

# **IN THE FAIR WORK COMMISSION**

**Matter No.: AM2014/196 and AM2014/197**

*Fair Work Act 2009*

**s.156 – 4 yearly review of modern awards**

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

## **Submissions in Reply of the Australian Council of Trade Unions (ACTU)**

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## **Background**

1. We refer to the 4 yearly award review common claims proceedings, matters AM2014/196 and AM2014/197 ('these Proceedings').
2. These submissions are filed in these Proceedings on behalf of the Australian Council of Trade Unions ('ACTU') in accordance with direction [7] of the Commission's Statement of 22 February 2016. They are filed in reply to the draft determinations, submissions and evidence filed by Australian Business Industrial and NSW Business Chamber Ltd ('ABI') and St Ives Group in relation to the Social, Community, Home Care and Disability Services Award ('SCHCDS Award') and St Ives Group in relation to the Aged Care Award 2010 and Nurses Award 2010 in these Proceedings (together 'the Employer Groups' Health Services Claims').
3. The ACTU opposes the Employer Groups' Health Services Claims and supports and also relies on the reply submissions and evidence being filed in relation to them by the Australian Nursing and Midwifery Federation ('ANMF'), Australian Services Union ('ASU'), United Voice and the Health Services Union ('HSU') ('together the Union Parties').
4. In responding to the Employer Groups' Health Services Claims, the ACTU also relies on the submissions and evidence we filed in support of our common claim in these proceedings.<sup>1</sup> The ACTU will also refer to and rely on some of the evidence filed by employer parties in the Employer Groups' Health Services Claims in the submissions we later make in support of our common claim.

### **The Employer Groups' Health Services Claims**

5. In summary, ABI and St Ives Group collectively seek in the main to vary the above three health services-related awards in order to provide more employer-oriented flexibility for both part-time employment and rostering arrangements by removing significant employee protections.

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<sup>1</sup> See ACTU Submissions and supporting evidence, including ACTU Submissions dated 19 October 2015 and attachments and expert reports of Professor Markey et al, especially Professor Markey et al, *Report on Casual and Part-time Employment in Australia*, filed by ACTU on 19 October 2015, ('Expert Report') and Professor Markey et al, *Supplementary Report on Casual and Part-time Employment in Australia*, filed by ACTU ('Supplementary Expert Report') and Professor Markey et al, *Second Supplementary Report on Casual and Part-time Employment in Australia*, filed by ACTU ('Second Supplementary Expert Report').

6. Currently, under the affected awards, part-time employees have a right to guaranteed hours of work, including guaranteed quantum of hours, days of work and start and finish times. For example, clause 10.3(b) of the Aged Care Award 2010 states that:

*“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.”*

Under clause 10.3(c) of that award, ‘Any agreed variation to the hours of work will be in writing.’

7. The Employer Groups’ Health Services Claims would significantly reduce the security of part-time employment. The proposals would effectively replace part-time employment with a new category of flexible part-time employment by removing the requirement that a part-time employee and their employer agree on the guaranteed hours and days of work and start and finish times before the commencement of a part-time employee’s employment. The proposals would replace this with the ability for the parties to agree on a minimum quantum of hours, with the capacity for rostering ‘additional’ hours, and both the additional and minimum hours would be subject to less employee protections and certainty.

8. St Ives Group proposes to replace 10.3 (b) of the Aged Care Award 2010 to provide merely that *‘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’*. St Ives Group’s proposal in relation to the SCHCDS Award and Nurses Award 2010 are in similar terms. ABI’s proposal in relation to the SCHCDS Award includes that the present clause 10.3 be amended to provide that:

*“Before commencing the employment, an employer:*

- (i) must agree in writing with the employee on the minimum number of hours to be worked each week; and*

(ii) *may agree in writing with the employee on the days of the week the employee will work and/or the starting and finishing times each day.*<sup>2</sup>

9. The proposals include that part-time employees may be offered and accept additional hours of work.<sup>3</sup>

10. Hence, under both ABI and St Ives Group's proposals, the current guarantees under the relevant awards vis-à-vis fixed quantum of hours, days of work, length of shift and start and finish times would be reduced to:

- a. A core minimum of number of hours of work to be worked each week plus 'additional' hours;
- b. Under the St Ives proposals, only the employee's available days and hours of work must be set before commencement of employment or varied subsequently by agreement in writing. The employer may then unilaterally roster hours within that availability.
- c. Under ABI's proposal, only *either* the employee's days of the week and/or start and finish times must be set before commencement of employment or varied subsequently by agreement in writing. An employer may then unilaterally roster employees within that availability. If only an employee's start and finish times are set, an employer may unilaterally roster an employee's minimum hours on any day of the week, irrespective of the employee's preferences as to days of work. If only an employee's days of work are set, an employer may unilaterally roster an employee's minimum hours at any time and for any length on that day irrespective of employee's preferences in that regard.
- d. Both St Ives and ABI's proposals allow greater capacity for employers to roster split shifts, short shifts and to vary hours of work unilaterally through rostering arrangements.
- e. The 'additional' hours component of an employee's engagement present the highest insecurity as:

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<sup>2</sup> See draft determination filed by ABI attached to ABI's Outline of Submissions dated 30 November 2015.

<sup>3</sup> For example, see proposed clause 10.3(d) of the Aged Care Award 2010 in St Ives' proposed draft variation to that award.

- i. these hours are not guaranteed week to week and are unilaterally determined in quantum or spread of hours by the employer; and
  - ii. they are not prescribed by the employee's availability regarding his or her minimum hours of work and could be rostered at any time, day of the week, and could involve shifts of variable length, subject to the awards minimum engagement provisions, which are already quite low.
- f. Most alarmingly, under the proposals, there would be no award protection against an employee's minimum hours of work on which they rely from being replaced partly or wholly by 'additional' hours except that an employee must 'agree' to it. As discussed below, this agreement is likely in many cases to be dictated by employers on their terms.
- g. The proposed variations do not include any loading akin to the casual loading in relation to the contingent 'additional' hours in compensation for the security foregone.
11. There is no limit in the proposed terms as to how low an employee's minimum hours may be set, so it could be as little as zero, with the remainder of hours worked on a variable basis. In that event, all hours could subsequently be set unilaterally by the employer through rostering arrangements and no casual loading would apply. A veritable Pandora's Box is evident when one even attempts to reconcile such a significant variation in the character of 'permanent' employment with present orthodoxy regarding the duties of employees, particularly any aspects of the duty of fidelity which concerns conflict, competition or inconsistent engagement. Whether an employee could be compelled to be 'available' on zero or minimal guaranteed hours but also simultaneously restrained from working for a competitor, for example, is of genuine concern. Granted, this is not a concern that the Commission is incapable of resolving in the abstract, but the recognition that such issues might arise is itself a powerful argument against granting the claim.
12. The claim would remove rostering protections by allowing employers to give less notice of rostering arrangements and remove the requirement that rosters must be displayed in the workplace. Currently, under the Aged Care Award 2010, SCHCDS Award and the Nurses Award 2010, rosters must be displayed in the workplace two

weeks before the roster commences. St Ives Group's proposed changes would remove the requirement to display the roster in the work place. If the roster is displayed, it would only need to be displayed seven days before it starts. The roster may instead be communicated by telephone, direct contact, mail, email or facsimile *without any prescribed notice at all*.

13. Under St Ives' proposal to the SCHCDS award, employees would lose the right to get paid if they are not notified of a client cancellation by 5PM the day before (albeit that they currently might be required to work make up time for the pay provided).

### **Consequences of the claims for employees**

14. The consequences of the Employer Groups' Health Services Claims for employees are that the claims constitute an erosion of the various forms of employee security that benefit part-time employees under the affected awards and are at the heart of the concept of permanent employment generally, including income security, regularity and quantum of income, working time security including quantum of hours and times and days of work, shift length, roster certainty and notice of roster arrangements. Hence, the proposals would make part-time work more akin to casual work and without any loading in compensation. Without the casual loading, the contingent 'additional' hours of part-time employees on the terms proposed would provide lower conditions than casual employment under the award.
15. Given the inherent power disparity between employer and employee, the proposed award terms would allow for the minimum hours of work of a part-time employee to be set to as little as zero on commencement or reduced subsequently by 'agreement' with all other hours worked as 'additional hours' on a contingent basis. The evidence suggests, such 'agreement' is in many cases unlikely to be freely negotiated or genuinely reciprocal and likely in many cases to largely be on employers' terms, if not unilaterally determined by employers. There is ample evidence that employees feel various pressures to accept hours of work and conditions proposed by employers.<sup>4</sup> In part, this may be because when negotiating with employers about such matters, employees are usually engaging directly with their employers on an

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<sup>4</sup> See ACTU Submissions dated 19 October 2015 at paragraph 87.

individual basis rather than with the collective support as might apply in collective bargaining or other processes. The evidence in relation to casual employees' experience of negotiating hours of work is instructive. By removing part-time employees' working time security, part-time employees would need to negotiate hours more like casual employees and are likely to experience similarly detrimental outcomes. As Markey et al note in evidence filed by the ACTU in our common claim:

*“Much of the evidence concludes that casual work is often controlled by employers – with hours largely dictated to employees (ACTU, 2012; Bohle et al, 2011; Heron and Charlesworth, 2012; Hosking and Western, 2008; LaMontagne et al, 2012; Masterman-Smith and Elton, 2007; McGann, Moss and White, 2012; McNamara, Bohle and Quinlan, 2011; Pocock, Prosser and Bridge, 2004). Figure 4.2, based on the ACTU survey, shows that 40 per cent of casuals indicate having very little say over their working hours, while only 26 per cent indicate having a lot of say. Analysis of HILDA data also shows that casual employees had lower average satisfaction with hours worked than permanent employees.”<sup>5</sup>*

16. The claim would provide greater capacity for employers to make short-sighted labour cost-cutting measures via reducing employees' 'additional' hours, giving employers greater managerial prerogative over hours and times of work. A significant proportion of new and existing part-time employees are hence at risk of seeing their quantum of guaranteed hours of work set to less than they otherwise would be, or of seeing those hours subsequently diminish and to as little as zero to be replaced with contingent and variable 'additional hours'. Such employees may subsequently be subjected to sudden increases or reductions in hours of work.
17. The ACTU has provided extensive evidence on the effects of unpredictable hours on employee's health, wellbeing, finances and work/life balance.<sup>6</sup> Linda Rackstraw's evidence filed in the ACTU's common claim speaks to the financial devastation and psychological stress that a sudden reduction in hours of work may produce and also the stress presented by living in fear of hours being reduced in future where employers have the power to do so. The Employer Groups' Health Services Claims

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<sup>5</sup> See Professor Markey et al, Expert Report, p21.

<sup>6</sup> See, for example, Expert Report, p26-29, 37.

would provide such a power and create ongoing roster uncertainty *for all permanent employees* affected by these awards who are urged to agree to an additional hours component. The proposals would also introduce uncertainty into employee's core minimum hours.

18. As Professor Markey et al note in evidence in the ACTU's common claim in relation to minimum hours of work:

*"...we see no benefit to be gained for employees in making permanent part-time work more closely approximate the conditions under which casuals work by reducing minimum engagements, minimum guaranteed hours, or increasing other variability in days of work. Indeed, this would only serve to subject part-time workers to the same feelings of powerlessness and being on-call and at the mercy of employers' whims as many casuals currently experience. The notion of making shifts easier to cancel at short notice can also only have negative effects on permanent part-time workers and their ability to plan and manage their lives. There is also a strong gendered aspect to this issue in that a high proportion of casuals [sic – part-time workers] are women, and many of these rely on predictability of hours for child-care arrangements. If anything, we think it likely that it would be more beneficial to move in the opposite direction, making casual conditions more closely approximate those enjoyed by their part-time counterparts."*<sup>7</sup>

19. Professor Markey et al further note:

*"...we see no economic benefit likely to accrue to permanent part-time employees by reducing protection and effectively increasing managerial prerogative over their hours of work. Reducing guaranteed hours and minimum engagements can only have the effect of reducing the earnings of permanent part-time workers. This also subjects them to greater variability and insecurity than they currently experience."*<sup>8</sup>

20. The ACTU has filed extensive material showing the financial and social consequences of lack of security in the context of casual employment. By undermining the security of part-time employment and making it more contingent and

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<sup>7</sup> See Markey et al, Second Supplementary Report at p20-21.

<sup>8</sup> Prof. Markey et al, Second Supplementary Report at p21.

akin to casual employment, the Employer Groups' Health Services Claims would expose part-time employees to many of the adverse effects that casual employees experience, including<sup>9</sup>:

- a. The lower security attaching to casual employment compared to traditional permanent employment, which includes lower security of income, hours, overall earnings and reduced predictability and reliability and increased intermittency of pay,<sup>10</sup> reduced employee-oriented flexibility such as control over hours and days of work and control over quantum of hours including that casual employees often receive more or less hours of work than desired<sup>11</sup> and fluctuating pay caused by working time insecurity and income insecurity;<sup>12</sup>
- b. The variability and insecurity of income that attends casual employment which makes financial planning for the medium and long-term difficult;
- c. Reduced access to finance caused by lower hours and income insecurity;<sup>13</sup>
- d. The detrimental affects of variability of hours on employees' family and social life, well being, and health and workers' work/life balance and their ability to plan their lives;
- e. Lack of minimum hours' protections for both casual and part-time employees particularly disaffects low income earners by reducing overall take-home pay after accounting for child care and the costs of attending work. Shorter engagements are particularly unviable for women who in practice still share the majority of child care responsibilities.
- f. Greater insecurity of pay, income and roster uncertainty in industries with a high proportion of female employees compared to other industries contributes to gender inequality including the gender pay gap, women's lower superannuation and retirement savings. The industries affected by the Employer Groups' Health Services Claims employ a very high proportion of women.

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<sup>9</sup> See, for example, ACTU Submission dated 19 October at paragraphs 77 and 98(g) and evidence referenced therein. See also the Expert Report and Supplementary Expert Report and Second Supplementary Report.

<sup>10</sup> See ACTU Submissions dated 19 October 2015, paragraph 77; Expert Report of Professor Ray Markey, p26.

<sup>11</sup> See Lives on Hold report filed by ACTU, p17; Expert Report, p29.

<sup>12</sup> Ibid.

<sup>13</sup> See Supplementary Expert Report, para 37.

21. The Employer Groups' Health Services Claims provide less roster certainty for part-time employees, less notice of rostering arrangements and would remove the requirement that rosters be displayed in the workplace. Under St Ives Group's proposal, rostering arrangements and changes to rosters may be communicated by telephone, direct contact, mail, email or facsimile and rosters may be so communicated without any minimum notice. This could have the consequence that employees are required to continually check, for example, their email, during non-working times or be constantly available by telephone during non-working times in case of roster changes. There is no requirement that the employer communicate via the employee's preferred mode of contact. Hence, this could also mean that an employee could be required to be constantly checking various modes of communication. Hence, the proposed changes to rostering under the affected awards would make part-time employment more akin to on-call casual employment in its intrusion on non-working hours and without any loading component in compensation.
22. These claims are not being driven by employee preferences or employee demand amongst part-time employees in the affected industries. The claims are contrary to employee preferences and needs. As Professor Markey et al note in evidence filed by the ACTU in support of our common claim:
- “Herron and Charlesworth (2012: 216) argue that “basic employee entitlements to regular and predictable hours, and a say in whether and how these conditions can be changed” are “crucial to accessing specific employee-oriented flexibility.”<sup>14</sup>*
23. As the Australian Workplace Relations Study ('AWRS') data shows, 61 per cent of permanent part-time employees in the health care and social assistance industry express a preference for 'about the same hours' and 33.3 per cent would prefer more hours per week. A mere 5.5 per cent would prefer fewer hours per week.<sup>15</sup> This suggests that varying awards to allow for employers to have the capacity to reduce part-time employees' hours would be contrary to 94.5 per cent of permanent part-time employees' preferences in the relevant industry.

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<sup>14</sup> See Expert Report at p21.

<sup>15</sup> See AWRS data in table 5.3 of the Supplementary Expert Report at page 58.

24. There is evidence that a significant proportion of casual employees in the affected industries would prefer permanent employment and require the greater security that part-time employment provides.<sup>16</sup> The claim would undermine the attractiveness of part-time employment for those employees.

### **The arguments presented for the Employer Groups' Health Services Claims**

25. There is some difficulty in ascertaining the arguments advanced in support of the Employer Groups' Health Services Claims as the materials filed are inadequate. ABI's Outline of Submissions makes no submissions of any substance as to how their claim meets the modern awards objective.<sup>17</sup> St Ives Group has filed no submissions in relation to its claim.

26. To the extent they are able to be ascertained from the employers' submissions and inferred from the witness statements filed, the employer groups' case for the proposed changes appears to comprise the following propositions:

- a. Part-time employment is better for employers because it:
  - i. reduces staff turnover, provides a more stable workforce and avoids having to continually recruit, train and support casual staff;
  - ii. provides a more skilled and experienced workforce; and
  - iii. creates a more dedicated workforce more committed to its clients.
- b. Employers invest in securing, retraining, training and developing their permanent workforce.<sup>18</sup>
- c. Part-time employment benefits clients, who prefer certainty regarding who will be caring for them, a familiar face and facilitating the development of ongoing relationships with staff members and providing reliable, consistent, long-term care, more skilled and expert care, and higher employee commitment to clients.<sup>19</sup> For example, according to one parent of a severely

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<sup>16</sup> For example, 32.9 per cent of casual employees in the Health Care and Social Assistance industry would prefer to become permanent according to the ACTU Survey: see Figure 4.7 in the Supplementary Expert Report at p46.

<sup>17</sup> See ABI's Outline of Submissions dated 30 November 2015.

<sup>18</sup> See witness Statement of Hugh Packard at para 26.

<sup>19</sup> For example, see *ibid* paras 27-33.

disabled client quoted in the witness statement of Hugh Packard filed by ABI, *“Our biggest priority is that support must be provided by reliable, consistent, long-term permanent staff instead of by a passing parade of casuals”* and Mr Packard notes many parents, guardians and clients have expressed similar sentiments;<sup>20</sup>

- d. Part-time employment is better for employees because it provides leave entitlements;<sup>21</sup>
- e. The health services industry has become more casualised;
- f. The National Disability Insurance Scheme (‘NDIS’) will introduce a number of significant changes such as:
  - iv. Increased client demand;
  - v. Increased cost pressures; and
  - vi. More variable demand due to more client-focussed service;
- g. These NDIS changes necessitate greater flexibility for employers;
- h. The health services industry is likely to become more casualised under NDIS;
- i. Employers are prevented from hiring more part-time workers due to the lack of flexibility of part-time employment which has caused a casualisation of the workforce;
- j. The NDIS changes will cause a further casualisation of the workforce;
- k. The Employer Groups’ Health Services Claims will prevent increased casualisation and facilitate more part-time employment by making permanent employment more attractive to employers (by making it more flexible); and
- l. The proposed changes are necessary for employers.

27. The ACTU does not dispute propositions (a)-(e) in paragraph (26) above. Permanent employment presents various advantages to employers, employees and clients compared to casual employment. However, the agreed benefits of permanent employment are based on the experience of permanent employment as presently

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<sup>20</sup> See witness statement of Hugh Kenneth Packard dated 26 November 2015 at paragraphs 30-32.

<sup>21</sup> See affidavit of Anthony Rohr filed by ABI at para 17.

understood. The Employer Groups' Health Services Claims seek to dilute permanent employment as presently understood into something very different and to such an extent that these agreed benefits would be less of a feature, if at all a feature, of the new category of employment they are seeking to establish in their claims. These agreed features of permanent employment cannot, in those circumstances, be argued as matters that support the creation of this new category of employment.

28. The ACTU disputes the other propositions underlying the Employer Groups' Health Services Claims. We now address some of these propositions in turn.
29. Firstly, the cost implications and any cost pressures resulting from the NDIS changes are currently unknown as the scheme has not yet been finalised and may yet be significantly changed. As the Union Parties' evidence will show, there is unlikely to be any significant increase in the variability of client demand in NDIS-affected industries. The vast majority of client services in those industries will continue to remain consistent and highly predictable, not least because:
- a. Services are required to be managed under a 12-month care plan;
  - b. A significant proportion of services under NDIS will be provided in group homes, large centres and aged care facilities; and
  - c. Most client needs are highly routine such as being showered in the morning and evening and assisted with weekly shopping and ongoing needs.
30. Secondly, any variability in demand does not necessitate the changes sought as it can be managed through operational practices. As business management theorists like Zaynep Ton argue, enterprises have various options in how to respond to fluctuating demand and cost pressures.<sup>22</sup> In other industries facing fluctuations in demand, unsophisticated operational strategies that simply respond to variable demand by crudely varying labour supply and thereby shifting cost to workers have been shown to be counterproductive to productivity, profitability and service quality.<sup>23</sup> Similarly,

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<sup>22</sup> See Ton, Zeynep, *The Good Jobs Strategy: How the Smartest Companies Invest in Employees to Lower Costs and Boost Profits*, 2014, which draws on her academic work in this area. See, for example, Ton, Zaynep, *The Effect of Labor on Profitability: the Role of Quality*, Harvard Business School Working Paper, 2008; Ton, Zaynep, RS Huckman, 'Managing the impact of employee turnover on performance: The role of process conformance' *Organization Science* v19(1), pp56-68, 2008; Raman, Horatius, Ton, 'Execution: The missing link in retail operations', in *California Management Review*, vol 43(3), 2001, pp136-152; Ton, Z, 'Why "good jobs" are good for retailers' in *Harvard Business Review* (2012), 90(1-2):124-31, 154.

<sup>23</sup> *Ibid.*

organisations that respond to cost pressures by cutting employees' hours and scheduling protections are likely to hurt their organisation's bottom line in the long run by raising other costs, increasing staff turnover and reducing employee motivation.<sup>24</sup> Degrading employee's working time and hours security is a 'low road' approach to such pressures that not only undermines job quality but threatens organisations' bottom line. As Ton notes in relation to her study of the low cost retail industries in several countries:

*"...when companies shift the cost of their uncertainty about customer traffic onto employees, they not only affect the lives of employees but also the customer's store experience and the company's profits. Employees who find it hard to manage their lives, or even just to get by, because of unexpected changes in their hours and hence their incomes do not come to work motivated or happy. Who would enjoy getting a new schedule every week or having his or her schedule changed the night before or working in really short shifts? Unhappy employees are less likely to be committed to their jobs and less likely to stay."*<sup>25</sup>

31. Instead, better operational strategies that respond to varying demand and cost pressures by *improving*, not degrading, job quality yield better bottom line performance. Ton argues that such approaches have been proven to work even in the low cost end of the retail industry in the United States and Spain despite intense cost competition, high customer demand variability and in the presence of intense competition from notorious low wage competitors such as Wal Mart. If such strategies can work in those conditions they can work in any industry. A high road approach – that which Ton calls the Good Jobs Strategy – involves, investing in employees, focussing on quality of service and customer needs and cultivating an organisational culture of excellence. She distils the following operational principles that have proven successful in the organisations she studied<sup>26</sup>:

- a. Invest in employees via training and high wages and conditions;
- b. offer less products or services,

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<sup>24</sup> Ibid.

<sup>25</sup> See Ton, Zeynep, *The Good Jobs Strategy: How the Smartest Companies Invest in Employees to Lower Costs and Boost Profits*, 2014 at pp. 141-142.

<sup>26</sup> Ibid.

- c. standardise procedures and services,
  - d. empower employees to make operational decisions, solve problems and to innovate,
  - e. cross-train employees to help cope with demand variation;
  - f. operate with slack so staff can make better decisions and avoid mistakes, do their jobs to a high standard, have capacity to adapt to varied demand and have time to innovate.
32. In the context of the industries affected by the NDIS changes, a Good Jobs Strategy might entail responding to variability in client demand and/or cost pressures through:
- a. Better forward planning;
  - b. Aggregating client services into blocks of employee time;
  - c. Cross training employees to facilitate aggregation and the covering of absenteeism and fluctuations in demand;
  - d. Standardising procedures;
  - e. Standardising some client service packages;
  - f. Limiting the selection of available services;
  - g. More employee consultation in rostering and operational matters;
  - h. Concentration on job quality, skills training and building a culture of service and operational excellence.
33. As the employer groups' own evidence shows, job quality has a significant effect on service quality and clients have a strong need and preference for skilled, consistent care. These objectives are likely to be undermined by regulations that facilitate 'low road' operational strategies.
34. As employers have already utilised their capacity to casualise their workforce, facilitated by the current regulatory system, there is no guarantee that more flexible part-time employment would prevent or diminish casualisation in the industries affected by the Employer Groups' Health Services Claims. As the employer groups' evidence shows, employers in that industry have used the extent of flexibility available to them by casualising their workforces against the wishes of clients for

permanent employment and despite proclaiming its benefits for all concerned. The employer groups' claims may only have the effect of adding to the overall insecurity of the workforce by making part-time employees additionally less secure without addressing the casualisation problem. Indeed, by reducing the attractiveness of part-time employment, the Employer Groups' Health Services Claims may reduce employee's incentive to convert or otherwise choose part-time employment and thereby exacerbate the casualisation problem.

35. Hence, the preferable way to meet the preference of clients, employers and employees alike for permanent employment, and address any risk of casualisation is through an industry-wide right of conversion to permanent employment, not through eroding the security and attractiveness of part-time employment.
36. Additionally, it must be noted that the proposed changes would not just affect those employees affected by NDIS-related changes but undermine the conditions of all part-time employees under the affected awards and the employer groups have not justified the changes with respect to those other employees.

### **Modern awards objective**

37. The requirements of the modern awards objective and the approach of the Commission to the 4-yearly award review are outlined in the ACTU's prior submission in the ACTU's common claim and need not be repeated here.<sup>27</sup> It is incumbent on a party seeking to vary an award to file submissions and probative evidence showing how the modern awards objective necessitates the changes sought. A proposal for a very significant change requires a higher standard of submissions and probative evidence to overcome the presumption that the modern awards objective has been met.
38. The Employer Groups' Health Services Claims regarding part-time employment are a very significant change, creating a new category of part-time employment that is largely foreign to the concept and its legal history, with significant consequences for the security of part-time employment. Yet St Ives Group has not filed any submissions at all in support of the variations it seeks and ABI has not articulated how

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<sup>27</sup> See ACTU Submission dated 19 October 2016 from paragraphs 21-25 and 107-109.

the claim meets the modern awards objective. The evidence and submissions these parties filed is insufficient to support such a significant change.

39. The modern awards objective, in our submission, requires increasing the security of part-time workers, not decreasing it. In summary, the proposed claims would fall foul of the modern awards objective and undermine the award system as a fair and relevant safety net, having regard to the limbs of s134 of the *Fair Work Act 2009* as follows:

*Fair and relevant safety net*

- a. In its common claim, the ACTU has filed submissions and evidence showing the modern awards system has contributed to a general problem of insecure work, inequality and gender inequity caused by lack of security for casual and part-time workers.<sup>28</sup> The proposed changes would exacerbate this problem;
- b. It is unfair that part-time workers would have lower conditions in relation to their contingent hours than casual employees under the same awards through lack of access to a casual loading in compensation for the loss of hours and income security. Under the proposed changes, much or indeed all of many part-time employees' hours could be replaced by variable 'additional hours';
- c. It is unfair that part-time workers under the affected awards would have significantly lower security than part-workers under other awards;

*Section 134(1)(a): the relative living standard and the needs of the low paid*

- d. The Employer Groups' Health Services Claims would undermine the pay and working time security of part-time workers in the affected industries. The affected industries contain many low paid workers. Pay and working time security are of particular importance to low paid workers who are likely to be disproportionately impacted upon in financial and other ways by such lack of security, including a disproportionate reduction in overall take-home pay as a result of a reduction in minimum hours of work after accounting for child care and the other costs of attending work.

*Section 134(1)(b): the need to encourage collective bargaining*

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<sup>28</sup> See, for example, ACTU Submission dated 19 October 2016 and the evidence referred to therein.

- e. The Employer Groups have not provided evidence that the claims would encourage collective bargaining. The flexibility sought is likely to be counter-productive but if sought anywhere, should instead be sought through collective bargaining and not by eroding the safety net that underpins it.

*Section 134(1)(c): the need to promote social inclusion through increased workforce participation*

- f. The claims would diminish social inclusion by diminishing part-time employees' work/life balance and capacity to plan and manage their lives and subject them to greater variation of working time and roster uncertainty. The proposed changes to the roster provisions of affected awards would present an intrusion into the non-working time of part-time employees who may then be required to constantly check their email and/or other modes of communication for roster arrangements and would receive less notice of their rostered hours of work.

*Section 134(1)(d): the need to promote flexible modern work practices and the efficient and productive performance of work*

- g. The proposed changes would undermine employee-oriented flexibility. As described above, basic employee entitlements to regular and predictable hours are crucial to accessing employee oriented-flexibility. The diminution of job quality that the changes would effect and the shifting of cost onto employees is a 'low road' strategy to responding to cost pressures and demand variability that is likely to reduce both labour productivity and organisational productivity over time by reducing employee motivation and commitment, increasing staff turnover and de-incentivising employers to pursue better operational strategies that would improve productivity such as investment in training and a focus on service quality and organisational excellence, all of which are compromised by eroding working time and pay security.

*Section 134(1)(e): the principle of equal remuneration for work of equal or comparable value*

- h. As Professor Markey et al note, jobs under the SCHCDS Award and Aged Care Award are already both 'feminised' and contain low minimum hours

protections. For example, the SCHCDS award contains a minimum engagement of just one hour and the Aged Care Award 2010 just 2 hours. These jobs are often both low paid and highly gendered. Hence, this lack of protection “reflects persistent devaluing of female-dominated work”.<sup>29</sup>

- i. The Employer Groups’ Health Services Claims would exacerbate this problem by both further degrading minimum hours protections and undermining pay security and reduce pay for workers in these industries.
- j. Greater insecurity of pay, income and roster uncertainty in the affected industries, as they contain a very high proportion of women compared to other industries, would further exacerbate gender inequality, including the gender pay gap, women’s lower superannuation and retirement savings. The claims would also erode employee’s minimum hours protections and give greater capacity for employers to roster shorter or more dispersed hours of work. Short shifts provide lower overall take home pay after taking into account the costs of attending work, including child care and are particularly unviable for women who in practice still share the majority of child care responsibilities.

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

- k. The claims are likely to have a negative impact on business in terms of both productivity and employment costs by eroding the job quality of part time employees and would encouraging the opposite of the practices required for organisational excellence, and higher productivity though job-quality focussed operational strategies.
- l. The claims are likely to contribute to underemployment by providing less security of hours and income for all part-time employees and by providing employers with the capacity to reduce employees’ hours without consent from roster to roster.

*Section 134(1)(g): the need to ensure a simple, easy to understand, stable and sustainable modern award system*

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<sup>29</sup> See Expert Report, p23.

m. Section 134(1)(g) of the modern awards objective suggests the status quo should be preserved in the interests of a stable modern award system unless there is cogent evidence suggesting otherwise. No cogent case has been presented to suggest the modern award system ought to be varied;

*Section 134(1)(h): the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy*

n. As described above, the proposed changes are likely to contribute to underemployment and facilitate unnecessary increases in service delivery cost.

40. Further, as the Preliminary Jurisdiction Issues Decision of the Full Bench of the Fair Work Commission confirms, in this review:

*“...the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s138). What is ‘necessary’ in a particular case is a value judgement based on an assessment of the considerations in s134(a) to (h), having regard to the submissions and evidence directed to those considerations.”<sup>30</sup>*

41. However, the proposed terms are not necessary in order to provide the increased employer-oriented flexibility the claimants claim employers require. Even if the terms were required, and we submit they are not, employers have other options such as operational strategies, including rostering arrangements and training and capacity building, that better further productivity and job quality and avoid the egregious effect of the claims on part-time employees’ pay and working time security.

## **Conclusion**

42. In conclusion, the modern awards objective requires that the Employer Groups’ Health Services Claims be rejected. The evidence does not support the claims being made in support of the changes and in any event the claimed facts would not necessitate the changes sought. The NDIS changes do not require eroding employee

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<sup>30</sup> See [2014] FWCFB 1788 at para [60], subparagraph (5).

security. Such an erosion would be contrary to the objectives of the NDIS scheme to provide quality care at low cost. The changes would facilitate the exacerbation of inequality and gender inequity and other problems identified in the ACTU's evidence resulting from lack of employment-related security.