3, which provides:

10.3 Casual employment

- (a) A casual employee is one engaged and paid as such. A casual employee’s ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer.
- (b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 14, plus a casual loading of 25%.

⁶²² Submission – 19 October 2015

(c) The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment. The loading constitutes part of the casual employee's all purpose rate.

[883] The RTBU proposes that a new subclause be added as follows to clause 6.4 of the exposure draft:

“(f) For the purposes of calculating overtime and weekend work for casual employees the following shall apply:

(i) Where the relevant penalty rate is time and a half, the employee must be paid 175% of the ordinary time hourly rate

(ii) Where the relevant penalty rate is double time, the employee must be paid 225% of the ordinary hourly rate

(iii) On a public holiday the casual employee will be paid 275% of the ordinary hourly rate.”⁶²³

[884] In support of its case, the RTBU adduced evidence from Mr Gary Talbot⁶²⁴, who was employed by the RTBU as a National Organiser and had responsibility for negotiating national and state rail infrastructure enterprise agreements, negotiating approximately 10–15 of these per year. He gave evidence that there was an increasing level of casualisation in the rail infrastructure industry, with approximately a third of the infrastructure workforce now being casually employed. Mr Talbot stated that, based on his industry experience, the use of labour hire companies had created a lot of job insecurity, and this had negatively impacted the RTBU's members' wages and conditions, and that casual employees in the industry found it difficult to secure loans.

[885] Mr Talbot said that the increase in the use of casual labour had led to a need to clarify how casual loading interacted with overtime and penalty rates. His interpretation of the Rail Industry Award was that penalty and overtime rates were payable in conjunction with the casual loading due to the fact that the loading for casual employees formed part of their base rate of pay to make up for the precarious nature of casual work. Mr Talbot said that there was a cross-over between rail infrastructure work and the construction industry, and in the Building Award, casual loading was paid in conjunction with overtime and penalties.

[886] On the basis of Mr Talbot's evidence, the RTBU submitted that:

- before the introduction of the modern award, casual employment in the rail industry was limited, but since 2010 there had been a marked increase, most significantly in rail infrastructure work;

⁶²³ See Amended Draft Determination of 19 October 2015

⁶²⁴ Witness statements – 16 October 2015, Exhibit 295; 17 August 2016, Exhibit 296

- only 3 of the 12 pre-reform rail industry awards had provided for casual employment, but those awards did not include a method of calculating overtime and penalties for casual employees;
- in the absence of such award provisions, it was appropriate to consider the relevant clauses of various state and federal agreements applicable in the industry, and in these there was a trend towards agreements providing that the loading was paid in addition to overtime and penalties;
- this method of applying the casual loading was utilised in other like industries, such as in clause 14.6 of the Building Award which had an extensive cross-over into the rail industry, in particular rail infrastructure;
- overtime and penalties should be paid in conjunction with the casual loading for casual employees, to make up for the precarious nature of their employment, and because the casual loading was paid instead of various other entitlements; and
- the proposed variation would ensure that casual employees were paid adequately and fairly.

Rail Employers' submissions

[887] A group of rail industry employers⁶²⁵ (Rail Employers)⁶²⁶ opposed the amendment proposed by the RTBU, and submitted that that neither the Rail Industry Award nor the revised exposure draft of 2 November 2015 provided for the casual entitlement to overtime penalties to be calculated including the casual loading, and indeed under the revised exposure draft casual employees were not entitled to overtime at all.⁶²⁷ The Rail Employers submitted that the RTBU had not provided probative evidence demonstrating the facts supporting the proposed variation, nor had the RTBU referred to any Full Bench decisions which should be followed regarding the casual entitlement to overtime penalties. The Rail Employers noted that the RTBU's draft determination of 19 October 2015 appeared to propose a variation to the casual entitlement to overtime penalties as well as the casual entitlement to penalties for working weekends and public holidays, and argued that when working overtime, full-time and part-time employees did not accrue the leave identified benefits for which the loading was paid, and accordingly casual employees should not be further compensated for working the same overtime.

[888] The Rail Employers did accept however that the casual entitlement to a penalty for working on weekends should be calculated to include the casual loading, provided that the weekend work was not overtime, because a full-time or part-time employee working ordinary hours on a weekend would accrue benefits for which the casual loading was paid. They disagreed with the provisions of the exposure draft because it calculated the public holiday

⁶²⁵ Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd

⁶²⁶ Reply submission – 1 April 2016

⁶²⁷ Most exposure drafts published as part of the 4 yearly review contain schedules of hourly rates of pay, including rates payable for overtime. As the interaction between casual loadings and overtime was an issue currently before this Full Bench, overtime rates for casual employees were not included in the schedules. Such an omission should not be interpreted as indicating that casual employees are not entitled to overtime.

penalty rate for casuals by reference to the ordinary rate, which included the casual loading. The Rail Employers submitted that under the NES, permanent employees were entitled to be absent from work on public holidays but casuals were not, and as such there was no rationale for granting additional remuneration for work performed by casuals on a public holiday. Accordingly the term “*casual ordinary rate*” introduced by the exposure draft, which included the casual loading, should be deleted or varied to “*ordinary hourly rate*” to remove the casual loading.

[889] In the alternative, the Rail Employers submitted that if the Commission did not accept that casual employees should be disentitled to the casual loading when working overtime or public holidays, the modifications should be made to the exposure draft which, in summary, removed references to the casual loading being an all-purpose loading and to the “*casual ordinary rate*”, and specified aggregate penalty rates for casuals of 175% of the ordinary rate for the first 2 hours of overtime and 225% thereafter on Mondays to Fridays, 175% for ordinary and overtime hours worked on Saturdays, 225% for ordinary hours and overtime worked on Sundays, and 275% for work required to be performed on a public holiday prescribed by the NES.

Consideration

[890] We consider that it is clear that the Rail Industry Award as it currently stands requires that the casual loading continue to be paid while performing work that is subject to penalty rate additions. The description of the loading in clause 10.3 of the current award as being part of “*the casual employee’s all purpose rate*” can only be taken to mean that the loading remains payable in all circumstances when a casual employee performs work, including overtime work, weekend work and public holidays work. Nor is there any doubt that casual employees are entitled to overtime penalty rates, since clause 20.2 read in combination with clause 10.3(a) makes specific provision for a casual employee’s weekly ordinary hours, clause 20.6 provides for the daily ordinary hours of all employees (which we read as including casuals), and clause 23.2(a) provides for the payment of overtime rates for work performed by all employees (which we also read as including casuals) outside of ordinary hours. Clauses 23.2(b), 23.5 and 23.6, which establish the penalty rates for Saturdays, Sundays and public holidays respectively, apply to employees generally, and we do not consider there is any reason for them to be read as excluding casual employees.

[891] We therefore reject the Rail Employers’ submission that the Rail Industry Award does not currently provide for the casual loading to be payable in situations where a penalty rate is also payable. The Rail Employers’ did not mount a case that there should be any change in substance to the current provisions or demonstrate that the provisions were no longer necessary to meet the modern awards objective. However we accept the submissions of both parties that the interaction between the casual loading and the various prescribed penalty rates needs to be clarified, particularly as the current description of the casual loading as an all-purpose rate might be interpreted as meaning that the penalty rates are to be calculated cumulatively on the casually-loaded rate, not on the base rate. No party submitted that this was the correct approach, and the award variations proposed by the RTBU and the Rail Employers both involved the casual loading and the penalty rates being separately calculated by reference to, and then separately added to, the base ordinary rate. We consider, as a matter of general principle, that is the correct approach.

[892] We consider that the Rail Employers' proposed variations best clarify the position, with the exception that the reference in their proposed clause 6.4(f)(iii) to a casual employee being "*required*" to work on a public holiday should be removed because it may imply that there are other circumstances in which a casual employee may work on a public holiday which does not attract the penalty rate. It should simply say: "*A casual employee will be paid 275% of the ordinary hourly rate for any hours, ordinary and overtime, worked on a public holiday prescribed in s.115 of the Fair Work Act.*"

[893] We will direct the Rail Employers to prepare a draft determination to give effect to our decision. The RTBU will then be given an opportunity to make submissions about the form of the draft determination.

12. LEGAL SERVICES AWARD

12.1 Law Firms' claim

[894] A group of 21 law firms⁶²⁸ (Law Firms)⁶²⁹ has sought a variation to clause 10.5 of the *Legal Services Award 2010* (Legal Services Award) to reduce the minimum daily payment for casual employees from 4 hours to 3 hours.

[895] Clause 10.5 of the Legal Services Award currently provides:

10.5 Casual employment

(a) A casual is an employee engaged and paid as such.

(b) A casual employee must be paid per hour at the rate of 1/38th of the weekly rate prescribed for the class of work performed, plus 25%. This loading is to be paid instead of entitlements to leave and other matters from which casuals are excluded by the terms of this award and the NES.

(c) A casual employee must be paid for a minimum of four hours for each day that the casual employee is engaged.

[896] The Law Firms proposes to vary clause 10.5(c) as follows:

“(c) A casual employee must be paid for a minimum of three hours for each day that the casual employee is engaged.”⁶³⁰

[897] In support of their claim, the Law Firms adduced evidence from Ms Sheila Roberts⁶³¹, the National Manager, Systems Performance & Reward, at the law firm Norton Rose Fulbright Australia. She stated that although each firm operates slightly differently, typically a majority of those employees engaged on a casual basis are law students who are employed on an as needs basis to undertake paralegal work. She said there was mutual benefit in engaging law students on a casual basis as it provided law firms with access to a flexible workforce during busy periods while also providing law students with experience in a law firm. Ms Roberts stated that a sensible afternoon shift was between 2.00 pm to 5.00 pm, but that this was not possible because of the 4 hour minimum engagement period operating under the award. Ms Roberts stated that it would be of great benefit to the legal industry for the casual minimum engagement under the Legal Services Award to be reduced from 4 hours to 3 hours.

⁶²⁸ Russell Kennedy, Norton Rose Fulbright, Arnold Bloch Leibler, Hall & Wilcox, Clayton Utz, Thomson Geer, Corrs Chambers Westgarth, Maddocks, DLA Piper, Allen & Overy, Piper Alderman, Dibbs Barker, Ashurst, Herbert Smith Freehills, Minter Ellison, Allens, Gilbert & Tobin, Lander & Rodgers, King & Wood Mallesons, Davies Collison Cave and Gadens.

⁶²⁹ Submission – 14 June 2016

⁶³⁰ Submission – 2 March 2015

⁶³¹ Witness statement – 14 June 2016, Exhibit 266; Oral evidence – Transcript 15 July 2016 at PN6581–PN6744

[898] In cross-examination by the ASU Ms Roberts accepted that there were 2 types of casuals that are employed by law firms, with the majority of those being paralegals but also a small number who were employed on a casual basis to assist in office moves, sit on reception, and perform filing work and other duties.⁶³² Ms Roberts was directed to advertisements for paralegal positions offering employment for 2 full days a week as opposed to a few hours. It was also raised with her that law firms do not generally close at 5.00 pm and there is nothing stopping a casual worker working until 6.00 pm.

[899] The Law Firms submitted that because a significant proportion of casual employees engaged under the Legal Services Award were law students employed as paralegals or in other support roles, their position was analogous to that considered in *National Retail Association Limited*⁶³³, where the minimum engagement period for school students working in the retail sector was reduced. In that decision the Commission had said that the retail sector was the most important industry for school students as it provided a large proportion of employment opportunities and significant benefits through equipping them with skills and networks to assist with future employment. The Law Firms argued that similar reasoning could be applied to the Legal Services Award, where law students who worked as paralegals were provided with significant benefits including equipping them with skills, networks and assisting them in obtaining future employment, and that the 4 hour minimum engagement periods unreasonably limited the opportunities to offer shifts to casual employees. In particular, it was preferable for casual paralegals to work in the afternoon from 2.00 pm to 5.00 pm. The Law Firms compared the position to the 3 hour minimum engagement under *Clerks - Private Sector Award 2010* for casual clerical and administrative employees, and similar provisions for clerical and administrative employees in other industries. The Law Firms also noted that prior to the modern award, the preceding state awards had various minimum engagement periods including no minimum engagement, 2 hours and 4 hours.

12.2 ASU submission in reply

[900] The ASU⁶³⁴ opposed the Law Firms' proposed variation to the casual minimum engagement period, and submitted that a reduction in the minimum engagement period would not create any more employment and that a 4 hour minimum engagement was not an unusual arrangement in modern awards. The ASU objected to the comparison of law students with school students on the basis of the complexity of the work performed and the level of study required. The ASU submitted that high school students working in retail and university students working as paralegals were not performing comparable functions. It was also noted that the variation would have a wider application than just to paralegals and support workers.

12.3 Conclusions

[901] We are not satisfied that the existing 4 hour minimum casual engagement in clause 10.5(c) is inconsistent with the achievement of the modern awards objective. The limited evidence did not demonstrate that the commitments of law students meant that they were unable to attend paralegal works for 4 hour periods such as to deny them work opportunities.

⁶³² Transcript 14 July 2016 at PN6652

⁶³³ [2011] FWA 3777

⁶³⁴ Transcript 15 July 2016 at PN6771–PN6775

In *National Retail Association Limited*⁶³⁵, the primary practical difficulty that was addressed was the limited time window between school students finishing school and shop closing times, and the difficulty in accommodating a longer minimum engagement period within this window. There was no evidence that the study timetables of law students (which are much more variable and flexible than those of school students) and the opening and closing times of law firms gave rise to any comparable difficulty. Although an afternoon shift of 3 hours from 2.00 pm to 5.00 pm for paralegals might be the desirable position for some law firms, the evidence did not indicate that a shift of that nature had any particular rationale in relation to the time availability of law students. We are not satisfied that a 4 hour minimum engagement period operates to reduce paralegal employment opportunities for law students. The Law Firms' proposal to reduce the minimum engagement period is therefore rejected.

⁶³⁵ [2011] FWA 3777

13. NEXT STEPS – DIRECTIONS

[902] The following directions are made:

Common claims

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**.

3. Any further written submissions which any interested party wishes to make concerning the provisional view of the Full Bench to include a 2 hour daily minimum engagement period for casual employees in modern awards which currently do not contain a daily minimum engagement period for casual employees shall be filed on or before **2 August 2017**.

Hospitality Awards

4. Any written submissions concerning the operative date of the part-time employment provisions to be inserted in the Hospitality Award and the Clubs Award and any residual issues shall be filed on or before **19 July 2017**.

5. Any interested party is directed to file any further evidence upon which they wish to rely and any written submissions they wish to make in respect of the proposition that the part-time employment provisions of the Restaurants Award be varied consistent with the variations to the Hospitality Award and the Clubs Award on or before **2 August 2017**.

6. United Voice is directed to file draft determinations for the variation of the Hospitality Award, the Restaurants Award and the Clubs Award to give effect to the decision regarding overtime penalty rates for casual employees on or before **19 July 2017**.

7. Any interested party which wishes to respond to United Voice's draft determinations may file a written submission on or before **2 August 2017**.

SCHCDSI Award

8. ABI is directed to file a draft determination for the variation of the SCHCDSI Award to give effect to the decision concerning the guaranteed number of hours each week for part-time employees (see paragraph [641]) on or before **19 July 2017**.

9. Any interested party which wishes to respond to ABI's draft determination may file a written submission on or before **2 August 2017**.

Retail Awards

10. The SDA is directed to file draft determinations for the variation of the General Retail Award, the Fast Food Award, and the Hair and Beauty Award to give effect to the decision regarding overtime penalty rates for casual employees on or before **19 July 2017**.

11. Any interested party which wishes to respond to the SDA's draft determinations may file a written submission on or before **2 August 2017**.

Horticulture, Pastoral and Wine Industry Awards

12. Any interested party is directed to file any further evidence upon which they wish to rely and any written submissions they wish to make concerning the decision regarding ordinary hours of work and overtime for casual employees under the Horticulture Award on or before **2 August 2017**.

13. The AWU, the NFF, ABI, the Ai Group and other interested parties are directed to confer in relation to the the decision regarding ordinary hours of work and overtime for casual employees under the Horticulture Award. A member of the Commission will be made available to assist if the parties request this to occur.

14. The NFF is directed to file a draft determination for the variation of the Pastoral Award to give effect to the decision regarding the minimum daily engagement period for casual dairy operators on or before **19 July 2017**.

15. The SAWIA is directed to file a draft determination for the variation of the Wine Industry Award to give effect to the decision regarding the minimum daily engagement period for casual employees on or before **19 July 2017**.

16. Any interested party which wishes to respond to the NFF's draft determination or the SAWIA's draft determination may file a written submission on or before **2 August 2017**.

Road Transport Awards

17. APTIA and TWU are directed to provide any further submissions they wish to make in relation to the proposed variation to the casual minimum engagement provision in Bus Award on or before **2 August 2017**.

18. The Ai Group, the TWU and any other interested parties are directed to confer in relation to the decision regarding the introduction of part-time employment provisions in the Long Distance Award. A member of the Commission will be made available to assist if the parties request this to occur.

Rail Industry Award

19. The Rail Employers are directed to prepare a draft determination to give effect to the decision regarding overtime and penalty rates in the Rail Industry Award on or before **19 July 2017**.

20. The RTBU and any other interested party which wishes to respond to the Rail Employers' draft determination may file a written submission on or before **2 August 2017**.

[903] The Full Bench will conduct a further hearing at a date to be advised if any party requests the opportunity to advance any oral submissions in addition to written submissions in relation to the above matters, and to hear any evidence that any party wishes to adduce.



VICE PRESIDENT

Appearances:

O Fagir of counsel and *J Fleming* for the Australian Council of Trade Unions.

S Taylor, *W Tegg*, *A Dettmar*, *M Nguyen* and *A Moussa* for the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) and the AMWU – Vehicle Division.

B Ferguson and *R Bhatt* for the Australian Industry Group.

N Ward and *J Arndt* for the Australian Chamber of Commerce and Industry, Australian Business Industrial, the New South Wales Business Chamber, the Costa Group of Companies, the Australian Childcare Alliance and the National Outside Schools Hours Services Association.

K Scott and *M Chan* for Australian Business Industrial and the New South Wales Business Chamber.

M Easton of counsel and *S McKinnon* for the National Farmers Federation.

L Doust of counsel, *S Bull*, *Mr Spreckley*, *S Russell-Uren*, and *M Robson* for United Voice.

L Doust of counsel and *L Svendsen* for the Health Services Union.

D Bliss for the Shop, Distributive and Allied Employees Association.

V Wiles for the Textile, Clothing and Footwear Union of Australia.

R Warren of counsel and *Ms Wells* for Restaurant and Catering Industrial.

R Warren of counsel and *Ms Carryannis* for Clubs Australia Industrial.

S Wellard, solicitor, for the Pharmacy Guild of Australia.

Mr Diamond and *Mr Talbot* for the Rail, Tram & Bus Union.

B Gee, solicitor, for the Recruitment and Consulting Services Association and the Australian Retailers Association.

S Maxwell for the Construction, Forestry, Mining and Energy Union, Construction and General Division.

A Thomas for the Construction, Forestry, Mining and Energy Union, Mining Division.

S Pill, solicitor, for the Group of 8 Universities.

Mr Desmond for the Victorian Automobile Chamber of Commerce.

A McCarthy for the Australian Nursing and Midwifery Federation.

S Crawford for The Australian Workers' Union.

P King of counsel and *I McDonald* for the Australian Public Transport Industrial Association.

M Adler for the Housing Industry Association.

C Brehas, solicitor, for the National Retail Association, Hair and Beauty Industry Association and Hardware Australia.

P Thomson and *J Zadel* for Australian Federation of Employers and Industry.

T Woods, solicitor, for the Australasian Railways Association.

G Fredericks of counsel for the Hair and Beauty Industry Association.

A Baumgartner for the Motor Traders Association and the Motor Traders' Association of South Australia and Western Australia.

W Chesterman and *A Baumgartner* for the Victorian Automobile Chamber of Commerce.

M Gibian of counsel and *W Carr* for the Transport Workers' Union of Australia.

R Warren of counsel, *P Ryan* and *S Morris* for the Australian Hotels Association, The Accommodation Association of Australia and The Motor Inn, Motel and Accommodation Association.

M Burns and *WG McNally*, solicitors, for The Maritime Union of Australia.

S Kenna for the National Tertiary Education Industry Union.

C Pugsley for the Australian Higher Education Industrial Association.

M Pegg for Jobs Australia.

L Doust of counsel and *M Rizzo* for the Australian Municipal, Administrative, Clerical and Services Union.

S Hills and *H Wallgren* for South Australian Wine Industry Association.

A Herbert of counsel and *G Johnston* for the Australian Meat Industry Council.

Ms Sostarko for the Master Builders Australia.

B Dudley and *S Crilly*, solicitors, for the Qube Ports Pty Ltd, Qube Bulk Pty Ltd and DP World Group.

Hearing details:

2016.

Sydney, Brisbane, Darwin, Adelaide, Melbourne, Hobart, Canberra, Perth (video hearing)

March 14–18, 21–24;

July 11–15;

August 15–19;

October 27;

November 28–29.

ATTACHMENT A

Modern awards subject to the ACTU claim for a model casual conversion clause

1. Aboriginal Community Controlled Health Services Award 2010 [MA000115]
2. Aged Care Award 2010 [MA000018]
3. Air Pilots Award 2010 [MA000046]
4. Aircraft Cabin Crew Award 2010 [MA000047]
5. Airline Operations-Ground Staff Award 2010 [MA000048]
6. Airport Employees Award 2010 [MA000049]
7. Alpine Resorts Award 2010 [MA000092]
8. Aluminium Industry Award 2010 [MA000060]
9. Ambulance and Patient Transport Industry Award 2010 [MA000098]
10. Amusement, Events and Recreation Award 2010 [MA000080]
11. Animal Care and Veterinary Services Award 2010 [MA000118]
12. Aquaculture Industry Award 2010 [MA000114]
13. Architects Award 2010 [MA000079]
14. Asphalt Industry Award 2010 [MA000054]
15. Banking, Finance and Insurance Award 2010 [MA000019]
16. Black Coal Mining Industry Award 2010 [MA000001]
17. Book Industry Award 2010 [MA000078]
18. Broadcasting and Recorded Entertainment Award 2010 [MA000091]
19. Business Equipment Award 2010 [MA000021]
20. Car Parking Award 2010 [MA000095]
21. Cement and Lime Award 2010 [MA000055]
22. Cemetery Industry Award 2010 [MA000070]
23. Children's Services Award 2010 [MA000120]
24. Cleaning Services Award 2010 [MA000022]
25. Clerks - Private Sector Award 2010 [MA000002]
26. Coal Export Terminals Award 2010 [MA000045]
27. Commercial Sales Award 2010 [MA000083]
28. Concrete Products Award 2010 [MA000056]
29. Contract Call Centres Award 2010 [MA000023]
30. Corrections and Detention (Private Sector) Award 2010 [MA000110]
31. Cotton Ginning Award 2010 [MA000024]
32. Dredging Industry Award 2010 [MA000085]
33. Dry Cleaning and Laundry Industry Award 2010 [MA000096]
34. Educational Services (Schools) General Staff Award 2010 [MA000076]
35. Educational Services (Teachers) Award 2010 [MA000077]
36. Electrical Power Industry Award 2010 [MA000088]
37. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
38. Fast Food Industry Award 2010 [MA000003]
39. Fitness Industry Award 2010 [MA000094]
40. Funeral Industry Award 2010 [MA000105]
41. Gardening and Landscaping Services Award 2010 [MA000101]

42. Gas Industry Award 2010 [MA000061]
43. General Retail Industry Award 2010 [MA000004]⁶³⁶
44. Hair and Beauty Industry Award 2010 [MA000005]
45. Health Professionals and Support Services Award 2010 [MA000027]
46. Horticulture Award 2010 [MA000028]
47. Hospitality Industry (General) Award 2010 [MA000009]
48. Hydrocarbons Field Geologists Award 2010 [MA000064]
49. Hydrocarbons Industry (Upstream) Award 2010 [MA000062]
50. Journalists Published Media Award 2010 [MA000067]
51. Labour Market Assistance Industry Award 2010 [MA000099]
52. Legal Services Award 2010 [MA000116]
53. Live Performance Award 2010 [MA000081]
54. Local Government Industry Award 2010 [MA000112]
55. Marine Tourism and Charter Vessels Award 2010 [MA000093]
56. Marine Towage Award 2010 [MA000050]
57. Market and Social Research Award 2010 [MA000030]
58. Meat Industry Award 2010 [MA000059]
59. Medical Practitioners Award 2010 [MA000031]
60. Mining Industry Award 2010 [MA000011]
61. Miscellaneous Award 2010 [MA000104]
62. Nursery Award 2010 [MA000033]
63. Nurses Award 2010 [MA000034]
64. Oil Refining and Manufacturing Award 2010 [MA000072]
65. Passenger Vehicle Transportation Award 2010 [MA000063]
66. Pastoral Award 2010 [MA000035]
67. Pest Control Industry Award 2010 [MA000097]
68. Pharmaceutical Industry Award 2010 [MA000069]
69. Plumbing and Fire Sprinklers Award 2010 [MA000036]
70. Port Authorities Award 2010 [MA000051]
71. Ports, Harbours and Enclosed Water Vessels Award 2010 [MA000052]
72. Poultry Processing Award 2010 [MA000074]
73. Premixed Concrete Award 2010 [MA000057]
74. Professional Diving Industry (Industrial) Award 2010 [MA000108]
75. Professional Diving Industry (Recreational) Award 2010 [MA000109]
76. Professional Employees Award 2010 [MA000065]
77. Quarrying Award 2010 [MA000037]
78. Racing Clubs Events Award 2010 [MA000013]
79. Racing Industry Ground Maintenance Award 2010 [MA000014]
80. Rail Industry Award 2010 [MA000015]
81. Real Estate Industry Award 2010 [MA000106]
82. Registered and Licensed Clubs Award 2010 [MA000058]
83. Restaurant Industry Award 2010 [MA000119]
84. Road Transport (Long Distance Operations) Award 2010 [MA000039]

⁶³⁶ 12 Month qualification option

85. Road Transport and Distribution Award 2010 [MA000038]
86. Salt Industry Award 2010 [MA000107]
87. Seafood Processing Award 2010 [MA000068]
88. Security Services Industry Award 2010 [MA000016]
89. Silviculture Award 2010 [MA000040]
90. Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]
91. Sporting Organisations Award 2010 [MA000082]
92. State Government Agencies Administration Award 2010 [MA000121]
93. Stevedoring Industry Award 2010 [MA000053]
94. Storage Services and Wholesale Award 2010 [MA000084]
95. Sugar Industry Award 2010 [MA000087]
96. Supported Employment Services Award 2010 [MA000103]
97. Surveying Award 2010 [MA000066]
98. Telecommunications Services Award 2010 [MA000041]
99. Timber Industry Award 2010 [MA000071]
100. Transport (Cash in Transit) Award 2010 [MA000042]
101. Travelling Shows Award 2010 [MA000102]
102. Waste Management Award 2010 [MA000043]
103. Water Industry Award 2010 [MA000113]
104. Wine Industry Award 2010 [MA000090]
105. Wool Storage, Sampling and Testing Award 2010 [MA000044]

ATTACHMENT B**Modern awards subject to the ACTU claim to increase the minimum engagement for casual employees to 4 hours**

1. Aboriginal Community Controlled Health Services Award 2010 [MA000115]
2. Aged Care Award 2010 [MA000018]
3. Airport Employees Award 2010 [MA000049]
4. Alpine Resorts Award 2010 [MA000092]
5. Aluminium Industry Award 2010 [MA000060]
6. Ambulance and Patient Transport Industry Award 2010 [MA000098]
7. Amusement, Events and Recreation Award 2010 [MA000080]
8. Aquaculture Industry Award 2010 [MA000114]
9. Business Equipment Award 2010 [MA000021]
10. Cement and Lime Award 2010 [MA000055]
11. Cemetery Industry Award 2010 [MA000070]
12. Children's Services Award 2010 [MA000120]
13. Cleaning Services Award 2010 [MA000022]
14. Clerks - Private Sector Award 2010 [MA000002]
15. Contract Call Centres Award 2010 [MA000023]
16. Corrections and Detention (Private Sector) Award 2010 [MA000110]
17. Cotton Ginning Award 2010 [MA000024]
18. Dredging Industry Award 2010 [MA000085]
19. Dry Cleaning and Laundry Industry Award 2010 [MA000096]
20. Electrical Power Industry Award 2010 [MA000088]
21. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
22. Fast Food Industry Award 2010 [MA000003]
23. Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]
24. Gardening and Landscaping Services Award 2010 [MA000101]
25. Gas Industry Award 2010 [MA000061]
26. General Retail Industry Award 2010 [MA000004]
27. Hair and Beauty Industry Award 2010 [MA000005]
28. Health Professionals and Support Services Award 2010 [MA000027]
29. Higher Education Industry—General Staff—Award 2010 [MA000007]
30. Horse and Greyhound Training Award 2010 [MA000008]
31. Horticulture Award 2010 [MA000028]
32. Hospitality Industry (General) Award 2010 [MA000009]
33. Labour Market Assistance Industry Award 2010 [MA000099]
34. Local Government Industry Award 2010 [MA000112]
35. Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]
36. Medical Practitioners Award 2010 [MA000031]
37. Mining Industry Award 2010 [MA000011]
38. Miscellaneous Award 2010 [MA000104]
39. Nursery Award 2010 [MA000033]
40. Nurses Award 2010 [MA000034]

41. Passenger Vehicle Transportation Award 2010 [MA000063]
42. Pastoral Award 2010 [MA000035]
43. Pharmaceutical Industry Award 2010 [MA000069]
44. Pharmacy Industry Award 2010 [MA000012]
45. Plumbing and Fire Sprinklers Award 2010 [MA000036]
46. Poultry Processing Award 2010 [MA000074]
47. Premixed Concrete Award 2010 [MA000057]
48. Quarrying Award 2010 [MA000037]
49. Racing Clubs Events Award 2010 [MA000013]
50. Racing Industry Ground Maintenance Award 2010 [MA000014]
51. Rail Industry Award 2010 [MA000015]
52. Registered and Licensed Clubs Award 2010 [MA000058]
53. Restaurant Industry Award 2010 [MA000119]
54. Seafood Processing Award 2010 [MA000068]
55. Silviculture Award 2010 [MA000040]
56. Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]
57. Sugar Industry Award 2010 [MA000087]
58. Supported Employment Services Award 2010 [MA000103]
59. Transport (Cash in Transit) Award 2010 [MA000042]
60. Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
61. Water Industry Award 2010 [MA000113]
62. Wool Storage, Sampling and Testing Award 2010 [MA000044]

ATTACHMENT C

Modern awards subject to the ACTU claim to increase the minimum engagement for part-time employees to 4 hours

1. Aged Care Award 2010 [MA000018]
2. Airport Employees Award 2010 [MA000049]
3. Alpine Resorts Award 2010 [MA000092]
4. Aluminium Industry Award 2010 [MA000060]
5. Amusement, Events and Recreation Award 2010 [MA000080]
6. Aquaculture Industry Award 2010 [MA000114]
7. Business Equipment Award 2010 [MA000021]
8. Cement and Lime Award 2010 [MA000055]
9. Cemetery Industry Award 2010 [MA000070]
10. Children's Services Award 2010 [MA000120]
11. Cleaning Services Award 2010 [MA000022]
12. Clerks - Private Sector Award 2010 [MA000002]
13. Concrete Products Award 2010 [MA000056]
14. Contract Call Centres Award 2010 [MA000023]
15. Corrections and Detention (Private Sector) Award 2010 [MA000110]
16. Cotton Ginning Award 2010 [MA000024]
17. Dredging Industry Award 2010 [MA000085]
18. Dry Cleaning and Laundry Industry Award 2010 [MA000096]
19. Electrical Power Industry Award 2010 [MA000088]
20. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
21. Fast Food Industry Award 2010 [MA000003]
22. Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]
23. Gardening and Landscaping Services Award 2010 [MA000101]
24. General Retail Industry Award 2010 [MA000004]
25. Hair and Beauty Industry Award 2010 [MA000005]
26. Health Professionals and Support Services Award 2010 [MA000027]
27. Horse and Greyhound Training Award 2010 [MA000008]
28. Horticulture Award 2010 [MA000028]
29. Hospitality Industry (General) Award 2010 [MA000009]
30. Labour Market Assistance Industry Award 2010 [MA000099]
31. Legal Services Award 2010 [MA000116]
32. Local Government Industry Award 2010 [MA000112]
33. Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]
34. Medical Practitioners Award 2010 [MA000031]
35. Mining Industry Award 2010 [MA000011]
36. Miscellaneous Award 2010 [MA000104]
37. Nursery Award 2010 [MA000033]
38. Nurses Award 2010 [MA000034]
39. Oil Refining and Manufacturing Award 2010 [MA000072]
40. Passenger Vehicle Transportation Award 2010 [MA000063]

41. Pastoral Award 2010 [MA000035]
42. Pharmaceutical Industry Award 2010 [MA000069]
43. Pharmacy Industry Award 2010 [MA000012]
44. Plumbing and Fire Sprinklers Award 2010 [MA000036]
45. Poultry Processing Award 2010 [MA000074]
46. Premixed Concrete Award 2010 [MA000057]
47. Quarrying Award 2010 [MA000037]
48. Racing Industry Ground Maintenance Award 2010 [MA000014]
49. Rail Industry Award 2010 [MA000015]
50. Registered and Licensed Clubs Award 2010 [MA000058]
51. Restaurant Industry Award 2010 [MA000119]
52. Salt Industry Award 2010 [MA000107]
53. Seafood Processing Award 2010 [MA000068]
54. Silviculture Award 2010 [MA000040]
55. Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]
56. Storage Services and Wholesale Award 2010 [MA000084]
57. Sugar Industry Award 2010 [MA000087]
58. Supported Employment Services Award 2010 [MA000103]
59. Timber Industry Award 2010 [MA000071]
60. Transport (Cash in Transit) Award 2010 [MA000042]
61. Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
62. Water Industry Award 2010 [MA000113]
63. Wine Industry Award 2010 [MA000090]
64. Wool Storage, Sampling and Testing Award 2010 [MA000044]

ATTACHMENT D

Modern awards subject to the claim for the further ACTU model clause

1. Aboriginal Community Controlled Health Services Award 2010 [MA000115]
2. Aged Care Award 2010 [MA000018]
3. Air Pilots Award 2010 [MA000046]
4. Aircraft Cabin Crew Award 2010 [MA000047]
5. Airline Operations-Ground Staff Award 2010 [MA000048]
6. Airport Employees Award 2010 [MA000049]
7. Alpine Resorts Award 2010 [MA000092]
8. Aluminium Industry Award 2010 [MA000060]
9. Ambulance and Patient Transport Industry Award 2010 [MA000098]
10. Amusement, Events and Recreation Award 2010 [MA000080]
11. Animal Care and Veterinary Services Award 2010 [MA000118]
12. Aquaculture Industry Award 2010 [MA000114]
13. Architects Award 2010 [MA000079]
14. Asphalt Industry Award 2010 [MA000054]
15. Banking, Finance and Insurance Award 2010 [MA000019]
16. Black Coal Mining Industry Award 2010 [MA000001]
17. Book Industry Award 2010 [MA000078]
18. Broadcasting and Recorded Entertainment Award 2010 [MA000091]
19. Business Equipment Award 2010 [MA000021]
20. Car Parking Award 2010 [MA000095]
21. Cement and Lime Award 2010 [MA000055]
22. Cemetery Industry Award 2010 [MA000070]
23. Children's Services Award 2010 [MA000120]
24. Cleaning Services Award 2010 [MA000022]
25. Clerks - Private Sector Award 2010 [MA000002]
26. Coal Export Terminals Award 2010 [MA000045]
27. Commercial Sales Award 2010 [MA000083]
28. Concrete Products Award 2010 [MA000056]
29. Contract Call Centres Award 2010 [MA000023]
30. Corrections and Detention (Private Sector) Award 2010 [MA000110]
31. Cotton Ginning Award 2010 [MA000024]
32. Dredging Industry Award 2010 [MA000085]
33. Dry Cleaning and Laundry Industry Award 2010 [MA000096]
34. Electrical Power Industry Award 2010 [MA000088]
35. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
36. Fast Food Industry Award 2010 [MA000003]
37. Fitness Industry Award 2010 [MA000094]
38. Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]
39. Funeral Industry Award 2010 [MA000105]
40. Gardening and Landscaping Services Award 2010 [MA000101]
41. Gas Industry Award 2010 [MA000061]

42. General Retail Industry Award 2010 [MA000004]
43. Graphic Arts, Printing and Publishing Award 2010 [MA000026]
44. Hair and Beauty Industry Award 2010 [MA000005]
45. Health Professionals and Support Services Award 2010 [MA000027]
46. Higher Education Industry—General Staff—Award 2010 [MA000007]
47. Horse and Greyhound Training Award 2010 [MA000008]
48. Horticulture Award 2010 [MA000028]
49. Hospitality Industry (General) Award 2010 [MA000009]
50. Hydrocarbons Field Geologists Award 2010 [MA000064]
51. Hydrocarbons Industry (Upstream) Award 2010 [MA000062]
52. Journalists Published Media Award 2010 [MA000067]
53. Labour Market Assistance Industry Award 2010 [MA000099]
54. Legal Services Award 2010 [MA000116]
55. Live Performance Award 2010 [MA000081]
56. Local Government Industry Award 2010 [MA000112]
57. Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]
58. Marine Tourism and Charter Vessels Award 2010 [MA000093]
59. Marine Towage Award 2010 [MA000050]
60. Market and Social Research Award 2010 [MA000030]
61. Meat Industry Award 2010 [MA000059]
62. Medical Practitioners Award 2010 [MA000031]
63. Mining Industry Award 2010 [MA000011]
64. Miscellaneous Award 2010 [MA000104]
65. Nursery Award 2010 [MA000033]
66. Nurses Award 2010 [MA000034]
67. Oil Refining and Manufacturing Award 2010 [MA000072]
68. Passenger Vehicle Transportation Award 2010 [MA000063]
69. Pastoral Award 2010 [MA000035]
70. Pest Control Industry Award 2010 [MA000097]
71. Pharmaceutical Industry Award 2010 [MA000069]
72. Pharmacy Industry Award 2010 [MA000012]
73. Plumbing and Fire Sprinklers Award 2010 [MA000036]
74. Port Authorities Award 2010 [MA000051]
75. Ports, Harbours and Enclosed Water Vessels Award 2010 [MA000052]
76. Poultry Processing Award 2010 [MA000074]
77. Premixed Concrete Award 2010 [MA000057]
78. Professional Diving Industry (Industrial) Award 2010 [MA000108]
79. Professional Diving Industry (Recreational) Award 2010 [MA000109]
80. Professional Employees Award 2010 [MA000065]
81. Quarrying Award 2010 [MA000037]
82. Racing Clubs Events Award 2010 [MA000013]
83. Racing Industry Ground Maintenance Award 2010 [MA000014]
84. Rail Industry Award 2010 [MA000015]
85. Real Estate Industry Award 2010 [MA000106]
86. Registered and Licensed Clubs Award 2010 [MA000058]
87. Restaurant Industry Award 2010 [MA000119]

88. Road Transport (Long Distance Operations) Award 2010 [MA000039]
89. Road Transport and Distribution Award 2010 [MA000038]
90. Salt Industry Award 2010 [MA000107]
91. Seafood Processing Award 2010 [MA000068]
92. Silviculture Award 2010 [MA000040]
93. Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]
94. Sporting Organisations Award 2010 [MA000082]
95. State Government Agencies Administration Award 2010 [MA000121]
96. Stevedoring Industry Award 2010 [MA000053]
97. Storage Services and Wholesale Award 2010 [MA000084]
98. Sugar Industry Award 2010 [MA000087]
99. Supported Employment Services Award 2010 [MA000103]
100. Surveying Award 2010 [MA000066]
101. Telecommunications Services Award 2010 [MA000041]
102. Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]
103. Timber Industry Award 2010 [MA000071]
104. Transport (Cash in Transit) Award 2010 [MA000042]
105. Travelling Shows Award 2010 [MA000102]
106. Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
107. Waste Management Award 2010 [MA000043]
108. Water Industry Award 2010 [MA000113]
109. Wine Industry Award 2010 [MA000090]
110. Wool Storage, Sampling and Testing Award 2010 [MA000044]

ATTACHMENT E

**Modern awards subject to the Ai Group claim for modification
of existing casual conversion clauses**

1. Alpine Resorts Award 2010 [MA000092]
2. Building and Construction General On-site Award 2010 [MA000020]
3. Cement and Lime Award 2010 [MA000055]
4. Concrete Products Award 2010 [MA000056]
5. Cotton Ginning Award 2010 [MA000024]
6. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
7. Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]
8. Graphic Arts, Printing and Publishing Award 2010 [MA000026]
9. Joinery and Building Trades Award 2010 [MA000029]
10. Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]
11. Mobile Crane Hiring Award 2010 [MA000032]
12. Plumbing and Fire Sprinklers Award 2010 [MA000036]
13. Quarrying Award 2010 [MA000037]
14. Road Transport and Distribution Award 2010 [MA000038]
15. Sugar Industry Award 2010 [MA000087]
16. Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]
17. Timber Industry Award 2010 [MA000071]
18. Transport (Cash in Transit) Award 2010 [MA000042]
19. Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
20. Waste Management Award 2010 [MA000043]
21. Wine Industry Award 2010 [MA000090]

ATTACHMENT F

Modern awards which currently contain a casual conversion clause

1. Alpine Resorts Award 2010 [MA000092]
2. Asphalt Industry Award 2010 [MA000054]
3. Building and Construction General On-site Award 2010 [MA000020]
4. Cement and Lime Award 2010 [MA000055]
5. Concrete Products Award 2010 [MA000056]
6. Cotton Ginning Award 2010 [MA000024]
7. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
8. Food, Beverage and Tobacco Manufacturing Award 2010 [MA000073]
9. Graphic Arts, Printing and Publishing Award 2010 [MA000026]
10. Higher Education Industry—General Staff—Award 2010 [MA000007]
11. Horse and Greyhound Training Award 2010 [MA000008]
12. Hospitality Industry (General) Award 2010 [MA000009]
13. Joinery and Building Trades Award 2010 [MA000029]
14. Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]
15. Mobile Crane Hiring Award 2010 [MA000032]
16. Pharmacy Industry Award 2010 [MA000012]
17. Plumbing and Fire Sprinklers Award 2010 [MA000036]
18. Premixed Concrete Award 2010 [MA000057]
19. Quarrying Award 2010 [MA000037]
20. Registered and Licensed Clubs Award 2010 [MA000058]
21. Road Transport and Distribution Award 2010 [MA000038]
22. Sugar Industry Award 2010 [MA000087]
23. Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]
24. Timber Industry Award 2010 [MA000071]
25. Transport (Cash in Transit) Award 2010 [MA000042]
26. Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
27. Waste Management Award 2010 [MA000043]
28. Wine Industry Award 2010 [MA000090]

ATTACHMENT G

Modern awards which provide for casual employment and currently contain no daily minimum engagement period for casual employees

1. Airport Employees Award 2010 [MA000049]
2. Aquaculture Industry Award 2010 [MA000114]
3. Architects Award 2010 [MA000079]
4. Banking, Finance and Insurance Award 2010 [MA000019]
5. Business Equipment Award 2010 [MA000021]
6. Cleaning Services Award 2010 [MA000022]
7. Commercial Sales Award 2010 [MA000083]
8. Corrections and Detention (Private Sector) Award 2010 [MA000110]
9. Cotton Ginning Award 2010 [MA000024]
10. Educational Services (Teachers) Award 2010 [MA000077]
11. Electrical, Electronic and Communications Contracting Award 2010 [MA000025]
12. Gas Industry Award 2010 [MA000061]
13. Higher Education Industry—Academic Staff—Award 2010 [MA000006]
14. Horticulture Award 2010 [MA000028]
15. Local Government Industry Award 2010 [MA000112]
16. Mannequins and Models Award 2010 [MA000117]*
17. Marine Towage Award 2010 [MA000050]
18. Market and Social Research Award 2010 [MA000030]
19. Medical Practitioners Award 2010 [MA000031]
20. Mining Industry Award 2010 [MA000011]
21. Miscellaneous Award 2010 [MA000104]
22. Pharmaceutical Industry Award 2010 [MA000069]
23. Port Authorities Award 2010 [MA000051]
24. Professional Employees Award 2010 [MA000065]
25. Rail Industry Award 2010 [MA000015]
26. Security Services Industry Award 2010 [MA000016]
27. Silviculture Award 2010 [MA000040]
28. Sporting Organisations Award 2010 [MA000082]
29. Surveying Award 2010 [MA000066]
30. Telecommunications Services Award 2010 [MA000041]
31. Transport (Cash in Transit) Award 2010 [MA000042]
32. Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]
33. Water Industry Award 2010 [MA000113]
34. Wool Storage, Sampling and Testing Award 2010 [MA000044]

*In the Mannequins and Models Award 2010, no minimum is required where specified notice of cancellation/postponement provided.