

IN THE FAIR WORK COMMISSION

Matter No:

AM2014/196

FOUR YEARLY REVIEW OF MODERN AWARDS
PART-TIME EMPLOYMENT COMMON ISSUE

Proponents:

AUSTRALIAN HOTELS ASSOCIATION
ACCOMMODATION ASSOCIATION OF AUSTRALIA
MOTOR INN AND MOTEL ACCOMMODATION ASSOCIATION

FINAL SUBMISSIONS

1. These are the final submissions of the Australian Hotels Association (“the AHA”), the Accommodation Association of Australia (“the AAA”) and the Motor Inn and Motels Accommodation Association (“the MIMAA”) (collectively “the Associations”) made pursuant to the directions of the Full Bench issued on 2 September 2016.
2. In addition to these submissions, the Associations rely on our previous written submissions filed on 12 October 2015 (except for any aspect which relies on witness statements which were subsequently withdrawn) and where referred to herein, our Final Written Submissions dated, 5 August 2016, which were filed in response to the Common Claims Application by the Australian Council of Trade Unions (“the ACTU”).

INTRODUCTION

3. In our submissions dated 12 October 2015, it was submitted “*that a fundamental aspect of a modern award is that it must be of utility for the industry or occupation that is covered by the modern award*”.¹

¹ Associations’ Submissions, dated 12 October 2015 at [39];

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4. Furthermore, it was submitted that “*where a modern award provides for a type or category of employment, the parameters of that type or category of employment must be able to accommodate the characteristics of the industry or occupation.*”²
 5. The Associations submit that the current part-time employment provision in the *Hospitality Industry (General) Award 2010* (“the Hospitality Award”) does not meet the modern awards objective.³ The evidence attests to the fact that the existing provision is rigid and inflexible and results in employers choosing, or being forced, by way of the deeming provision, to employ casual employees rather than part-time employees.
 6. Accordingly, as part of this 4 Yearly Review of Modern Awards, the Associations propose that the Fair Work Commission (“the Commission”) exercise its modern award powers⁴ to vary the Hospitality Award to incorporate a part-time employment provision that strikes a fair balance between a degree of regularity and certainty for employees and flexibility for employers as to the days and times at which a part-time employees ordinary hours of work may be rostered.
 7. The Associations’ proposed variation was filed on 17 July 2015 in accordance with directions issued by the Commission. An amended draft determination was subsequently filed on 12 October 2015 with the evidence and submissions in support of the proposed variation. The Associations are seeking 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. The Associations’ do not seek to disturb existing minimum or maximum shift lengths or other hours of work conditions set out in clause 29.2 and submit that those matters are adequate and appropriate. In that respect, we refer to paragraphs [48]-[54] of our submissions dated 5 August 2016.

² Associations Submissions, dated 12 October 2015 at [40];

³ Associations Submissions, dated 12 October 2015 at [37]-[39];

⁴ *Fair Work Act 2009* at s134 (2); s156 (2);

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8. At the outset, it is also important to note that that the Associations are not a ‘*lone wolf*’ in terms of voicing concerns with the part-time employment provision in the Hospitality Award and low levels of part-time employment in the sector.
 9. United Voice acknowledges that there are “*problems with excessive casualisation in the hospitality sector and underutilisation of part time employment*”.⁵ (emphasis added)
 10. In closing oral submissions made on behalf of the ACTU⁶ as part of the common claims it was submitted that, “*the AHA focuses on the part-time clause. They also do say that it's about recruitment preferences and their argument essentially is that people are not engaged permanently because part-time work is too unattractive so everyone becomes a casual. There is some truth in that..”⁷ (emphasis added)*

THE PROCEEDINGS - 4 YEARLY REVIEW OF MODERN AWARDS

11. In our submissions dated 12 October 2015, we set out the legislative requirements and jurisdictional issues applying to the conduct of a 4 Yearly Review of Modern Awards and the conduct of the review of Part-time Employment as a Common Issue.⁸
12. There are two key matters referred to therein that warrant further emphasis.
13. *First*, while the Commission has considerable discretion in relation to the process by which the Review is to be conducted each modern award is reviewed in its own right before a Full Bench.⁹

⁵ United Voice Submissions, dated 22 February 2016 at [44];

⁶ Although it is acknowledged they were made by a representative of United Voice; Transcript dated 18 August 2016 at PN3328;

⁷ Transcript dated 18 August 2016 at PN3398-PN3399;

⁸ Associations Submissions, dated 12 October 2015 at [2]-[14];

⁹ *Fair Work Act 2009* at s156 (5);

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14. *Second*, notwithstanding that a matter is designated as a common issue, different outcomes in different modern awards may be achieved. In the Preliminary Jurisdictional Issues Decision¹⁰, a Full Bench of the Commission foreshadowed this possibility, stating that:

*“.....The need to balance the competing considerations in s.134 (1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards..... there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.”*¹¹ (emphasis added)

15. It is also important to note that in the performance or exercise of modern award powers, the Commission is to take into account the objects of the *Fair Work Act 2009* (“the Act”).¹²

THE HOSPITALITY AWARD: PART-TIME EMPLOYMENT PROVISION

16. The part-time employment provision in the Hospitality Award is set out at clause 12 as follows:

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.*

¹⁰ [2014] FWCFB 1788;

¹¹ [2014] FWCFB 1788 at [33]-[34];

¹² *Fair Work Act 2009* at s134 (2); The Objects of the Act are set out at s3;

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.

17. The practical effect and operation of this provision is set out in our submissions dated 12 October 2015 at paragraphs [22]-[26].

THE ASSOCIATIONS' EVIDENCE

18. In support of the Associations' proposed variation, the following witnesses gave evidence by witness statement(s) and were required for cross examination:

- (i) Joanne Blair;
- (ii) Darren Brown;
- (iii) Elizabeth Cleaves;
- (iv) Christopher Gatfield;
- (v) Rosario Leonardi;
- (vi) Paul Stocks; and
- (vii) Robert Bruce Woods.

Joanne Blair – Zamovisa Pty Ltd (and related entities) (New South Wales)

19. The evidence of Joanne Blair, hotel owner/director was that:
- a. She has 30 years experience in working in the hospitality industry;¹³
 - b. Zamovisa Pty Ltd owns and operates three hotels located in regional and metropolitan New South Wales;¹⁴
 - c. Zamovisa Employment Pty Ltd employs 60 employees covered by the Hospitality Award, of which:
 - i. There are no part-time employees; and
 - ii. 75% are casual employees.¹⁵
 - d. The part-time employment provision in the Hospitality Award was “*too inflexible*” and “*not compatible with the operational requirements at the Venues*”;¹⁶
 - e. She had declined a request from a casual employee for conversion to part-time employment on the basis of the “*inflexibility of the part time employment provision.*”¹⁷
20. Ms. Blair was cross-examined.¹⁸ During cross-examination, Ms Blair gave the following evidence in relation to the casual conversion request:

Now you're basically noting that you received a request from a casual employee to be converted to part time. She made the request because she wanted a home loan?---Yes.

¹³ Exhibit 122 at [2];

¹⁴ Exhibit 122 at [3];

¹⁵ Exhibit 122 at [8]-[9];

¹⁶ Exhibit 122 at [11]-[12];

¹⁷ Exhibit 122 at [15]-[16];

¹⁸ Transcript dated 23 March 2016 at PN10201;

*You declined the request on the basis that you were unable to accommodate the request due to the inflexibility of the part time employment provisions in the award?--
-Yes.¹⁹*

21. And continuing:

And you would have had the capacity to employ someone regularly for 20 hours a week in the position that this employee had, is that correct?---Sorry, say that again?

Well, there would have been work in your establishment for this person, 20 hours a week?---There is work of 20 hours a week, yes.

For this – in what - - -

VICE PRESIDENT HATCHER: So let's be clear?---Yes.

You had 20 hours per week work?---Mm.

But that wasn't the problem. The problem was that you didn't have the flexibility of when those 20 hours could be rostered during the - - -?---Yes, that's correct.²⁰
(emphasis added)

Darren Brown – Shoreline Hotel (Tasmania)

22. The evidence of Darren Brown, general manager of the Shoreline Hotel was that:

- a. He has over 35 years experience in the hospitality industry;²¹
- b. The Shoreline Hotel is located in suburban Hobart, Tasmania;²²
- c. The Shoreline Hotel employs 59 employees covered by the Hospitality Award, of which:
 - i. There are no part-time employees; and
 - ii. Approximately 52% are casual employees.²³

¹⁹ Transcript dated 23 March 2016 at PN10325-PN10326;

²⁰ Transcript dated 23 March 2016 at PN10334-PN10339;

²¹ Exhibit 126 at [4];

²² Exhibit 126 at [1]; Transcript dated 23 March 2016 at PN10444-PN10445;

²³ Exhibit 126 at [8];

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- d. The Shoreline Hotel “does not currently employ part-time employees” because “the part-time provision in the Award requires the Hotel to set an employee’s hours of work and days of work including starting and finishing times;”²⁴
23. Mr. Brown was cross-examined.²⁵ During cross-examination, Mr. Brown gave the following evidence about his experience with conversion requests to part-time employment:

You’ve said in your statement that you’ve had some requests by casual employees to convert to permanent?---That’s right.

*And in your statement you said you didn’t agree to those requests because essentially you don’t like the part-time work provision of the Hospitality Award. Is that a reasonable summary of what occurred?---Well, I’ll give two examples. One example was that it – the hours that they wished to work certainly didn’t suit our business. They wished to go to us, part time. Another one, when we had that same conversation, the particular lady chose herself not to convert because of the amount of hours that I was prepared to look at for part time and that took away from her ability to actually do enough hours, **it would take up extra hours which she wanted, so she’d in fact turned it down herself,** so they’re the only two that I can – that come to mind in an example.*

*But do you understand, in relation to the first person, that the employer and the employee has to initially agree on the pattern of hours, so if the employee puts to you a proposal which is unacceptable, you don’t have to accept that and by a process of negotiation you could come to an arrangement that suits you both. Are you aware of that?---**Yes, I am, and that particular case there – we didn’t come to an arrangement to suit us because the employee wasn’t – chose to become inflexible. Where they were flexible as a casual, they were becoming very inflexible as a – with what they wanted part time, which didn’t suit the business.***

*All right, so you didn’t like the way this particular employee interacted with you in terms of negotiating a pattern of work, is that what you’re saying?---It wasn’t so much the way they interacted, as what they were looking – what they were seeking to do. **They were seeking hours outside of what they’d previously worked, in a different pattern they’d previously worked and it just didn’t suit the business.***

*Did it occur to you to maybe **offer her a pattern of part time work that reflected her existing casual pattern of work?**---**She didn’t want that.***

*Well, you’ve said it was - - -?---She was looking for a complete – **she was looking for a complete change which was outside of what she’d done before, to fit in with her***

²⁴ Exhibit 126 at [9]-[10];

²⁵ Transcript dated 23 March 2016 at PN10437;

lifestyle which didn't fit with the business. She was looking for hours of work when I didn't have them.

*But you've said in your statement that you've had casual employees who've wanted to convert to get a bank loan or access to annual leave and sick leave. Surely if that particular person wanted a bank loan and leave entitlements she would have been agreeable to a pattern of work that reflected her existing pattern of work?---**The particular example of the bank loan was the previous one that actually declined herself because she wanted to keep her hours at a higher level than we'd discussed permanent part time.***²⁶ (emphasis added)

24. Mr. Brown gave further evidence under cross-examination of his experience with part-time employment under the Hospitality Award in the context of a parent seeking to return from a period of parental leave. This evidence is extracted below:

“Okay. Now have you ever employed an award part time worker?---Yes.

All right, when was that?---The most recent would have been probably three years ago.

*And what happened to that person?---They were – the person that had worked for me as a casual. We'd – they'd come along very well with their own personal growth in our business. **I made her full time and after being full time for a while, she had a bub. I brought her back to work part time and her flexibility, if you like, for her work changed on a weekly basis to the point where she then – I actually asked to go back to casual. That was the last experience I had with a part time worker.***

So it was by mutual arrangement that she reverted back to casual?---That's right.²⁷

Elizabeth Cleaves – Primus Hotel (New South Wales)

25. The evidence of Elizabeth Cleaves, director of human resources:
- a. She has approximately 20 years experience in human resources in the hotel industry;²⁸

²⁶ Transcript dated 23 March 2016 at PN10455-PN10461;

²⁷ Transcript dated 23 March 2016 at PN10508-PN10511;

²⁸ Exhibit 200 at [3];

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- b. The Primus Hotel is located in the Sydney Central Business District²⁹ and opened for trading on 23 December 2015;³⁰
- c. The Primus Hotel employs 93 employees covered by the Hospitality Award, of which:
- i. There are no part-time employees; and
 - ii. Approximately 43% are casual employees.³¹
- d. The Primus Hotel did not include the recruitment of part-time employees that would be covered by the Hospitality Award in their recruitment strategy as it requires an employer to “contract with an employee to work set days and hours of work including starting and finishing times”³² and the hotel “needs the flexibility to be able to draft rosters in accordance with the changing needs of the business”.³³
26. Ms. Cleaves was cross-examined.³⁴ During cross-examination, Ms. Cleaves was asked questions regarding the rostering of particular casual employees, which led to the following exchange between Ms. Cleaves and members of the Full Bench:

*VICE PRESIDENT HATCHER: Was the point you were trying to make is that, you have a part-time, you've got to guarantee them say 20 hours a week, and **the problem may be that you want the 20 hours when they work to be changed, and under the current provision the employee might simply not agree, and in that situation you're stuck with the existing 20 hours and paying them for 20 even though you might not want those particular hours to be worked, is that the problem?---And in a business when you're new, you need that flexibility to change the hours on the needs of a business.***

²⁹ Exhibit 200 at [1];

³⁰ Exhibit 201 at [2];

³¹ Exhibit 201 at [3]-[4];

³² Exhibit 200 at [14(a)];

³³ Exhibit 200 at [17];

³⁴ Transcript dated 12 July 2016 at PN1586;

But why can't you just deal with that by having casuals? That is, what benefit does having a part-time instead of a casual - - -A part-timer is - well it's about retention - - -

*Can I just finish the question? I assume you've got a big enough pool of casuals that you can fill any slot on your roster?---We could just use casuals. **I would prefer as a strategy to have people as part-time, permanent career employees who we can offer, you know, a long-term career to, based on part-time employment.***

*SENIOR DEPUTY PRESIDENT HAMBERGER: So you believe that **casuals don't have the same level of commitment to the business as a part-timer** would have?---**Yes, I agree with that.***

*And what do you base that on?---**The turnover in the business of casual employees, as opposed to permanent full-time employees.***

*Have you got any experience where you do have - maybe not at this hotel, but I mean other areas of work where you have employed part-timers as opposed to casuals?---Yes, **I worked for Accor and Novotel Sydney Manly Pacific, and we had a housekeeping department there where a predominant number of employees were part-time employees.***

*And did you see a difference in the turnover of staff?---**Yes, they were long-term employees, a lot of them, before I got there and after I left; they were still there.***

*So you're saying that your experience is in this industry is **that part-time employees are more likely to stick with the employer?**---Yes.³⁵ (emphasis added)*

Christopher Gatfield – Australian Hotels Association NSW

27. The evidence of Christopher Gatfield, policy and research officer of the Australian Hotels Association, NSW, was that:
- a. He was instructed to develop a survey in relation to the prevalence and nature of part-time employment under the Hospitality Award;³⁶
 - b. His created the survey using Survey Monkey;³⁷

³⁵ Transcript dated 12 July 2016 at PN1616-PN1623;

³⁶ Exhibit 202 at [3];

³⁷ Exhibit 202 at [4]-[10];

c. The survey, the raw data of which was exhibited an attached to Mr. Gatfield's witness statement³⁸ indicated the following:

- There were 455 full responses, representing approximately 10% of the total number of survey recipients;³⁹
- The respondents were located in all states and territories⁴⁰ and predominantly operated Accommodation Hotels or pub/tavern style hotels;⁴¹
- Where the respondents were covered by the Hospitality Award and did not have an enterprise agreement, that part-time employment is approximately 3.6%;⁴²
- That part-time employees are generally in the age range of 18-34 years;⁴³
- The primary factor influencing the respondent's decision not to employ a part-time employee was that the award terms and conditions are not suitable or flexible enough – 62.3%;⁴⁴
- The primary factor influencing the respondent's decision to implement an enterprise agreement was to gain more flexible part-time employment provisions – 44.8%;⁴⁵ and
- Approximately 32.42% of the respondents indicated that they would employ *more* part-time employees if a flexible part-time employment provision as

³⁸ Exhibit 202 at [19];

³⁹ Exhibit 202 at [18]; Transcript dated 12 July 2016 at PN1767;

⁴⁰ Exhibit 202 at [21(a)];

⁴¹ Exhibit 202 at [21(b)];

⁴² Exhibit 202 at [21(c)];

⁴³ Exhibit 202 at [21(f)];

⁴⁴ Exhibit 202 at [21(g)];

⁴⁵ Exhibit 202 at [21(h)];

proposed by the Associations was introduced into the Hospitality Award, while 55.04% indicated there would be no change.⁴⁶

28. Mr. Gatfield was cross-examined.⁴⁷ Under cross-examination, Mr. Gatfield gave evidence that survey was a snapshot of the broad views and observations of the respondents to the survey and did not represent a scientific or weighted analysis.⁴⁸
29. During cross-examination, His Honour, Senior Deputy President Hamberger queried whether or not the Australian Hotels Association had analysed the part-time work provisions in enterprise agreements.⁴⁹
30. While the Australian Hotels Association has not conducted an exhaustive analysis of enterprise agreements, we are aware that generally employers implementing an enterprise agreement within the hospitality industry will generally, but not in all cases⁵⁰, seek to introduce a part-time employment provision which is more flexible than the part-time employment provision in the Hospitality Award.
31. For example, the *Stamford Hotels and Resorts Enterprise Agreement 2010*, the *Westin Melbourne Enterprise Agreement 2012*, the *Hyatt Enterprise Agreement 2011*, the *Star Enterprise Agreement 2013*, the *Hilton Sydney Enterprise Agreement 2009* and the *Sebel Cairns Enterprise Agreement 2011* all contain more flexible provisions for part-time employment when they are considered in comparison to the part-time employment provision in the Hospitality Award.

⁴⁶ Exhibit 202 at [21(i)]; Transcript dated 12 July 2016 at PN1743;

⁴⁷ Transcript dated 12 July 2016 at PN1718;

⁴⁸ Transcript dated 12 July 2016 at PN1727; PN1751 & PN1753;

⁴⁹ Transcript dated 12 July 2016 at PN1760-PN1764;

⁵⁰ See for example the *Observatory Hotel Enterprise Agreement 2010* and the *Sheraton Perth & LHMU Collective Agreement 2010*;

Rosario Leonardi – Aspen Holiday Parks

32. The evidence of Rosario Leonardi, which related the business of his former employer⁵¹ was that:
- a. He has over 14 years experience in human resources, 5 of which is in the hospitality industry;⁵²
 - b. Aspen Holiday Parks operates 26 holiday parks across 5 different States;⁵³
 - c. Aspen Holiday Parks employs 275 employees covered by the Hospitality Award, of which:
 - i. Less than 5% are part-time employees; and
 - ii. Almost 85% are casual employees.⁵⁴
 - d. Aspen Holiday Parks does not actively recruit for part-time employees due to the inflexibility of the part-time employment provision in the Hospitality Award.⁵⁵
33. Mr. Leonardi was cross-examined.⁵⁶ During cross-examination, and in response to questions from the Full Bench, Mr. Leonardi gave evidence about the prescriptive nature of the current part-time employment provision and the requirement to record changes in writing⁵⁷, the difficulties associated with the availability of casual employees, and the benefits of part-time employment. Mr. Leonardi's evidence in relation to the latter two matters is extracted below:

⁵¹ Exhibit 199 at [1]-[3]; Transcript dated 12 July at PN1481-PN1482;

⁵² Exhibit 199 at [2];

⁵³ Exhibit 199 at [4];

⁵⁴ Exhibit 199 at [7];

⁵⁵ Exhibit 199 at [9]-[11];

⁵⁶ Transcript dated 12 July 2016 at PN1488;

⁵⁷ Transcript dated 12 July 2016 at PN1516;

Re difficulties associated with the availability of casual employees:

DEPUTY PRESIDENT KOVACIC: How would you overcome that problem in rural areas that you identified with casuals, in terms of part-time? I mean, you're arguably talking about similar - you're drawing from the same pool, if I can describe it that way?---Yes, certainly.

So how would the different forms of employment necessarily address the issue that you've alluded to there?---In rural areas one of the greatest challenges is being able to provide people with consistent work, **and specifically in our instance to be able to provide someone with a dedicated set hours per week gives them the opportunity of (a) being able to note they've got a standard form of income without having to worry about where their next windfall's going to be,** and then we've also got the opportunity of engaging casuals should the needs arise, depending on the operational demand of our business.

VICE PRESIDENT HATCHER: You can do that with a casual, can't you? That is, you can enter into a contract with a casual to say, look, you're casual in the sense that we'll allocate you work but we'll guarantee you say 20 hours a week?---You can. **The unfortunate part about a casual sometimes is the commitment. You don't necessarily have that two-way commitment that they are dedicated to your business.**

COMMISSIONER ROE: If you want the same flexibility with your part-timer as you currently get with your casual, so if you're currently offering your casual regularly 20 hours per week but there's some changes to the days and hours within that 20 hours, if that's what you're currently doing because that's what your business demands for casuals, what's the difference in calling them a part-timer or calling them a casual?---That's a good point. I think, look, for us it comes down to continuity. Again, we can't guarantee that a casual is going to be with our business long-term, whereas providing someone with a stable employment contract with regular hours gives us an opportunity of knowing that they're - - -

So the difference is that because the part-timer would have a contract that they are obliged to work the 20 hours, you can rely on that 20 hours, whereas with the casual, the casual's got the right to refuse?---Correct.

That's the difference from your perspective?---Correct, yes⁵⁸.

And further:

MR RUSSELL-UREN: In response to a question from Commissioner Roe, I believe, you said that essentially the casuals have a right to refuse shifts. Was it a common experience that you couldn't fill work because a group of casuals had refused to work?---It would be. Like I mentioned before, **being in regional they would have a number of different pools to draw on as casual employees, so effectively we were potentially having conversations with one who had already been offered shifts in**

⁵⁸ Transcript dated 12 July 2016 at PN1544-PN1549;

another holiday park or in another pub or in another area of that particular location.⁵⁹ (emphasis added)

Re Benefits of part-time employment:

VICE PRESIDENT HATCHER: How would Aspen benefit from having less casual employees and more part-time employees?---I think it's more about how we would be able to benefit our employees.

Can you answer my question first?---Yes, certainly.

I'll come to the employees in a second, but from the company's point of view, how would it benefit? I mean, it has casual employees, which allows it to meet peaks and troughs and seasonal demands, but what benefit does it get by having more part-time and less casuals?---Simply simplicity - simplicity and stability. It gives us the opportunity of having a range of people who have a core set of requirements and skills that are consistent within Aspen. They understand our processes; they understand what we do, how we do it, when we do it. It gives us greater efficiency; it gives the individual stability as well as ourselves, particularly in rural where, you know, you can have quite a large transient workforce, because people either leave a rural area or they come back, and it's quite challenging to manage individuals. Giving them that sense of stability gives us the opportunity of having a consistent workforce.⁶⁰

And further:

VICE PRESIDENT HATCHER: And from the employee's perspective, is there any indication that there's any interest in employees who work variable and irregular hours being employed on a part-time basis?---I couldn't give you any facts from our business, but based on conversation there would be a number of individuals across Aspen at the point in time that would like to have gone onto a part-time provision. It gave them a lot of other benefits obviously with annual leave, sick leave. Those are the other benefits that they very much looked to have because it gave them that sense of uncertainty.⁶¹

And under cross-examination from Mr. Fleming:

You mentioned some of the reasons that the workers across the business might be interested in permanent employment. Do you accept that part of the attraction of permanent employment for some of those workers might be having set times and hours of work and restrictions on their availability for some workers?---Not from the discussion that I had with them. The major benefit for them was being able to know that they had a stable set of hours, so irrespective of the days that they worked, it

⁵⁹ Transcript dated 12 July 2016 at PN1554;

⁶⁰ Transcript dated 12 July 2016 at PN1541-PN1543;

⁶¹ Transcript dated 12 July 2016 at PN1550;

*was knowing that they were employed for 30 hours a week and that 30 hours gave them a sense of stable income.*⁶²

Paul Stocks – Kelly’s Motor Club Hotel (Victoria)

34. The evidence of Paul Stocks, managing director of the Kelly’s Motor Club Hotel was that:
- a. He has over 30 years experience in the hospitality industry;⁶³
 - b. The Kelly’s Motor Club Hotel is located in suburban Melbourne, Victoria;⁶⁴
 - c. The Kelly’s Motor Club Hotel employs 72 employees covered by the Hospitality Award, of which:
 - i. There are no part-time employees; and
 - ii. Approximately 83% are casual employees.⁶⁵
 - d. The part-time employment provision in the Hospitality Award “*is **too rigid and offers no flexibility** to adjust times and days that an employee can work to match the fluctuations in trade*”⁶⁶.....which “*forces me to rely heavily on casual employment, which creates further rostering complexities as **casual employees have the right to decline shifts** at short notice **and often do so.**”⁶⁷ (emphasis added)*

⁶² Transcript dated 12 July 2016 at PN1561;

⁶³ Exhibit 128 at [4];

⁶⁴ Exhibit 128 at [2]; Transcript dated 23 March 2016 at PN10550;

⁶⁵ Exhibit 128 at [9];

⁶⁶ Exhibit 128 at [11];

⁶⁷ Exhibit 128 at [15];

35. Mr. Stocks was cross-examined.⁶⁸ During cross-examination, and in response to a question from His Honour, Vice President Hatcher, Mr. Stocks conceded that “*some of the longer serving casuals who obviously aren’t students would tend to have fairly more or less the same hours on every roster*”.⁶⁹ (emphasis added)

36. However, this concession should be considered in light of his evidence that “*the bulk of my staff are employees employed on a casual basis as they are either parents or students and they do like the flexibility*”⁷⁰ or they are grandparents who “*change [their] roster quite often*” in order to “*take their grandkids.*”⁷¹ (emphasis added)

Robert Bruce Woods – Bushrangers Bar and Brasserie (New South Wales)

37. The evidence of Robert Bruce Woods, director/licensee of the Bushrangers Bar and Brasserie Hotel was that:

- a. He has approximately 30 years experience operating hotels and restaurants in the hospitality industry;⁷²
- b. The Bushrangers Bar and Brasserie is located in Largs, New South Wales;⁷³
- c. The Bushrangers Bar and Brasserie employs 24 employees covered by the Hospitality Award, of which:
 - i. There are no part-time employees; and
 - ii. Approximately 45% are casual employees.⁷⁴

⁶⁸ Transcript dated 23 March 2016 at PN10550;

⁶⁹ Transcript dated 23 March 2016 at PN10625;

⁷⁰ Transcript dated 23 March 2016 at PN10614;

⁷¹ Transcript dated 23 March 2016 at PN10591;

⁷² Exhibit 203 at [6];

⁷³ Exhibit 203 at [3]; Transcript dated 12 July 2016 at PN1796;

⁷⁴ Exhibit 203 at [10]-[11];

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- d. The Bushrangers Bar and Brasserie does not consider the employment of part-time employees under the Hospitality Award because it restricts an employer's ability to change a part-time employee's days and times to suit the operational needs of the business.⁷⁵
38. Mr. Woods was cross-examined.⁷⁶ During cross-examination, Mr Woods conceded that some back-of-house employees "*probably could have been*" employed on part-time basis.⁷⁷ However, this also needs to be considered in the context of Mr. Woods' evidence that employees "*want the flexibility as much as we want it too, and need it*".⁷⁸
39. In terms of accommodating full-time employees who wish to return to work on a part-time basis, Mr. Woods gave the following evidence:

*What stops you from engaging these people on a part-time basis?---On a part-time basis? Probably one of the things that has been more restrictive - and I have employed part-time in other licensed establishments that I have, but where we are at the moment, one of the biggest issues that I've got is pregnancies. I hope none of these dishies we're talking about are pregnant, but we've got six babies to five mothers in 20 months and we're staring down the seventh baby to five mothers in about 26 months. **The point I make, they are key people and we've got to bring them back in. To bring them back in on a more flexible part-time, would be more suitable for us to do that. They are people that are dearly missed and they leave a hole in our administration, in our face-to-face bar. Our hostess that has been with us 10 years is off and she was a key person that run that restaurant floor, so it does have an effect.***

*VICE PRESIDENT HATCHER: These people are currently full-time people or casuals?---**These have all been full-time people. It just has a serious drain on our ability to manage and to bring them back in and not be penalised with overtime at a certain level would suit us. At the moment they're casual.***⁷⁹

⁷⁵ Exhibit 203 at [15]-[18];

⁷⁶ Transcript dated 12 July 2016 at PN1797;

⁷⁷ Transcript dated 12 July 2016 at PN1837;

⁷⁸ Transcript dated 12 July 2016 at PN1862;

⁷⁹ Transcript dated 12 July 2016 at PN1835-PN1836;

SUBMISSIONS AND EVIDENCE OF OPPOSING PARTIES

40. The ACTU and United Voice were the only interested parties that filed submissions and/or evidence in opposition to the Associations' proposed variation.

The ACTU

41. The ACTU filed submissions dated 22 February 2016 ("the ACTU Submissions") in response to various proposed claims.
42. While the ACTU Submissions identify and provide a brief description of the particular claims and the relevant applicant party, they do not identify the particular claim that is sought by the Associations.⁸⁰
43. Furthermore, whilst the ACTU Claims indicate that their submissions are also relevant to other claims by employer groups in relation to particular awards⁸¹, they do not otherwise expressly refer to the Associations' proposed variation, nor are those submissions otherwise directly or indirectly relevant to the Associations' proposed variation.

United Voice

44. United Voice filed submissions dated 22 February 2016 ("the United Voice Submissions") and relevantly to the Hospitality Award, led evidence from the following witnesses who were not required for cross examination:

- (i) Keith Harvey;
- (ii) [REDACTED]; and
- (iii) Elena Marsiglia.

⁸⁰ ACTU Submissions, 22 February 2016 at [2];

⁸¹ ACTU Submissions, 22 February 2016 at [3];

United Voice Submissions

45. The United Voice Submissions respond to three different claims seeking to vary the part-time employment provision in three different modern awards⁸², and does so collectively by reference to the modern awards objective. In addition, the United Voice Submissions deal with some specific aspects in relation to each different claim.
46. In responding specifically to the claim by the Associations, the United Voice Submissions identify only one concern, which is, quite perplexingly, that under the Associations' proposed variation, an employer and employee may agree to one x 3 hour shift per week – something which is unlikely, but otherwise permitted under the current provision.⁸³
47. In addressing part-time employment generally in the context of the various hospitality industry claims, United Voice refers to the two-tiered part-time employment provision which existed in the hotels and motels sector prior to the Award Simplification Process in the late 1990's.⁸⁴
48. The characterisation of that provision is, with respect, inaccurate.
49. The '*specific hours*' provision⁸⁵ did not require fixed starting and finishing days, but provided an employee with a guaranteed number of hours per week and provided the employer with the flexibility to roster those hours over not more than 5 days per week.⁸⁶

⁸² There were claims made relating to the Hospitality Award, the *Registered and Licensed Clubs Award 2010* and *Restaurant Industry Award 2010*. The claim relating to the *Restaurant Industry Award 2010* was subsequently withdrawn;

⁸³ United Voice Submissions, dated 22 February 2016 at [32]-[34];

⁸⁴ United Voice Submissions, dated 22 February 2016 at [6]-[9];

⁸⁵ Clause 16.3.7 of the *Hotels, Resorts and Hospitality Industry Award 1995*;

⁸⁶ Clause 16.3.7 (a) of the *Hotels, Resorts and Hospitality Industry Award 1995*;

50. United Voice submits in their conclusion that non-compliance is ‘*endemic*’ in the hospitality sector.⁸⁷ On the material referred to in the United Voice Submissions, there is absolutely no basis for this conclusion; presumably it is based on the witness statement of Mr. Harvey and its reliance on the Reports of the Fair Work Ombudsman, which we address below.

Keith Harvey

51. The extent of Mr. Harvey’s evidence goes to summarising various reports relating to award reliance and industrial instrument compliance in the hospitality industries.

52. In relation to award reliance, Mr. Harvey does little more than to summarise Australian Bureau of Statistics reports for the Accommodation and Food Services Sector of the Australian and New Zealand Standard Industrial Classification 2006 (ANZSIC).

53. In relation to industrial instrument compliance, Mr. Harvey summarises 2 reports compiled by the Fair Work Ombudsman following compliance campaigns undertaken in waves within the hospitality industry as follows:

Wave 1: Accommodation/Taverns and Bars focusing on the Hospitality Award; and

*Wave 2: Restaurants, Cafes and Catering focusing on the *Restaurant Industry Award 2010*.*

A copy of these reports was filed in the Commission on 22 February 2016.

54. In the section titled “Conclusions” in his witness statement, Mr. Harvey states “*compliance with awards and agreements by employers **remains a significant problem, according to the Fair Work Ombudsman**, especially in the restaurants and cafes sector”.⁸⁸ (emphasis added)*

⁸⁷ United Voice Submissions, dated 22 February 2016 at [48];

⁸⁸ Exhibit 288 at [45];

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55. While this is somewhat qualified by the reference to the *restaurants, cafes and catering sector*, it fails to acknowledge the concluding remarks of the Fair Work Ombudsman’s Report titled “*National Hospitality Campaign 2012-2105 Accommodation, pubs, taverns and bars*” which states, “*the results of our audits in the accommodation, pubs taverns and bars sectors showed **these sectors had a better understanding of their rights and obligations than we expected in light of our initial complaint analysis***”.⁸⁹ (emphasis added)
56. The Report continues, “overall **the audit** of the accommodation, pubs, taverns and bars sector **has not revealed any significant industry wide issues**. The Employers have in the most part been cooperative during the audit process.”⁹⁰ (emphasis added)

Ms. Elena Marsiglia

57. Ms. Elena Marsiglia was not required for cross examination.
58. While her characterisation of the Associations’ proposed variation set out in her witness statement is not accurate⁹¹, the gravamen of her evidence is that her current part-time employment is covered by the Hospitality Award, and that she does not wish to lose her regular pattern of work (set days and hours) in the event that a flexible part-time employment provision is introduced into the Hospitality Award.⁹²
59. This concern can be accommodated by a transitional provision (we address this further in paragraphs [79]-[81] below).

██████████

60. ██████████ was not required for cross examination.

⁸⁹ Fair Work Ombudsman Report titled “*National Hospitality Campaign 2012-2105 Accommodation, pubs, taverns and bars*” at p.21;

⁹⁰ Fair Work Ombudsman Report titled “*National Hospitality Campaign 2012-2105 Accommodation, pubs, taverns and bars*” at p.22;

⁹¹ Exhibit 286 at [29];

⁹² Exhibit 286 at [12]-[20], [33];

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61. Similarly to the evidence of Ms. Marsiglia, [REDACTED] characterisation of the Associations' proposed variation set out in her witness statement is not accurate⁹³ and the gravamen of her evidence is that in her current part-time employment she has a regular pattern of work (set days and hours) and does not wish to lose that in the event that a flexible part-time employment provision is introduced into the Hospitality Award.⁹⁴
62. A key aspect of [REDACTED] evidence (and something which goes to the weight of her evidence) is that her employment is covered by the [REDACTED] [REDACTED] and therefore the Hospitality Award does not apply to her employment.⁹⁶
63. The [REDACTED] provides that a part-time employee is entitled to a specified/guaranteed number of hours, which are then rostered in accordance with 'contracted availability'.⁹⁷
64. Furthermore, it appears from her evidence that the arrangement she negotiated with her employer in 2011 is a flexible working arrangement.⁹⁸
65. [REDACTED] concern, which appears to be premised on her flexible working arrangement being jeopardised by the Associations' proposed variation, is not justified as such arrangements under the National Employment Standards cannot be undermined by a provision of a modern award.⁹⁹
66. To the extent that her concerns relate to the removal of the requirement for regular pattern of work (set days and hours) in the Hospitality Award, then those concerns can

⁹³ Exhibit 291 paragraph i) on p.4;

⁹⁴ Exhibit 291 at [12]-[18];

⁹⁵ Exhibit 291 at [13];

⁹⁶ *Fair Work Act 2009* at s47, s57;

⁹⁷ Clause 3.3 of the [REDACTED]

⁹⁸ Exhibit 291 at [15]-[17]; *Fair Work Act 2009* at s65; Clause 6.6 of the [REDACTED];

⁹⁹ *Fair Work Act 2009* at s44; s55;

be accommodated by a transitional provision (we address this further in paragraphs [79]-[81] below).

CONCLUSIONS/OBSERVATIONS AS TO THE EVIDENCE

67. In assessing the evidence and drawing conclusions and observations, it is important to take into consideration the trading characteristics of the hospitality industry. The Associations submit that the hospitality industry is characterised by a range of fluctuating trading characteristics which include unpredictability and peak service periods. In this respect, we refer to, and rely on; paragraphs [26]-[28] of our submission dated 5 August 2016 which were filed in response to the ACTU Common Claims.
68. The Associations submit that the following conclusions or observations can be drawn from the evidence:
- a. There is higher level of ‘award-reliance’ in the hospitality industry compared to other industries;
 - b. There is a much higher level of casual employees compared to part-time employees covered by the Hospitality Award;
 - c. The primary reason influencing an employer’s decision not to employ a part-time employee is the lack of flexibility in the part-time employment clause. Importantly in relation to this conclusion/observation is that employers can generally guarantee a quantum of ordinary hours, the problem is that they don’t have the flexibility of when that quantum of hours can be rostered;
 - d. The primary reason influencing an employer’s decision to implement an enterprise agreement is to gain a more flexible part-time employment provision;
 - e. Employees want flexibility as much as employers;

-
- f. Employees view a stable number of hours over a roster period as more important than those hours locked in at specific days and times. This is obviously qualified by those employees who have entered into specific flexible working arrangements;
- g. Requests for conversion from casual employment or full-time employment to part-time employment are being refused (which could include NES flexible working arrangement requests). The result being that a casual remains casual and the full-time employee either remains full-time or converts to casual. In this respect, we refer to paragraphs [62]-[63] of our submissions dated 12 October 2015;
- h. Some employees have withdrawn requests for conversion to part-time employment where it is apparent that they will not receive any hours in excess of their hours guaranteed;
- i. Some employers would prefer to employ part-time employees rather than casual employees for a range of reasons including:
- i. Some casual employees are less committed;
 - ii. Some casual employees are often, and out of necessity, seeking work from multiple places which creates labour sourcing issues for some employers;
 - iii. Some casual employees often refuse or cancel shifts at short notice;
 - iv. Casual employees are not contractually bound to attend work;
 - v. Part-time employees would provide greater stability in terms of business function and operation. That is, what the business does, how it does it and when it does it;
 - vi. In order to retain staff, reduce staff turnover and provide a career path for employees who cannot work on a full-time basis.

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- j. A flexible part-time employment provision will lead to more part-time employees in the hospitality industry and therefore, less casual employees.

PROVISIONAL VIEW OF THE FULL BENCH

69. On 2 September 2016, the Full Bench published a provisional view representing “*one possible way in which the applications concerning part-time employment might be resolved*”¹⁰⁰ (“the Provisional View”).
70. The Associations submit that the Provisional View is largely similar and consistent with the Associations’ proposed variation, with the major differences being the introduction of a minimum of at least 8 hours per week; and the ability to roster additional hours over and above an employee’s guaranteed hours within the employee’s availability at the ordinary hourly rate of pay. A comparison of the Associations’ proposed variation and the Provisional View is annexed hereto and marked with the letter “A”.
71. In relation to the increase in minimum number of hours to at least 8 hours per week or an average of 8 hours per week over the roster cycle, the Associations’ support this proposal.
72. In relation to the ability for an employer to roster additional hours within an employer’s availability, the Associations’ submit this is an appropriate way of promoting the utilisation of part-time employment in an industry where it is virtually non-existent.
73. Furthermore, it would remove a disincentive for employees to refuse offers of part-time employment or seek casual conversion in circumstances whereby the entitlement to overtime rates for work performed above their ordinary hours means the employer is unlikely to offer/roster any hours other than what was provided for in the

¹⁰⁰ Correspondence of the Fair Work Commission dated, 2 September 2016;

employee's regular pattern of work, and therefore, removes the likelihood of the employee receiving additional hours.¹⁰¹

Modifications

74. The Associations submit that the following modifications be made to the Provisional View. A copy of the Provisional View identifying these modifications in 'mark-up' is annexed hereto and marked with the letter "B".

Sub-Clauses (d) and (f)

75. The Associations' submit sub-clause (f) be deleted. The effect of sub-clause (f) is that an employee could unilaterally vary their availability by giving 28 days notice and substantially alter the employment contract. For example, an enterprising employee could provide 28 days notice to vary their availability, to days and time ranges that the employer's business does not trade, or by reducing their availability to a time range that contains less hours than the employee's guaranteed hours. It is unclear what would occur in such circumstances and whether or not the employer would still be obligated to pay the employee for the guaranteed hours (see sub-clause 12 (c) (i)) or whether it would create a *sham* redundancy situation or whether it would give rise to a repudiation of contract by the employee.

76. The Associations' submit that the more fairer and equitable way to deal with variations would be to make them subject to agreement by the employer and the employee. There are adequate existing legislative and/or other protections to deal with any disputes arising.

¹⁰¹ See the evidence of Mr. Darren Brown extracted at paragraph [23] of these Submissions;

Sub-clause (e) (ii)

77. This is a minor modification to make the range of hours per shift consistent with the existing provision in clause 29.2 of the Hospitality Award.

Sub-clause (e) (iii)

78. The Associations' submit that the requirement that the two days off per week are consecutive is potentially onerous and would not cater for employees whose availability (based on other commitments – such as study, alternative work, family) is structured in a way that does not accommodate two consecutive days. This will create a barrier to part-time employment for such persons and unnecessarily require an individual flexibility agreement to be entered into.

Transitional Provision

79. We refer to the evidence of Ms. Marsiglia and [REDACTED] set out above.¹⁰²

80. A convenient and sensible way to accommodate existing part-time employees with a regular pattern of work under the current part-time employment provision in the Hospitality Award is to implement a transitional provision preserving those arrangements and provides the employee with the option to opt out.

81. A possible provision is set out as follows:

Transitional Provision

An existing part-time employee who immediately prior to (insert date) has a written regular pattern of work must be rostered in accordance with that regular pattern of work, unless the part-time employee requests an arrangement in accordance with the preceding provisions of this clause.

¹⁰²See paragraphs [57]-[66]

THE OBJECTS OF THE ACT AND THE MODERN AWARDS OBJECTIVE

82. As submitted earlier in these submissions, the current part-time employment provision in the Hospitality Award does not meet the modern awards objective.
83. As such, the Associations submit that a variation to the current part-time employment provision in the Hospitality Award is necessary to meet the modern awards objective.
84. We referred to a number of the considerations forming part of the modern awards objective at paragraphs [53]-[64] of our submissions dated, 12 October 2015.
85. We make the following additional submissions regarding the objects of the Act and modern awards objective:

Section 3 (a)

It is abundantly clear on the evidence that the current part-time employment provision is not flexible for businesses operating in the hospitality industry.

Section 3 (b)

The current part-time employment provision is not a fair or relevant term for the hospitality industry.

Section 3 (d)

It is abundantly clear on the evidence that the current part-time employment provision in the Hospitality Award operates as a barrier to women returning to work on a part-time basis a period of maternity leave.

Section 134 (1) (a), (c), (f) and (g)

We refer to, and rely on, our submissions dated 12 October 2015.

Section 134 (1) (b)

We accept that a consideration of the modern awards objective is to *encourage* collective bargaining. However, it is submitted for the Associations that the current part-time employment provision goes further than that to *compel* employers to bargain in order to have the utilisation of a productive, effective and flexible modern part-time employment term.

Section 134 (1) (d)

In respect to the current part-time employment provision in the Hospitality Award, it is contrary to this particular consideration that a term of a modern award requires an employer to maintain sets days and hours regardless of the operational needs of the employer, or the personal needs of the employee.

Furthermore, it is unequivocally clear on the evidence that a flexible part-time employment provision in the Hospitality Award would remove the barrier to part-time employment in the sector and that the utilisation of permanent part-time employees, who could not refuse to attend work, would increase the efficiency and productivity of their workplaces.

CONCLUSION

86. The Associations' submit that a review of the particular operation of the particular part-time employment provision that is currently in the Hospitality Award, with reference to the evidence before the Commission, the modern awards objective and

the objects of the Act, makes it abundantly clear that the existing provision does not meet the modern awards objective or the objects of the Act.

87. In taking into consideration the terms of the Associations' proposed variation and the Provisional View, the Associations' annexe hereto and marked with the letter "C" a further amended draft determination.
88. The Associations' submit that we have put before the Commission relevant evidence and submissions that satisfies the '*substantive case*' requirement envisaged by a Full Bench of the Commission in *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].
89. For these reasons it is submitted that the Commission vary the Hospitality Award in accordance with the further amended draft determination set out in Annexure C.

For the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motels Accommodation Association

16 September 2016

ANNEXURE “A”

COMPARISON OF THE ASSOCIATIONS’ PROPOSED VARIATION AND THE FULL BENCH’S PROVISIONAL VIEW

Component/Requirement	Associations’ Variation	Provisional View
Guaranteed Hours	3-37pw or 12-148 per 4 week period	8-38pw or averaged per roster period
Days Off per week	2-3 depending on hours not required to be consecutive	2 consecutive days
Shift length	3-11.5 hours	3-12 hours
Roster Period	1 or 4 weeks	The applicable roster period (could be 1,2,3 or 4 weeks)
Change to guaranteed hours	By agreement	With employee consent
Change to availability / guaranteed days off	By agreement	By employee giving 28 days notice
Rostering outside of availability	N/A	Not permitted
Overtime	In excess of rostered hours; on days off and in excess of maximum shift length	In excess of rostered hours
Status of employee if not part-time	To be engaged and paid as a casual	To be engaged and paid as a casual
Payment	1/38 th of the weekly rate	1/38 th of the weekly rate

ANNEXURE “B”
PROVISIONAL VIEW “MARK-UP”
HOSPITALITY INDUSTRY (GENERAL) AWARD

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 *or the employee's availability* may only occur ~~with the written consent of the employee by agreement and will be recorded in writing.~~
- (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 *or in excess of 11.5 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.~~

- (f) 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**.
- (g) 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~~ *13*.
- (h) 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.

ANNEXURE “C”

FURTHER AMENDED DRAFT DETERMINATION

PRXXXXXX

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

**4 yearly review of modern awards – Part-Time Employment
(AM2014/196)**

**HOSPITALITY INDUSTRY (GENERAL) AWARD 2010
[MA000009]**

A. It is ordered that the *Hospitality Industry (General) Award 2010* be varied as follows:

1. By deleting clause 12 in its entirety and inserting the following:

“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:

- (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 or the employee's availability may only occur by agreement and will be recorded in writing.
- (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 less than 3 hours or in excess of 11.5 hours in a day; and
- (iii) the employee must have two days off each week.
- (f) 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**.
- (g) 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.
- (h) 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."
2. By deleting the words "*A part-time employee's regular pattern of work must meet the following conditions:*" appearing at the beginning of clause 29.2 and inserting in lieu "*A part-time employee's guaranteed hours, and any additional hours are to be rostered in accordance with the following conditions:*"
3. By deleting the reference to "*clause 12.7*" in clause 33.2 (b) and inserting in lieu "*clause 12 (f)*".
- B. This determination comes into operation on the first full pay period on or after DD Month YYYY.

BY THE COMMISSION