

**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 Response by:**

**Australian Council of Trade Unions (ACTU)**

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## **Background**

1. These submissions are filed in accordance with the Commission's directions of 29 June 2015 and in response to the claims, including draft determinations and submissions, made by the various employer groups filed earlier in accordance with those directions.
2. Employer groups have made a number of claims for greater employer-oriented flexibility. These claims propose changes to awards that would provide greater managerial freedom to, for example, employ casual workers, set hours of work, reduce minimum hours of work and the working time security of casual and part-time employees and reduced obligations to notify employees of their rights. They include claims to:

### *Re casual employment*

- a. remove the requirement to notify casual workers of the right to convert from casual to permanent employment in 21 of the 120 modern awards (filed by the Australian Industry Group, and the Recruitment and Consulting Services Association);
- b. reduce the minimum hours of engagement of casual employees in a number of modern awards (Ai Group, South Australian Wine Industry Association, National Farmers Federation, Pharmacy Guild of Australia, Australian Public Transport Industry Association);
- c. eliminate the requirement that casual employment be 'temporary' or for 'relief' purposes in the Childrens Services Award (Business SA);
- d. extend casual employment to production and engineering employees under the Black Coal Industry Award (AI Group);
- e. limit the class of employees to which casual conversion applies in seven awards (AI Group);
- f. alter the calculation of casual loading in three modern awards (Master Builders Association, Jobs Australia);
- g. exclude overtime rates for casuals from including casual loading in a number of awards [AI Group];

### *Re part-time employment*

- h. reduce the security of part-time employment in six awards by amending the requirement to set part-time workers' hours of work at commencement to allow for only a component of hours of work to be set at commencement and a proportion of hours of work to be instead contingent and variable (St Ives, MSS Security, Restaurant and Catering Industrial, Clubs Australia Industrial);
  - i. allow employers to unilaterally change days of work in two awards (Business SA);
  - j. reduce the minimum hours of some part time workers in two awards (NFF, Pharmacy Guild of Australia); and
  - k. allow for part time employment in the Road Transport (Long Distance) Award 2010 which currently excludes it (AI Group).
3. We hereafter refer to the above claims as the "employer groups' claims". The comments below are also relevant to propositions advanced in support of other claims by employer groups in relation to particular awards.
4. The ACTU intends to address the claims submitted by Australian Business Industrial and NSW Business Chamber ('ABI/NSWBC') in a separate submission, and has requested an extension of time in which to do so.
5. The ACTU opposes all of these claims. They stand in direct opposition to the ACTU's claims for increased employment security via a model right of conversion from casual to permanent employment and improved minimum hours of engagement for part-time and casual workers. The claims would exacerbate the problems we demonstrate in our prior submissions; namely, the adverse financial, social and economic consequences of insecure work. They represent an attack on basic employment security protections which we submit are already inadequate.
6. Our prior submission outlines why these protections need strengthening, not weakening in order to meet the modern awards objective.<sup>1</sup> The economic arguments proffered by employers as justification for various claims are in fact baseless, and do not present any new developments. Further, even if such challenges did exist in the form described, they would not necessitate the changes sought.

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<sup>1</sup> See ACTU submission in these proceedings dated 19 October 2015 and attached evidence.

7. Hence, given that the 4 yearly review of modern awards proceeds “on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made”<sup>2</sup>, and the “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”<sup>3</sup>, we submit the employer groups' claims should be rejected.
8. The above claims present many arguments and propositions in common in favour of increasing employer-oriented flexibility. In order to address these claims, we have sought expert opinion on a number of the common arguments and propositions underlying them. The attached Second Supplementary Report of Professor Markey, Dr O'Brien and Dr McIvor<sup>4</sup> sets out the experts' response and we rely on it in full. We extract some of the major points below.
9. We rely also on our prior submissions and the evidence we have already filed which traverses many of the issues raised by the employer groups' claims. We also rely on the union parties' submissions in relation to the employer groups' claims. In particular, we rely on the union parties' submissions in response to (d), (e), (f) and (k).

*Economic challenges as a motivation for flexibility*

10. Many of the claims by employer groups argue that the current economic and commercial climate necessitates greater labour market flexibility. For example, Ai Group claims that employers need more flexibility to employ casual and part-time employees due to a number of economic 'challenges' facing business including:
  - a. the high pace of technological development;
  - b. that a wide range of industries have trended down;
  - c. the population is ageing;

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<sup>2</sup> 4 yearly review of Modern Awards – Preliminary Jurisdictional Issues [2014] FWCFB 1788 at paragraph [60] (3).

<sup>3</sup> Ibid at paragraph [60](5).

<sup>4</sup> See attached E004 Second Supplementary Expert Report of Prof Markey\_Dr McIvor\_Dr O'Brien ('Second Supplementary Expert Report'), and E005 Brief to Prof. Markey re second sup expert report 1.2.2016.

- d. productivity growth is of increasing importance as a source of economic growth (that implicitly, other sources of productivity growth are dwindling); and
  - e. there are competitive and disruptive pressures from populous industrialising countries such as China, India, and Indonesia.<sup>5</sup>
11. Similar claims are made in other employer groups' submissions and witness statements. However, little substantive evidence was provided for many of these propositions, many of which appear to be rhetorical platitudes unsupported by evidence. None present any *new* challenge to business or change in relevant circumstances necessitating the erosion of employee protections.
12. In the attached report, Professor Markey et al refer to these propositions and note:
- "It is quite contentious whether the issues or events presented.. [above] could accurately be described as 'new' challenges for the Australian economy, or phenomena that are intensifying in nature compared to previous times. Rather than being anything new, most are issues common to any developed economy and have been faced for decades. In general, these are throwaway lines not based upon fact."*<sup>6</sup>
13. As these purported challenges are not new, they do not displace the presumption that the modern awards objective was met at the time the awards were made. Further, the claims are largely unsubstantiated, mischaracterised or exaggerated, and, in any event, would not necessitate the changes sought.
14. Regarding the claim that the pace of technological development presents a challenge to business, the authors of the attached report note that there is disagreement as to whether the pace of technological development is increasing, decreasing or stagnant and note that a high level of technological development is nothing new.<sup>7</sup>
15. The wide range of industries Ai Group claims are trending downwards is a decades-old phenomenon and is the result of structural changes common to other developed economies, all of whom have been transitioning from dominance in agricultural and

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<sup>5</sup> Eg See Ai Group Submission in these proceedings dated 14 October 2015.

<sup>6</sup> See Second Supplementary Expert Report at p3.

<sup>7</sup> Ibid; Cowan, T (2011) *The Great Stagnation : How America Ate All The Low-Hanging Fruit of Modern History, Got Sick, and Will (Eventually) Feel Better*, Dutton New York.

manufacturing to services over a long period.<sup>8</sup> Hence, this trend is well-established and nothing indicates the award system needs to be altered to be more responsive to any business needs in relation to it.

16. The report notes that an ageing population is not a new challenge to the economy and has been considered in policy development for some time, including the introduction of superannuation and private health insurance in the 1990s and intergenerational reports from the early 2000s. Productivity growth has always been an important source of growth but there is nothing to suggest its relative importance has increased. In fact, such a statement would seem to suggest technological change has stagnated or declined.
17. A number of employer groups complain that wages and rising energy prices in Australia present a cost burden on business and are higher than in other countries, creating a competitive disadvantage. Ai Group contends this puts Australian business in an uncompetitive cost position.
18. The attached report notes there has only been a marginal increase in energy costs for business in Australia compared the USA and EU and the main increase has been in retail natural gas followed by electricity. Oil products have decreased in price in recent times.<sup>9</sup> However, according to a broader measure of costs to business, the producer price index (PPI), a commercial equivalent to CPI, business price inflation has been growing at a slower rate in Australia compared to the USA and Europe.<sup>10</sup> Hence, if anything, Australia has an advantage in this regard compared to many other developed countries.
19. Ai Group claims that Australia's competitiveness has slipped in recent years and refers to the World Economic Forum's Global Competitive Index. However, this index is not objective. Much of the data does not come from official statistical agencies but from executive opinion surveys that do not appear to meet academic standards.<sup>11</sup>
20. Whilst there are a number of competing international competitiveness measures with no standard of definition or measurement, Australia has been performing well

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<sup>8</sup> See Second Supplementary Expert Report at p3.

<sup>9</sup> Second Supplementary Expert Report, p5.

<sup>10</sup> Ibid, p5.

<sup>11</sup> See discussion in Second Supplementary Expert Report at p7.

compared to its OECD peers on the factors that in general can be said to influence international competitiveness: inflation, productivity, exchange rates, tax rates, cost of doing business and infrastructure.<sup>12</sup> For example, productivity growth has been trending upwards in recent years, exchange rates have depreciated and, although Australia's CPI was marginally above the OECD average, the PPI was below average.<sup>13</sup>

21. It is also claimed that high wage growth has put Australia in an uncompetitive cost position. This is a contentious claim and would require significant evidence on a multitude of complex issues. As the attached report notes, China has had a much higher annual wage growth rate of between 9.5% and 18.5% and whether Australia's wage growth leaves Australia in a competitive or uncompetitive position,

*"...is unclear as costs of production would also depend on other influences such as labour productivity, costs of other facts of production (such as capital) and the exchange rate."*<sup>14</sup>

22. In any event, competition from other countries is not new. Globalisation has meant national economies have become intertwined, presenting both international competition and export opportunities. Rather than being characterised as a threat, Australian Treasury comments suggest growth in China and India and the attendant rise of their middle class provide substantial Australian export opportunities in food production, tourism, financial and other professional services which Australia is well placed to capitalise upon.<sup>15</sup>

23. In response to the claim that Australia's productivity growth rates and GDP growth have been trending lower in recent years, the attached report notes that, overall, Australia's economic growth has been both higher and more stable than that of both the US and the EU over the past decade.<sup>16</sup> Whilst labour productivity growth declined from the early to mid-2000s, since then, overall across the period, it has been trending upwards.<sup>17</sup>

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<sup>12</sup> Second See Supplementary Expert Report, p7.

<sup>13</sup> Ibid, p7.

<sup>14</sup> Ibid, p4.

<sup>15</sup> Ibid p4; Gruen D (2011) 'The Resources Boom and Structural Change in the Australian Economy', *Economic Roundup*, Issue 2, 2011.

<sup>16</sup> Second See Supplementary Expert Report, p8.

<sup>17</sup> Ibid.

24. Whilst the above shows many of these claimed challenges do not exist or have been overstated, the number of industries that could possibly be affected by such circumstances is, in any event, very low.<sup>18</sup> Most of the claimed challenges above would only be relevant to the tradeable sector, the part of the economy most exposed to international competition. Table 1 below lists the Industries according to Australia and New Zealand Standard Industry Classification (ANZIC) divisions that are relevant to the employer groups' claims.
25. The vast majority, thirteen out of the sixteen industries affected by the employer groups' claims, are neither directly trade affected (defined by at least 10% of industry output being exported – in red below) or even indirectly trade affected (defined as 20% of industry supply being imported – in green below).<sup>19</sup>.

**Table 1- Relevant ANSIC Divisions**

	<b>Industry (ANZSIC division)</b>
1.	Accommodation and Food Services
2.	Administrative and Support Services
3.	<b>Agriculture, Forestry and Fishing</b>
4.	Construction
5.	Education and Training
6.	Electricity, Gas, Water and Waste Services
7.	Financial and Insurance Services
8.	Health Care and Social Assistance
9.	<b>Information Media and Telecommunications</b>
10.	<b>Manufacturing</b>
11.	<b>Mining</b>
12.	Other Services
13.	<b>Professional, Scientific and Technical Services</b>
14.	Public Administration and Safety
15.	Retail Trade
16.	<b>Transport, Postal and Warehousing</b>

*Nexus between economic circumstances and flexibility*

26. Whilst the very existence of the challenges to business claimed above is denied, in any case, the employer groups' claims have also failed to show how the introduction

<sup>18</sup> See Second Supplementary Expert Report, p9.

<sup>19</sup> See Crossnan and Attlewell's definition of tradeable industries described in Second Supplementary Expert Report, p10; See Table 1 in Second Supplementary Expert Report, p10.

of increased employer-flexibility would in any way alleviate the problems they claim exist.

27. The employer groups' claims for further labour flexibility can be grouped as follows, being claims aimed at providing:

- a. increased freedom to engage casual employees;
- b. lower minimum hours of employment for part-time and casual employees; and/or
- c. greater freedom for employers in setting and changing part-time employees' hours and days of work and total daily and weekly hours of work. For example, instead of guaranteeing a part-time employees certain hours of work, to vary awards to provide employers with the ability to unilaterally, or in the alternative, with the agreement of the employee:
  - i. to guarantee only part of a part-time employee's hours and allow the other part to be variable in quantum or rostered days or times or able to be cancelled at short notice; or
  - ii. to agree set days an employee is available to work but without guarantees of work on those days.

28. Employer groups claim these changes are necessitated by the challenges described above and in order to:

- a. increase productivity,
- b. increase business' competitiveness,
- c. increase employment growth;
- d. increase workforce participation. In particular, it is claimed that lowering the minimum engagement period for casual employees will increase the employment of younger people, older and retired people and secondary school students and help better accommodate parents with family or caring responsibilities;
- e. increase the performance and competitiveness of the national economy; and/or

- f. help workers and employers by preventing plant closures due to un-competitiveness and inflexibilities.

29. In the attached report, Markey et al confirm there is no established link in the research between increasing casualisation or part-time employment and productivity growth.<sup>20</sup> Some have demonstrated a negative relationship between casualisation and productivity growth.<sup>21</sup> As outlined in our previous submission, casualisation is likely to undermine productivity growth by reducing investment in skills, training and development and eroding organisational commitment, human capital and functional flexibility.<sup>22</sup>
30. The attached report notes there is little reason to believe greater casualisation would yield other economic benefits in terms of economic growth or reduced unemployment.<sup>23</sup>
31. Workforce participation is unlikely to be significantly affected either, as the proposals are likely only to redistribute hours for the existing workforce rather than bring new entrants into the workforce.<sup>24</sup> Further, the proposals to reduce minimum hours of engagement are likely to exacerbate underemployment as, by definition, minimum engagement periods ensure a minimum is paid per engagement and provide protections against reduced or variable hours.<sup>25</sup>
32. The changes, by further undermining employment and earnings security, would reduce workers' take-home pay, which is likely to exacerbate inequality, particularly as casual and part-time employees tend to be both lower paid and are more likely to be award reliant.<sup>26</sup> Economic organisations such as the World Bank, IMF and the OECD, have all recently noted that the increase in inequality in many economies in

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<sup>20</sup> See Second Supplementary Expert Report, p11.

<sup>21</sup> See Ibid, p12; Richardson, D. (2012) 'Casual Labour: A Stepping stone to something Better or Part of an Underclass?', The Australia Institute Submission, January 2012, <http://www.tai.org.au/node/1817>.

<sup>22</sup> See Second Supplementary Expert Report, p14.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid, p13.

<sup>25</sup> Ibid, p21.

<sup>26</sup> For example, 55 per-cent of award reliant employees are casual: see Supplementary Expert Report at paragraph 8; Professor R.Markey and Dr J.McIvor, *Report on Casual and Part-Time Employment in Australia*, in attachment E001 Statement of Professor R.Markey to ACTU submission in the these proceedings dated 19 October 2015 ('Expert Report') p26.

the last three decades, has had a negative effect on economic growth and prosperity.<sup>27</sup> In a paper released last year, the International Monetary Fund noted that inequality is one of the fundamental barriers to improving labour productivity and measures must be taken to address wealth distribution in order to support economic growth. The report notes:

*"Earlier IMF work has shown that income inequality matters for growth and its sustainability. Our analysis suggests that the income distribution itself matters for growth as well. Specifically, if the income share of the top 20 percent (the rich) increases, then GDP growth actually declines over the medium term, suggesting that the benefits do not trickle down. In contrast, an increase in the income share of the bottom 20 percent (the poor) is associated with higher GDP growth. The poor and the middle class matter the most for growth via a number of interrelated economic, social, and political channels."*<sup>28</sup>

33. The erosion of job security through casualisation and reduced minimum hours diminishes job quality and the erosion of job quality is a barrier to economic growth. A focus on employment at the expense of job quality is misguided. As the OECD notes, the decline of the traditional, permanent, nine-to-five job in favour of non-standard work has meant the creation of a paradox: even rising employment, has been accompanied by a rise in inequality, and inequality inhibits economic growth.<sup>29</sup> According to the OECD, in order to promote economic growth, policies must be adopted that focus not merely on increasing employment but the creation of quality, secure jobs. The OECD notes:

*"Policy needs to focus on access to jobs and labour market integration in order to increase both equality and growth. But only focusing on the number of jobs is not enough... it is about policies for quantity and quality of jobs;*

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<sup>27</sup> "Inequality and Labour Market Institutions", IMF Staff Discussion Note (July 2015), p.5 and "In It Together – Why Less Inequality Benefits All", OECD (2015), p.20,23;

<sup>28</sup> Era Dabla-Norris, Kalpana Kochhar, Nujin Suphaphiphat, Frantisek Ricka, Evridiki Tsounta, *Causes and Consequences of Income Inequality: A Global Perspective*, International Monetary Fund, June 2015.

<sup>29</sup> OECD (2015), *In It Together: Why Less Inequality Benefits All*, OECD Publishing, Paris.

DOI: <http://dx.doi.org/10.1787/9789264235120-en>, p28.

*jobs that offer career and investment possibilities; jobs that are stepping stones rather than dead ends (emphasis in original)."*<sup>30</sup>

34. In other words, regulation that creates employment through the creation of poor quality jobs is likely to be detrimental to the economy. Greater employment security through improved access to permanent work and greater minimum hours of work and access to guaranteed hours of work is needed in order to redress inequality and the take-home pay of the low paid and to improve productivity, not the reverse.
35. Our previous submission outlines how the undermining of employment security has contributed to gender inequality and how this in turn has compromised productivity.<sup>31</sup> The above changes, by further undermining employment security, are likely to exacerbate both problems.
36. Without demonstrable economic benefits, it cannot be claimed that reducing job security is likely to prevent plant closures or is otherwise in workers' interests. The proposals are instead likely to create significant adverse effects for a significant number of workers and to undermine the fairness and relevance of the safety net.

*Effect on workers*

37. The adverse effects of casual employment and insecure work, such as work with reduced minimum hours of engagement and less working time and working hours security are outlined extensively in our previous submissions. These consequences include lower pay, reduced security of hours, reduced income, reduced levels of training, skill development and workplace participation and lower accrual of superannuation, as well as feelings of powerlessness, fear, and lack of voice in the workplace.<sup>32</sup>
38. As the attached report notes, there is unlikely to be any economic benefit for permanent-part time workers by reducing protections and effectively increasing managerial prerogative over their hours of work. Reducing guaranteed hours can only

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<sup>30</sup> Ibid.

<sup>31</sup> See ACTU Submission in these proceedings, dated 19 October 2015, pp49-53.

<sup>32</sup> See ACTU Submissions in these proceedings dated 19 October 2015 at paragraphs [60]-[77]. See also *Lives on Hold*.

have the effect of reducing workers' earnings and subject them to greater variability and insecurity.<sup>33</sup>

*Employee preferences*

39. Various employer groups argue that their claims are supported by employee preferences, in particular that<sup>34</sup>:
- a. the majority of casual employees freely choose to engage or remain in casual employment;
  - b. casual employees have similar levels of job satisfaction as permanent employees and a higher level of satisfaction in relation to flexibility afforded them to balance work and life;
  - c. a very low number of casual employees, if any, wish to convert to permanent employment;
  - d. a significant number of employees want to work less hours per engagement but might be prevented from doing so because of minimum engagement periods; and/or
  - e. employees want more flexible work, for example, to better accommodate family responsibilities, work/life balance or the needs of retirees.<sup>35</sup>

40. We reject this. Employees' relevant preferences are traversed in our previous submissions and expert reports.<sup>36</sup> Relevantly, some 52 per cent of casual employees would prefer to be in permanent employment according to an ABS study in 2010.<sup>37</sup> In the attached report, Markey et al equate this to 1.2 million casual employees on the basis of the ABS' 2014 figure for total casual employment.<sup>38</sup> The more recent survey commissioned by the ACTU found 49 per cent of respondents were in casual employment because no other work was available. For full-time casual workers, this figure may be higher.<sup>39</sup>

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<sup>33</sup> See Second Supplementary Expert Report, p22.

<sup>34</sup> For example, see RCSA Submission in these proceedings dated 12 October 2015 at paragraph 7-14, available at: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014197-sub-RCSA-121015.pdf>

<sup>35</sup> Eg see RCSA Submission dated 12 October 2015 at paragraph 28.

<sup>36</sup> For example, see Expert Report, sections 4 and 7.

<sup>37</sup> See Second Supplementary Expert Report, p 15.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

41. Some submissions reference a study of Australian workers by Keuskemp, Mackenzie, Ziersch and Baum in 2013<sup>40</sup> which found that a majority of participants had chosen casual work and had positive outcomes from casual work. As Markey et al note, it is inappropriate to use this study to draw general conclusions about casual employees' preferences as it was a qualitative study of only 32 participants. The study's reported findings of positive experiences in casual employment must be taken in context, including that some of the participants were higher-qualified and higher-skilled than average, and working in industries with skills shortages and some had pre-existing capital security.<sup>41</sup> The study's authors note a 'bias toward participants with good education and good health relative to the population' which could help to 'explain the relatively benign effects... found in this study'.<sup>42</sup> Hence, the study obviously cannot be said to be generally representative of the majority of casual employees' circumstances.<sup>43</sup>
42. The submissions of the RCSA point to data from waves 1-11 of the House, Income and Labour Dynamics in Australia Survey ('HILDA') showing that, overall, casual workers have a higher overall satisfaction regarding their ability to balance work and non-work commitments than permanent workers. The attached report notes that this due to the advantages of part-time hours, not casual work:

*"... the available evidence suggests that any such perceived advantage of casual employment with respect to work/life balance is dependent not on the nature of casual employment per se, but on the fact that casuals work disproportionately part-time; and that any advantage in work/life balance can be attributed to working part-time hours. As we pointed out, other studies have found that when hours of work are accounted for, casual employment offers no advantage for work-life balance over permanent work (see Hosking and Western, 2008; Skinner and Pocock, 2014)."*<sup>44</sup>

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<sup>40</sup> Eg, see RCSA Submission at paragraph 14, available at:

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014197-sub-RCSA-121015.pdf>

<sup>41</sup> See Second Supplementary Expert Report, p16.

<sup>42</sup> Ibid; Keuskemp, D., Mackenzie, C.R.M., Ziersch, A.A. and Baum, F.E. (2013) 'Deliberately Casual? Workers' Agency, Health, and Nonstandard Employment Relations in Australia', *Journal of Occupational and Environmental Medicine*, 55(6): pp620-627 at p 626.

<sup>43</sup> See Second Supplementary Expert Report, p16.

<sup>44</sup> See Second Supplementary Expert Report, p19.

43. We address the above assertions in more detail below in relation to the employer groups' claims.

***AI Group and RCSA's claim to remove casual conversion notice requirements***

44. The Ai Group call for the removal of employers' obligation to notify casual employees of their right to request to convert to permanent employment after a specified period of service in the following awards<sup>45</sup>:

- a. Alpine Resorts Award 2010;
- b. Building and Construction General On-site Award 2010;
- c. Cement and Lime Award 2010;
- d. Concrete Products Award 2010;
- e. Cotton Ginning Award 2010;
- f. Electrical, Electronic and Communications Contracting Award 2010;
- g. Food, Beverage and Tobacco Manufacturing Award 2010;
- h. Graphic Arts, Printing and Publishing Award 2010;
- i. Joinery and Building Trades Award 2010;
- j. Manufacturing and Associated Industries and Occupations Award 2010;
- k. Mobile Crane Hiring Award 2010;
- l. Plumbing and Fire Sprinklers Award 2010;
- m. Quarrying Award 2010;
- n. Road Transport and Distribution Award 2010;
- o. Sugar Industry Award 2010;
- p. Textile, Clothing, Footwear and Associated Industries Award 2010;
- q. Timber Industry Award 2010;
- r. Transport (Cash in Transit) Award 2010;

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<sup>45</sup> See AI Group submission in these proceedings dated 14 October 2015, p2.

- s. Vehicle Manufacturing, Repair, Services and Retail Award 2010;
  - t. Waste Management Award 2010; and
  - u. Wine Industry Award 2010.
45. The RCSA seeks removal of the notification requirement in all of the above awards except the Cotton Ginning Award 2010.
46. We addressed the economic arguments raised by Ai Group in support of these changes above. We note the majority of the industries involved are not directly or indirectly trade-effected and in any event we question the relevance of these assertions in relation to notification requirements.
47. The RCSA's submission claims that casual employment has decreased in Australia. In response, we submit that the number of casual employees in Australia almost tripled between 1982 and 1999, rising from just below 700,000 to almost 2 million.<sup>46</sup> Casual density, the proportion of casual jobs out of all jobs, grew from 15.8 per cent in 1984 to a peak of 27 per cent in 2000-2003 before becoming relatively stable at about 24 per cent between 2005 to 2014.<sup>47</sup> This relative stabilisation was thought to be explained partly by the growth of other forms of insecure work such as fixed-term contracts, labour hire and independent contracting, which have given employers other options for minimising costs and shifting risks on to their employees.<sup>48</sup> The latest ABS statistics, released in November 2015 (released after our prior submissions were filed), however, show that casual employment has continued to increase again, rising from 23.8% of all workers in August 2013 to 24.1% at August 2014.<sup>49</sup>
48. The Ai Group argues that such conversion clauses should be dealt with on an award by award basis and not harmonised. We reject this. The problems of casual

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<sup>46</sup> Campbell, I. 'The Spreading Net: Age and Gender in the Process of Casualisation in Australia' in *Journal of Australian Political Economy*, issue 45, June 2000, pp68-99 at p68.

<sup>47</sup> Research and analysis by the Centre for Workforce Futures, Macquarie University, commissioned by ACTU in 2015 based on: Simpson, Dawkins and Madden (1997) 'Casual employment in Australia: incidence and determinants' *Australian Economic Papers* 36 (69) pp194-204 for data 1984-1987, and based on ABS, *Employment Benefits, Australia*, cat. no. 6334.0; ABS, *Weekly Earnings of Employees (Distribution)*, cat. no. 6310.0, 1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, 1998-2013; ABS *Trade Union Members, Australia*, cat. no. 6325.0, 1996.

<sup>48</sup> *Independent Inquiry into Insecure Work, Lives on Hold: unlocking the potential of Australia's workforce, A Report of the Independent Enquiry into Insecure Work in Australia (2012) 21*, attachment 'R001 Lives On Hold Report' to ACTU submission in these proceedings dated 19 October 2015, at p10 and p14.

<sup>49</sup> See ABS Cat 6333, November 2015.

employment and its adverse consequences and the benefits of permanent work are not industry-specific but generally applicable.<sup>50</sup> A fair and relevant safety net requires that all casual employees in principle have equal access to such a right. Hence, a model, clause of general applicability ought to be adopted and implemented across all industries except where exceptional circumstances can be demonstrated.

49. The issue of the merits of conversion rights is well-established in prior decisions of the Commission, as outlined in our prior submissions. The industrial tribunals have acknowledged the significance of employers' obligation to notify employees of their right to convert in facilitating the operation of such clauses.<sup>51</sup> The obligation is consistent with employers' obligations under clause 5 of modern awards to provide access to the relevant award and NES. In the decision that introduced that term during the award modernisation process, the Australian Industrial Relations Commission was concerned to "...ensure that employees are in a position to find out, at the workplace, what their minimum conditions of employment are".<sup>52</sup> The notification requirement is consistent with this purpose and employer groups have not demonstrated a case for change.
50. The Ai Group and RCSA also argue the notification requirement is an unnecessary regulatory burden on business and rely on a number of witness statements from Managers and HR professionals claiming it is an administrative burden and that few if any employees are interested in converting or elect to convert. They present witness evidence to the effect that employees, even if interested in converting, once told they will lose the casual loading, are no longer interested.
51. We note that the claims apply across industries but the witness evidence seems to relate only to labour hire companies and is hence of limited value. HILDA data suggests labour hire represents as little as approximately 2 per cent of the workforce.<sup>53</sup> It is reasonable to assume that employees of labour hire companies would prefer to secure permanent employment with a host employer rather than a

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<sup>50</sup> Australia has experienced exponential growth in casualisation in virtually all industries, including manufacturing, which traditionally had little experience of it: Burgess, J., Campbell, I. and May, R. (2008) "Pathways from Casual Employment to Economic Security: The Australian Experience", *Social Indicators Research*, 88(1): 161-178.

<sup>51</sup> For example, see Award Modernisation Decision [2008] AIRCFB 1000 at paragraph [183].

<sup>52</sup> Ibid at paragraph [34].

<sup>53</sup> See Expert Report, p14.

labour hire agency who will then place them in various temporary assignments. Labour hire companies by their very nature have an incentive to discourage permanent employment. They operate to provide 'on-tap' labour to host employers, who retain the right to end the relationship at any time.

52. RCSA submitted a statement from Jane Baremans. The attachment 'JB1' to her statement is purported to be a template letter she reports is sent to employees qualifying to convert to permanent employment. This template letter makes no mention of the entitlements employees would get if they become permanent, for example, annual leave and personal leave, and hence misrepresents how conversion would affect these employees. It follows that it is unsurprising that she reports the conversion rate is low. It is somewhat concerning that Ms Baremans, as General Manager of a labour hire agency employing over 400 workers, reports that she personally contacts every worker who qualifies for conversion to have a conversation about it and it would perhaps be unsurprising if those who were initially interested in conversion then felt influenced in deciding not to convert. Some witness evidence has been submitted by employers suggesting casual employees prefer the casual loading to security.
53. Participants in the ABS survey of 2007 were explicitly warned they would lose the casual loading but 52% responded that they would prefer permanent employment, suggesting they value the stability of permanent work.<sup>54</sup> The 2015 ACTU-commissioned survey showed 40 percent of respondents responded positively about the opportunity to convert to permanent employment.<sup>55</sup>
54. The attached report provides evidence of a significant desire to convert to permanent employment by a range of employees and indicates some of the reasons employees are prevented from doing so. It states:

*"As we noted in section 4.2 of our first Supplementary Report, 19.8 per cent of casuals in the ACTU survey indicated having made a request to become permanent. Of those who had not made such a request, just under half (48.3 per cent) indicated that this was because they were satisfied with current arrangements. The remainder indicated either that they were afraid to*

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<sup>54</sup> See Expert Report, p37.

<sup>55</sup> Ibid, p1.

*ask their employer because of job security concerns (10.0 per cent), that they believed permanent status was not available (25.1 per cent), that they were not convinced their employer would allow them to change (8.3 per cent), or other reasons. These latter reasons largely imply that the employees in question desire more permanent employment, should it be offered, but feel constricted in terms of their ability to make an effective request.*"<sup>56</sup>

55. The same survey provides evidence that the notification of a right to convert may increase the propensity of employees to make these requests. There was roughly double the rate of conversion amongst those who had been notified of a right to request.<sup>57</sup> The survey also provides evidence that notification has the effect of increasing employees' knowledge of their rights and confidence in making such requests without risk of negative consequences. Out of those who had not made a request to convert, far fewer of those who had been notified chose not to convert because of security concerns, because they didn't believe permanent employment would be available or because they didn't believe their employer would allow it.<sup>58</sup> Also, a higher proportion chose not to convert because they were satisfied with their arrangements.<sup>59</sup> This suggests that the notification obligation plays a role in ensuring employees are able to make a genuine choice and better addresses workers' hesitations that might be based on the disparity in bargaining power.

56. Hence, we reject the Ai Group claims that:

*"Employee's reliance on employers for information about their entitlements and workplace rights is of lessening relevance when employees today have far greater access online to resources and information about their employment entitlements."*<sup>60</sup>

57. Even at its highest, it seems counter-intuitive to suggest that a low incidence of a right being exercised ought to be met with a reduced requirement to inform people of that right, all the more so where the need and preference for its exercise is established.

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<sup>56</sup> Second Supplementary Expert Report, p17.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid, p17-18.

<sup>59</sup> Ibid, p17.

<sup>60</sup> AI Group Submission dated 14 October 2015, Paragraph [71] and Expert Report p31 and 39.

58. Our previous submission outlined how casual employees (which includes labour hire workers) are less likely to know their rights and conditions or speak up about them.<sup>61</sup> If anything, the employers' duty to notify has become more important at a time when rates of insecure work are at an all-time high and union membership rates are at an historical low.
59. Both RCSA and Ai Group rely on an employer survey conducted by RCSA. The survey is highly problematic. Firstly, it is an in-house survey, not an academic study or one designed or conducted by an arms-length firm with specialist expertise. Secondly, it involves a sample of only 28 respondents, 78 per cent of whom employ twenty or less employees. Further problems include that Question 4 asks whether the respondent employs "on-hire employees as casual employees". Question 5 then asks if the firm is covered by an award requiring them to write to casual employees and give them a right to elect to convert.
60. However, it is entirely ambiguous whether this and the subsequent question relate to casual employees that they employer directly or use through on-hire arrangements. Hence, the subsequent responses are likely to be confused. Some 52 per cent of the 21 respondents to question 5 said they were covered by an award listed in an attachment to the survey requiring them to write to casual employees and give them the right to elect to convert. The next question (Q6) asks "of those casual employees who have been sent a letter advising of their right to elect to become a permanent employee, approximately what percentage have formally elected to convert to permanent employment?" It does not specify whether what is being asked relates to on-hire employees or direct employees or what time period the question relates to.
61. Mysteriously, only 8 respondents respond to this question even though 21 responded to the question above. It is open to speculate that the other 13 respondents (the majority) witnessed workers having a more positive reception to conversion, or these missing respondents informed workers by means other than sending "a letter" or, indeed, these missing respondents failed to notify workers of a right to convert, even if required to do so. Hence, the survey responses are of no value.

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<sup>61</sup> Eg see ACTU submissions filed in these proceedings dated 19 October 2015, at paragraph [77](k);

62. We note that seven respondents responded to question 7 which asks respondents to estimate the time taken managing the process. Their responses vary between two and 12 hours, a variance of 600 per cent. We suggest the variance between these upper and lower levels and the low number of respondents means the answer is inconclusive at best.
63. We submit that employer groups' claims that the requirement to notify employees of the right in question is an administrative burden and a cost burden is absurd. The Commission is entitled to inform itself, as a matter of judicial notice, of the extent of tools available for employers to satisfy this obligation and to even automate the process if necessary, including email and electronic services. We reject that it is any administrative or cost impost at all in any meaningful sense of those words.
64. Criterion 134(1) of the *Fair Work Act 2009* sets out the modern awards objective. Criterion (f) of that clause requires the Commission to have regard to 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'.<sup>62</sup> We submit the criterion does not imply that regulation is, of itself, a burden. To claim as such would be an attack on the idea of an awards system itself as a regulatory safety net. It is incumbent on a party arguing that a regulation is burdensome to show evidence to that effect and then the task of the Commission is to weigh any such impact on business against other the other criteria in the section in deciding whether an award, together with the National Employment Standards, provides a fair and relevant safety net. An award clause that provides some benefit or neutral effect on business would not engage this criterion at all. We submit the notification requirements are such clauses.
65. In terms of other claims about the removal of the notification requirement and the modern awards objective, the removal cannot even in principle be said to contribute to the simplicity, understandability or stability of the award system<sup>63</sup> in anything but a trivial sense.

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<sup>62</sup> See *Fair Work Act 2009* (Cth), s134(1)(f).

<sup>63</sup> See *Fair Work Act 2009* (Cth) s134(1)(g), eg as raised by Ai Group in their submission in these proceedings dated 14 October 2014 at p28.

66. Notice of conversion, also promotes collective bargaining as it promotes conversion to permanent employment.<sup>64</sup> Casual employees find it more difficult to bargain. Secure employment, which the conversion right is designed to promote, contributes to productivity growth and the economy by encouraging investment in skills and training.
67. Likewise, the impact of this regulation in terms of administration and costs to business is of trivial relevance to employment growth and the economy.
68. The Ai Group contends social inclusion and an employee's ongoing employment are not affected by removing the notification obligation and that ongoing employment is only determined by operational needs. However, permanent employment provides security of employment and protection against dismissal.
69. We have submitted previously the detriment casual employees suffer in relation to social inclusion.<sup>65</sup> Conversion gives employees rights to guaranteed hours of work and ongoing employment that casual employees do not have. The needs of the low paid are also served by greater employment and earnings security, which notification of the right to convert facilitates.
70. We submit that the regulation of labour hire companies through awards should encourage and facilitate conversion to permanent employment in order to confer the benefits of permanent employment and diminish the adverse consequences of casual employment, including on employees and the economy as outlined in our previous submissions.
71. In any event, the evidence provided appears only to relate to labour hire and yet seeks changes that would undermine employee protections across the whole industries concerned. We have submitted extensive evidence as to why conversion clauses are necessary and we submit this evidence is to be preferred.

***Claims to reduce the minimum hours of engagement of casual and part-time employees in a number of modern awards and reduce the security of part-time workers***

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<sup>64</sup> *Fair Work Act 2009* (Cth), s134(1)(b) requires the Commission to have regard to the need to promote collective bargaining regarding the modern awards objective.

<sup>65</sup> See ACTU submissions dated 19 October 2015 at pp65-66.

72. Employer groups make a number of claims to reduce the minimum hours of engagement of casual employees in the following awards as follows:
- a. Fast Food Industry Award 2010: Ai Group;
  - b. Wine Industry Award 2010: SAWIA;
  - c. Pastoral Award 2010: National Farmers' Federation;
  - d. Pharmacy Industry Award 2010: Pharmacy Guild of Australia;
  - e. Joinery and Building Trades Award 2010: Housing Industry Association, Ai Group;
  - f. Road Transport (Long Distance Operations) Award 2010: (NB: Ai Group no longer presses this claim);
  - g. Passenger Vehicle Transportation Award 2010: Australian Public Transport Industry Association;

73. Further, employer groups make a number of claims to reduce the minimum hours of engagement of part time employees as follows:

- a. Pastoral Award 2010: National Farmers Federation; and
- b. Pharmacy Industry Award 2010: Pharmacy Guild of Australia;

74. Additionally, several employer submissions call for reduced security of part time employment *viz.* changes to the following awards, allowing for only a component of part-time employees' hours to be set and guaranteed and the remainder to be unguaranteed and conditional:

- a. Social, Community, Home Care and Disability Services Industry Award 2010: ABI, St Ives;
- b. Aged Care Award 2010: St Ives;
- c. Nurses Award 2010: St Ives;
- d. Security Industry Award 2010: MSS Security;
- e. Restaurant Industry Award 2010: Restaurant and Catering Industrial; and
- f. Registered and Licensed Clubs Award 2010: Clubs Australia Industrial.

75. Perhaps the most ambitious attempt to undermine employee security has been made in the draft determinations filed by Business SA dated 17 July 2015 in relation to the Banking, Finance and Insurance Industry Award 2010 and the Nursery Award 2010. These changes would allow employers to unilaterally set the days and times of work of part-timer workers. Such a claim is inconsistent with the purpose of permanent employment. However, no submissions, list of affected awards or evidence has been filed in support of these draft determinations or those filed by Business SA in relation to the Children's Services Award 2010. As the Commission's Directions of 29 June 2015 have not been complied with, and parties have not been presented with a case to address, we ask the Commission to ignore these proposals. Similarly, we ask the Commission to ignore the proposals of Clubs Australia Industrial and Restaurant & Catering Industrial for similar reasons.
76. Employer groups argue that the above proposals will increase workforce participation and that lowering the minimum engagement period for casual employees will increase the employment of younger people, older and retired people and secondary school students and help better accommodate parents with family or caring responsibilities. We submit this is not the case.
77. In relation to minimum hours, we refer to our previous submissions on this issue and the evidence showing 4 hours is the minimum length of shift to make work viable due to the fixed costs of attending work.<sup>66</sup> Short shifts and reduced working time security reduce employee's net free time and the net earnings of work, especially after accounting for travel and preparation costs and time, and this can particularly be the case in relation to split shifts.<sup>67</sup> Short shifts also disproportionately disadvantage low income earners due to the fact that the cost and time of attending work is to a large degree fixed, irrespective of wage. We note that many of the employers' claims are likely to particularly disaffect low income earners in the dairy, retail pharmacy, wine and hospitality industries.
78. We note the absence of any material filed by the employer groups which relates to the experience and economic consequences of reducing the minimum engagement period in the General Retail Industry Award 2010. We note also that the Ai Group relies on a

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<sup>66</sup> See ACTU submission dated 19 October 2015, especially at pp53-58 and pp63-73.

<sup>67</sup> See Expert Report, p22.

survey of McDonalds personnel which was performed in-house and is not of an academic standard or designed or conducted by an arms-length firm with specialist expertise.

79. Employer groups argue that reducing minimum shift hours will create jobs and/or ameliorate underemployment. We submit this is not the case. Shorter shifts are likely just to redistribute the work and earnings between employees. Any gains are likely to be offset by the losses in guaranteed hours and earnings incurred by existing employees by allowing them to be rostered for less hours or sent home earlier. To the extent the claims are limited to school students, they are likely to allow for the replacement of some existing workers' hours with cheaper youth labour which is likely to be detrimental to employment and underemployment in the very rural areas where it is argued unemployment and underemployment are particularly acute.<sup>68</sup>
80. Shorter shifts and less secure hours are likely to exacerbate gender inequality and to disproportionately undermine the needs of women and carer's responsibilities, not the reverse. As the attached report notes, lowering minimum engagement periods is likely to diminish employee-oriented flexibility.<sup>69</sup> As its authors note:

*"The bulk of the research and evidence on casual employment demonstrates that for many casual employees, their insecure status as casuals subjects them to hours which are not only dictated by the employer, but are unpredictable and variable, subject to short-term changes beyond the control of the employer. Minimum engagements serve as some protection against this, ensuring that employees can better balance time spent at work with time preparing for, travelling to and from, and recovering from work; and with non-work time, and better to better plan their lives. Lowering minimum engagements would serve only to exacerbate the costs and unpredictability associated with casual work for employees."*<sup>70</sup>

81. As various studies have shown, casual employment offers no advantage for work-life balance over permanent work.<sup>71</sup>

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<sup>68</sup> For example, see submission filed on 30 October on behalf of the Pharmacy Guild of Australia.

<sup>69</sup> See Second Supplementary Expert Report, p20.

<sup>70</sup> Ibid; see also Expert Report at section 4.

<sup>71</sup> Ibid, p19.

82. In relation to the employer groups' various claims to reduce the security of part-time employment, we note the attached report goes on to state:

*"Relatedly, 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 are women, and many of these rely on predictability of hours for childcare 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 permanent part-time counterparts."*<sup>72</sup>

83. Heron and Charlesworth have suggested minimum engagements enhance flexibility for casual employees by ensuring a better balance between time spent at work and travelling and preparation. They argue that a failure to protect workers' minimum hours undermines, rather than facilitates, flexibility for the workers, as well as undermining their income security.<sup>73</sup>

84. Minimum engagement periods and guaranteed hours and days of work provide the basis for employee-oriented security. Without them, the inherent power disparity between employer and employee means employees are vulnerable to having their hours and days of work controlled by employers. Much of the evidence concludes that casual work, for example, is controlled by employers, with hours largely dictated by employers.<sup>74</sup> In reality, many casuals feel at the mercy of employers and are afraid to

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<sup>72</sup> Ibid, pp20-21.

<sup>73</sup> See Expert Report, p25; Heron, A. and Charlesworth, S. (2012) "Working Time and Managing Care Under Labor: Whose Flexibility?", *Australian Bulletin of Labour*, 38(3): 214-233; Charlesworth, S. (2012) "Decent Working Conditions for Care Workers? The Intersections of Employment Regulation, the Funding Market and Gender Norms", *Australian Journal of Labour Law*, 25(2): 1-25, Charlesworth, S. and Heron, A. (2012) "New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?", *Journal of Industrial Relations*, 54(2): 164-181.

<sup>74</sup> See Expert Report, p21.

reject work for fear of reprisal and the precariousness of their employment circumstances.<sup>75</sup>

85. The employer groups' attempts to erode the security of part-time employment by allowing for part of a permanent part-time worker's hours to be made variable akin to casual employment. However, the proposed changes do not provide for the payment of a casual loading in respect of these variable and contingent hours. It is as though part-time employment is to be divided into two separate engagements: one permanent and one casual but the casual-like component would be on even lower terms than would apply to a casual employee. Such provisions would undermine the fairness of the safety net and hence fail to meet the modern awards objective.
86. As the attached report notes, there is also no support for employer groups' claims that a large proportion of employees desire to work fewer hours per engagement.<sup>76</sup> Its authors further note:

*"In Table 4.3 of the first Supplementary Report, we showed that the proportion of employees agreeing with the notion that shifts should be longer substantially exceeded the proportion who disagreed. Of those who had worked a shift of 3 hours or less, only around 11.0 per cent of casuals disagreed that minimum shifts should be longer, including 2.6 per cent who strongly disagreed; 47.7 per cent agreed that minimum shifts should be longer, including 21.3 per cent who strongly agreed. Interestingly, none of the 30 employees in the Accommodation and Food Services sector who had worked a shift less than the 4 hours proposed by the ACTU disagreed that minimum shifts should be longer. Only 3 workers of the 36 in the retail sector who had worked a 3 hour shift disagreed that minimum shifts should be longer, while none of the other 11 who had worked shorter shifts of 1-2 hours disagreed. In the Health Care and Social Assistance sector, only 2 of the 40 workers who had worked a shift less than 4 hours disagreed that minimum shifts should be longer."<sup>77</sup>*

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<sup>75</sup> Ibid.

<sup>76</sup> See Second Supplementary Expert Report, p20.

<sup>77</sup> See Second Supplementary Expert Report, p20; Prof. Markey, Dr McIvor, Dr O'Brien, *Supplementary Report: Casual and Part-Time Employment in Australia*, in attachment E001 to ACTU submission in these proceedings dated 19 October 2015 ('First Supplementary Expert Report').

87. According to the AWIRS data, only 3.7 per cent of employees working part-time hours want to work fewer hours, whilst 36.8 per cent want more hours and 59.6 per cent want about the same hours.<sup>78</sup> Out of total employees, only 7 per cent want fewer hours and 29 per cent want more hours.<sup>79</sup> This further contradicts any assertion that a significant portion of employees want shorter shifts in order to work fewer hours. Reducing minimum shift protections is likely to violate the vast majority of employees' preferences.

### *Claims in relation to the casual loading*

88. In relation to the claim to exclude overtime rates for casual employees from including casual loading in a number of awards, we submit that these ought to be dealt with at the individual award stage, owing to the history of those provisions.

## **Conclusion**

### *Modern awards objective*

89. The employer parties are required to show that the changes sought are necessary in order to meet the modern awards objective and to provide submissions and probative evidence in support of this.<sup>80</sup> The presumption that the modern awards objective was met at the time the awards in question were made must also be overcome.<sup>81</sup> We submit the employer groups' claims fail both these tests.

90. Further, as the Insecure Work Inquiry found, the key driver of the growth in insecure work has been the emergence of a business model that shifts the risks associated with work from the employer to the employee and minimises labour costs at the expense of job quality.<sup>82</sup> We submit that the business practices that employer groups seek to facilitate in their claims before the Commission are an attempt to further this very process, to continue the decades-long erosion of job security under the pretence of purported business and economic needs; needs that do not withstand scrutiny. We call

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<sup>78</sup> See Dr M.O'Brien's analysis of AWIRS data, Table 5.3, p58 of the First Supplementary Expert Report.

<sup>79</sup> Ibid, paragraph [56].

<sup>80</sup> *4 yearly review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at paragraph [60].

<sup>81</sup> Ibid.

<sup>82</sup> See *Lives on Hold*, p10; ACTU submissions in these proceedings dated 19 October 2015, p40.

on the Commission to ensure the maintenance of a fair and relevant safety net by arresting this process and rejecting the employers groups' claims.

**Attachments**

- *E004 Second Supplementary Expert Report of Prof Markey\_Dr McIvor\_Dr O'Brien*  
(Second Supplementary Expert Report');
- *E005 Brief to Prof.Markey re second sup expert report 1.2.2016.*



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# Second Supplementary Report: Casual and Part-Time Employment in Australia

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## **1 New Challenges Facing the Australian Economy [with respect to sections 1-5 of the Brief]**

### **1.1 Do you agree with the proposition that the Australian economy is facing the following new challenges? [Section 1, a-e]**

- a) *the high pace of technological development; a wide range of industries have trended down; the population is ageing; productivity growth is of increasing importance as a source of economic growth (that implicitly, other sources of productivity growth are dwindling); and there are competitive and disruptive pressures from populous industrialising countries such as China, India, and Indonesia.*

It is quite contentious whether the issues or events presented in part a) could accurately be described as ‘new’ challenges for the Australian economy, or phenomena that are intensifying in nature compared to previous times. Rather than being anything new, most are issues common to any developed economy and have been faced for decades. In general, these are throwaway lines not based upon fact.

Firstly, a high pace of technological development could not be described as a new phenomenon. Furthermore, there is disagreement over whether the pace of technological development is increasing, decreasing or stagnant (Cowan 2011).

Similarly, ‘a wide range of industries’ trending downward is a reflection of structural changes in the economy that have been occurring for decades as a result of economic development. Along with other developed economies, Australia has evolved from an economy dominated by agriculture, to manufacturing and finally to services over a long period of time. Measurements of structural change reported by the Productivity Commission indicate a general decline in both employment and real output structural change indices after the Global Financial Crisis up until 2012 (the most recent period reported by them). To the extent that the mining boom contributed to the decline in other industries via an appreciating exchange rate, one may expect structural change to be easing further.

Again, ageing population pressures are not a ‘new’ challenge to the Australian economy. Introduction of superannuation in the early 1990’s, private health insurance in the late 1990’s, welfare reforms and Intergenerational reports dating from the early 2000’s are testament to

the fact that Ageing populations, while undeniably a phenomenon, are not in any way ‘new’ and have been in consideration from a policy perspective for some time.

Likewise, productivity growth has always been an important source of economic growth. Australia’s Productivity Commission was created in 1998 echoing the importance of productivity to the Australian economy, replacing the previous institutions of the Industry Commission, Bureau of Industry Economics and the Economic Planning Advisory Commission. There is no reason to believe productivity is more important as a source of economic growth in more recent times. In fact, to posit such a statement would appear to support a claim that technological change has in fact stagnated or declined, which is in contrast to the first claim above.

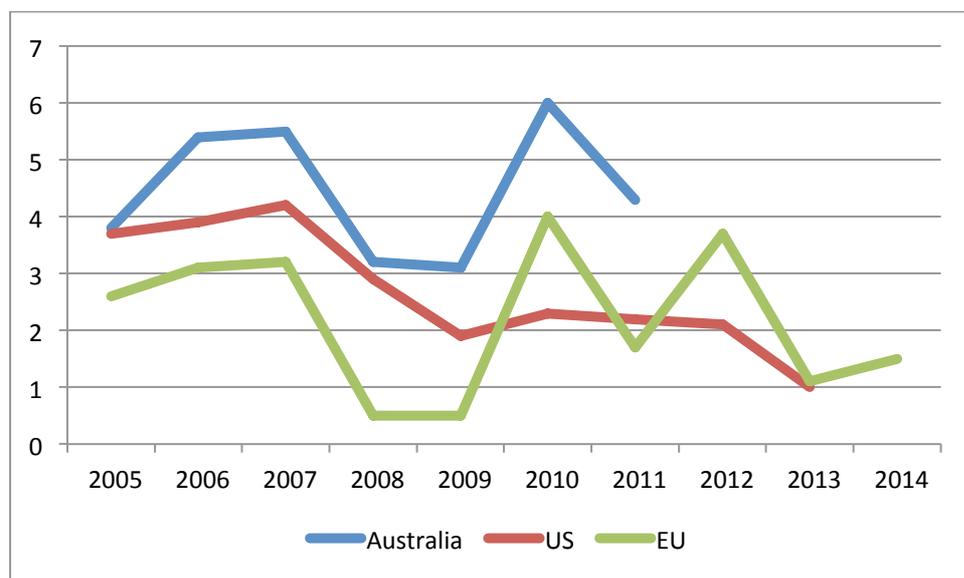
Finally, a common outcome of the process of globalization is that the fortunes of economies become entwined with those of their trading neighbours. Australia is expected to face both increased competition from other trading nations as well as increased opportunities to export to these markets. Rather than being characterised as a threat, Australian Treasury commentary suggests that growth in China and India and the associated rise of their middle classes provides substantial Australian export opportunities for food production, tourism, education, financial and other professional services in which Australia has a proven track record (Gruen 2011).

***b) While wages growth has been relatively low in the past couple of years, for most of the past decade Australian wages were growing faster than those in other countries, leaving Australian businesses in an uncompetitive cost position.***

Figure 1. shows the annual growth rate of labour compensation per hour worked as a measure of wages growth for Australia, the US and EU. Unfortunately, the last data reported by the OECD for Australia was the 2011 growth rate, however, this does confirm a higher growth rate of labour compensation in Australia compared to the other two. Although not a directly comparable measure, the annual growth of average wages in China has been between 9.5 to 18.5% over the previous decade (National Bureau of Statistics China 2015).

Whether this wage growth leaves Australia in a competitive or uncompetitive cost position is unclear as costs of production would also depend on other influences such as labour productivity, costs of other factors of production (such as capital) and the exchange rate.

**Figure 1. Annual Growth Rate of Labour Compensation Per Hour Worked (%)**



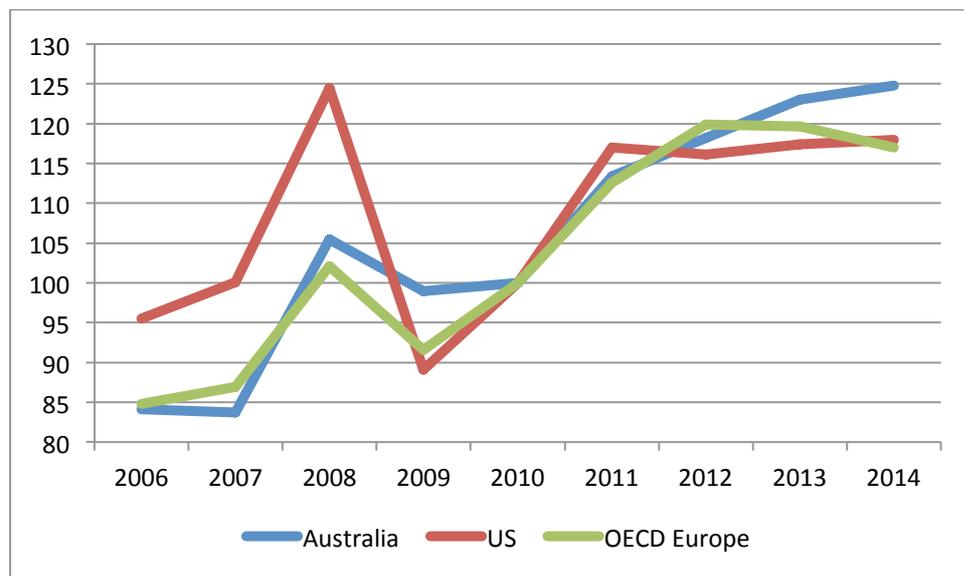
Source: OECD (2016a)

***c) Energy costs have risen and hence one of Australia's comparative advantages has been negated***

Figure 2 shows the energy end-use price indices for industry in Australia, the US and OECD Europe countries, as reported by the International Energy Agency (2015). We observe only a marginal increase in energy costs for business in Australia compared to the US and OECD. Decomposing the increase in energy costs in Australia, the main increase has been in retail natural gas prices followed by electricity. In contrast, the price of oil products has decreased in recent times.

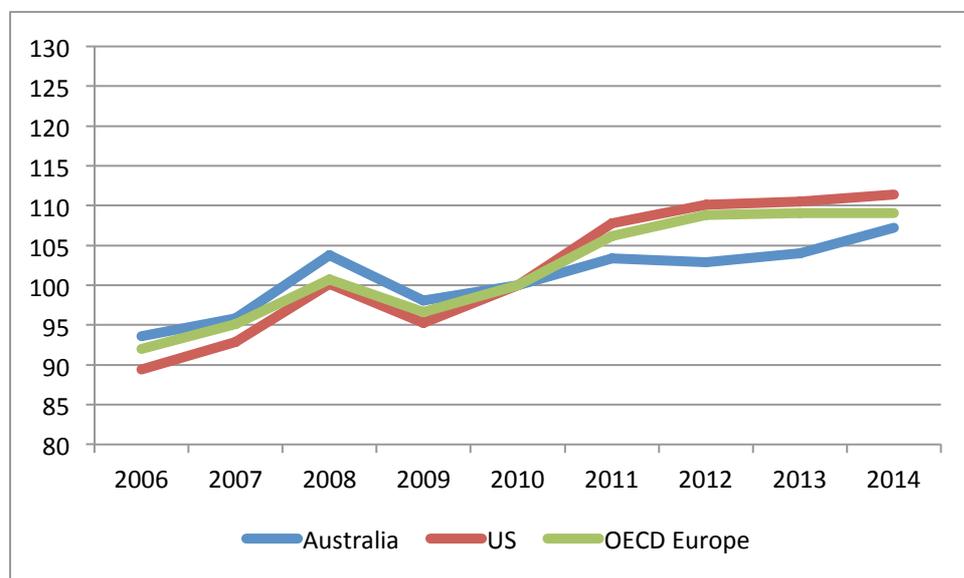
A more broad measure of business related inflation is provided by the producer price index, which is the commercial equivalent to the CPI. We see in Figure 3 that business price inflation has been growing at a slower rate in Australia compared to the US and Europe.

**Figure 2. Energy End-use Price Indices for Industry: Nominal (Total Energy)**



Source: International Energy Agency (2015) – Table 12

**Figure 3. Producer Price Indices**



Source: International Energy Agency (2015) – Table 16

*d) Australia's international competitiveness has slipped in recent years, for example, Australia has fallen from 15<sup>th</sup> place on the World Economic Forum's Global Competitiveness Index in 2009-10 to 22<sup>nd</sup> in 2014-15 before rising slightly to 21<sup>st</sup> in 2015-2016.*

Reference to the Technical Notes and Sources section of the 2015-16 World Economic Forum's Global Competitiveness Index report shows that much data collected for the construction of the index does not come from official statistical agencies but from an Executive Opinion Survey run by the World Economic Forum (World Economic Forum 2015). In Australia, the Australian Industry Group is listed as the Partner Institute who is responsible for compiling the population frame of businesses, selecting the survey respondents and conducting the survey. The objective nature of the findings from World Economic Forum Global Competitiveness Index may be questionable when the Partner Institute responsible for the survey is then called upon to be a lobby group:

‘The Partner Institutes also play an active and essential role in disseminating the findings of *The Global Competitiveness Report* and other reports published by the World Economic Forum by holding press events and workshops to highlight the results at the national level to the business community, the public sector, and other stakeholders’ (World Economic Forum 2015: 78).

There is a number of competing measures of international competitiveness, with no standard definition or standard of measurement. However, in general we can say that international competitiveness is influenced by relative inflation, productivity, exchange rates, tax rates, cost of doing business and infrastructure (Economicshelp 2012). Relative inflation as measured by the CPI was marginally higher in Australia compared to most OECD countries in 2014, however, PPI was below average. As we shall see in the following section, productivity growth has been trending upward in recent years. Exchange rates, as measured by the RBA's trade weighted index, indicates a depreciation since the beginning of 2013 and thus an increase in competitiveness, reversing the trend of currency appreciation since the GFC (RBA 2016). In terms of cost of doing business Australia is ranked 13 out of 189 countries in terms of ease of doing business (World bank 2016). Finally, infrastructure can be measured by a number of factors such as fresh water withdrawals, container port traffic,

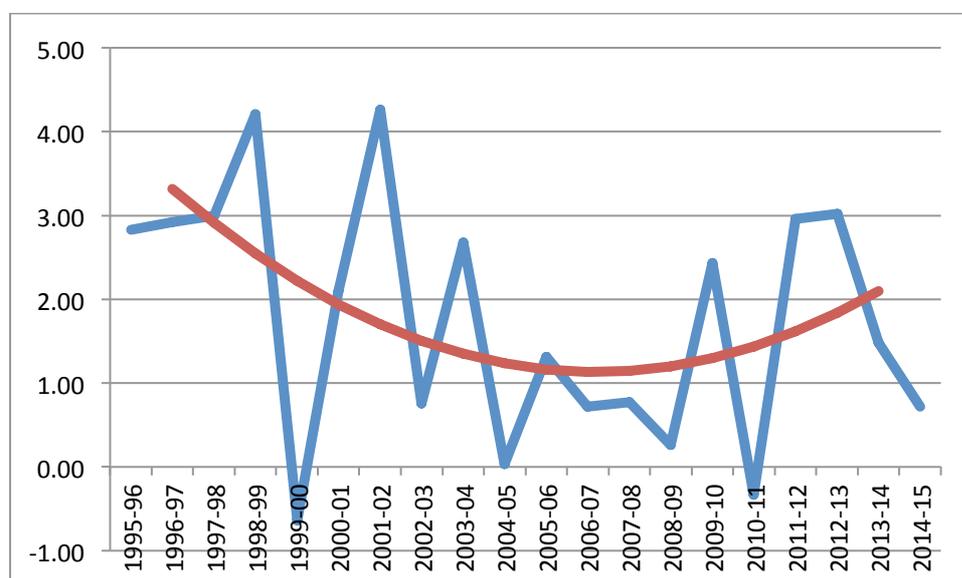
internet usage, railway length, motor vehicle and road usage amongst others (World bank 2016b). there is no reason to believe we have slipped backwards in these regards.

***e) Productivity growth rates and real GDP growth have been trending lower in recent years.***

In order to comment about the trends in data we must observe a time series over a reasonable time frame. Starting with productivity growth, we see in Figure 4 that labour productivity growth has declined in 2013-14 and 2014-15. However, looking at the trends over a longer period we observe that productivity growth declined from the early to mid-2000's but has been trending upwards in more recent years. This is confirmed using a quadratic prediction line.

Figure 5 displays economic growth rates for Australia, the US and EU. Australia's economic growth has tapered off in recent years compared to the 1990's and early 2000's. However, overall Australia's economic growth has been both higher and more stable than that of the US and EU over the past decade.

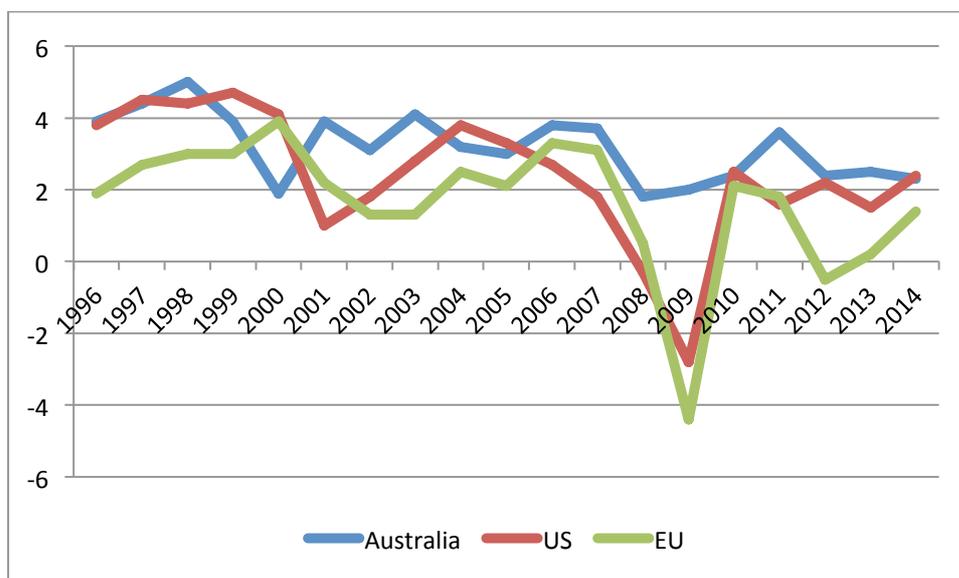
**Figure 4. Annual Labour Productivity Growth Rate\* (%)**



Source: Australian Bureau of Statistics (2016) – Table 2

\* Quality adjusted hours worked basis

**Figure 5. Annual Gross Domestic Product Growth Rate\* (%)**



Source: OECD (2016b)

\* Expenditure approach

**1.2 Can you comment on the extent to which the claimed challenges listed above in (1) are likely to be faced in each of the industries listed in Appendix A, given the level of trade exposure in those industries or other factors? [section 2]**

First, the very existence or nature of the challenges put forth in Part 1.1 have been challenged in this report. Second, the number of industries subject to these challenges, if they do exist, is relatively low. The tradable sector is that part of the economy most exposed to international competition. Most of the issues or challenges explored in the above section are more relevant to this tradable sector; namely, technological change, structural change, relative wage and productivity growth, factors affecting competitive advantage and international competitiveness. This is not to trivialise the role of labour productivity or wage growth to employers in the non-tradable sector. However, whereas businesses in the non-tradable sector compete primarily with other domestic businesses, firms in the tradable sector must compete with others in a global market. Hence, the relative importance of productivity, costs, and comparative advantage of tradable sectors compared to those in other trading economies.

Tradable sectors are more easily defined by products and services. However, Crossan and

Attlewell (2013) have recently developed industry definitions and methodology for classifying Australia and New Zealand Standard Industry Classification (ANZSCIZ) data. Tradable industries are defined as those industries where 10 per cent or more of that industry's output is exported and/or 20 per cent or more of the supply to that industry are imported. Using the direct method of industry classification, only Agriculture, Manufacturing and Mining are defined as tradable sectors (highlighted below in red). An alternative indirect method was then developed which incorporates other industries that, while not facing direct international competition, do face it indirectly as their output is included in earlier stages of production of export goods. Using this indirect method, the list of tradable industries expands to include those highlighted in green below. This comprises six of the sixteen ANSZIC Divisions listed in Appendix A of the Brief (see Table 1 below).

Table 1. List of ANZSIC Divisions from Appendix A

	<b>Industry (ANZSIC division)</b>
1.	Accommodation and Food Services
2.	Administrative and Support Services
3.	<b>Agriculture, Forestry and Fishing</b>
4.	Construction
5.	Education and Training
6.	Electricity, Gas, Water and Waste Services
7.	Financial and Insurance Services
8.	Health Care and Social Assistance
9.	<b>Information Media and Telecommunications</b>
10.	<b>Manufacturing</b>
11.	<b>Mining</b>
12.	Other Services
13.	<b>Professional, Scientific and Technical Services</b>
14.	Public Administration and Safety
15.	Retail Trade
16.	<b>Transport, Postal and Warehousing</b>

**1.3 Do you agree with the proposition that the challenges described in (1) (or one or more of them) could be better managed by employers, materially or at all, if those employers were given the following increased flexibility regarding the employment of casual and part-time employees [section 3]:**

- a) increased freedom to engage casual employees;
- b) lower minimum hours of employment for part-time and casual employees; and/or
- c) greater freedom for employers in setting and changing part-time employees' hours and days of work and total daily and weekly hours of work. For example, instead of guaranteeing a part-time employees certain hours of work, vary awards to provide employers with the ability to unilaterally, or in the alternative, with the agreement of the employee:
  - to guarantee only part of a part-time employee's hours and allow the other part to be variable in quantum or rostered days or times or able to be cancelled at short notice; or
  - to agree set days an employee is available to work but without guarantees of work on those days.

First, the very existence or nature of the challenges put forth in Part 1.1 have been challenged in this report. Second, the number of industries significantly affected by these challenges, if they do exist, is relatively low. Third, it is unclear how the introduction of increased flexibility will alleviate the challenges presented in Part 1.1. Established research does not provide any clear link between increasing casualisation or part-time employment with productivity growth. Productivity Commission research indicates that the theoretical nature of the relationship is ambiguous (Barnes *et al.* 1999). Part-time and casual employment may increase labour productivity via shorter hours increasing employees' application and decreasing fatigue. Similarly, this type of employment may be favoured by individuals with high productivity such as students. However, labour productivity may decline via reductions in employee commitment or higher staff turnover, inefficiencies and capital costs. Resulting empirical analysis from the Productivity Commission provides only a weak link between increased flexibility and productivity growth. Research by Buchanan (2004) establishes a short run benefit to increased casualisation but at the longer term expense of safety and

training. More recent commentary by Richardson (2012) posits a negative relationship between casualisation and productivity growth. This is discussed further in Section 2 below.

**1.4 Can you comment on any of the consequences for employees of giving employers the increased labour flexibility described above in (3) in light of the matters traversed in the reports you have provided in these proceedings? In addition, is it probable that there might be negative economic impacts for others (for example, for employers) of adopting the increased flexibility described in (3) above [section 4].**

Findings from AWRS data presented in paragraphs 57 and 58 of our first Supplementary Report show that underemployment is prevalent for part-time and casual employees. Over a third of part-time employees would prefer more hours of employment compared to less than five per cent of who would prefer fewer hours. Over forty per cent of casual employees would prefer more hours, including the majority of casual employees in Manufacturing, Construction, Wholesale, Transport, IT, Public Administration and Arts and Recreation Services, and Community and Personal Service Workers prefer longer hours. Increasing the rate of employee casualisation, particularly in these industries would likely lead to further underemployment.

Analysis contained in paragraphs 58 and 59 of the Supplementary Report showed casual employees tended to receive fewer training opportunities. Less than half of casual employees received training in the majority of industries. Furthermore, casual employees were more likely to have to pay for their own training costs. Again, increased casualisation of workforces would be expected to exacerbate these patterns.

Analysis of employee costs in Section 5.5 of the Supplementary Report showed that childcare costs were relatively high as a percentage of earnings for casual employees, particularly in Manufacturing, Wholesale, Retail, Accommodation and Food Services, Healthcare, and Arts and Recreation services. Similarly, transport costs as a percentage of earnings were greater for casual employees, particularly in Manufacturing, Electricity, Gas, Water and waste Services, Wholesale, Retail, Accommodation and Food Services, Transport, Postal and Warehousing, Information Media and Telecommunications, Health Care and Social Assistance and arts and Recreation services.

Regression analysis showed that a relatively high proportion of employment expenses for part-time and casual employees were fixed costs. That is, these costs were incurred

regardless of the number of hours worked. For example, close to ninety per cent of childcare costs for part-time employees were fixed costs, likely being the reflection of fixed pricing structure for placing children in childcare. Lowering the number of hours of employment engagement and reducing core employment hours would not reduce these costs, particularly for female employees. Likewise, employees with childcare arrangements will be disadvantaged if shifts are added or cancelled at short notice as foreshadowed in the part (3c) of the proposed flexibility measures.

**1.5 Do you agree with the proposition that the forms of increased flexibility for employers described above at (3) will, or are essential in order to [section 5]:**

- a) increase productivity,
- b) increase business competitiveness,
- c) increase employment growth,
- d) increase workforce participation, particularly for carers and women,
- e) increase performance and competitiveness of the national economy,
- f) help prevent plant closures due to uncompetitiveness and inflexibilities.

This section of the Brief is really covered by other parts already addressed above, and below. Further insights may be derived from economic theory. Productivity, being derived from a production function, is determined by physical capital/worker, human capital/worker, natural resources/worker and technology. So any changes to these other factors of production will be reflected in labour productivity. Rather than these flexibility measures, policymakers would typically focus on the importance of saving and investment as well as research and development to increase capital and technology, and education, training and health policies to increase human capital (Gans et al. 2012).

Regarding workforce participation, this is unlikely to be affected significantly, if at all by the proposals. Labour force participation rates are only increased by bringing new entrants into the labour force. The proposals may only redistribute hours for the existing workforce. At best, the proposals may introduce some new participants for an hour or two here and there, which will have minimal impact. Other aspects are addressed below.

## **2 Productivity and the Economy [with respect to sections 6(b) and 7 of the Brief]**

### **2.1 Implications of casualisation for productivity and the economy (section 6(b))**

In its recent assessment of the workplace relations system, the Productivity Commission (2015) found that the evidence with respect to the impact of the workplace relations system on productivity, unemployment and overall economic performance is mixed and inconclusive (see sections 33 and G of the final report). There is little apparent reason to believe, beyond theorising, that economic benefits would accrue from greater casualisation of the workforce. We had similar findings with respect to unemployment, briefly discussed in section 4 (specifically 4.4.2) of our first Supplementary Report, finding that the evidence is mixed, with a number of substantial studies showing neutral or positive effects on employment from greater employment protection. However, we were less qualified in our assessment of the likely effects on productivity. In section 3 of our first Report, we found substantial evidence that casualisation is likely to undermine productivity by undermining organisational commitment, innovation, investment in training, the development of ‘human capital’, and functional flexibility. Any gains, real or imagined, from the numerical flexibility afforded by casual employment appear to be more than outweighed by negative impacts on the motivation and productive capacity of casual workers.

### **2.2 Alternatives for increasing productivity, flexibility and performance (section 7 of the Brief)**

Our analysis in the first Report strongly implies that increasing both productivity and functional flexibility requires investment in the development of the workforce through better investment in training and organisational commitment. This is likely to require, not greater casualisation, but if anything a reversal of the trends in casualisation seen in the 1990s and early 2000s. Our Report suggests that productivity and numerical flexibility are likely to be enhanced by more secure and permanent employment through better access to training and organisational commitment.

The Productivity Commission (2015 – see section 20) has also made suggestions as to ways that employers can better pursue productivity gains. One method suggested by the Commission is to ‘encourage greater employee engagement and greater trust between

employers and employees' (Productivity Commission, 2015: 693). We would suggest that this, too, would be better facilitated by use of permanent, rather than casual employment, for similar reasons to those discussed in our assessment of organisational commitment. The Commission has also suggested that Australian managers need to improve their focus on improved management techniques, including in particular improving the management of incentives.

Finally, employers have means to pursue flexibility through the enterprise bargaining process. This process allows for the industrial minima set out in the relevant award to be varied, provided that the employee is given adequate recompense and made 'better off overall' than the award. Reducing minimum standards set out in the award merely imposes the cost of the employer's pursuit of flexibility on vulnerable employees not in a position to bargain for a better deal.

### **3 Employee Choice and Casual Conversion [with respect to sections 6(a), 8(a)-(e) excluding 8(d), and 10 of the Brief]**

#### **3.1 Casual employment and employee choice [sections 8(e) and 10 of the Brief]**

We address the extent to which casual employment reflects employee choice in sections 4 and 7 of our main Report. As previously stated in the main Report, a 2007 study by ABS found that around 52 per cent of casual employees would prefer to be in permanent employment (ABS, 2010). If applied to ABS figures on total casual employees (ABS, 2014), this would equate to around 1.2 million workers who are currently in casual work but would prefer to be in permanent employment. More recently, the ACTU survey, which was mainly of part-time casuals, found that around 49 per cent of surveyed casuals were in casual employment because there was no other work available; which would equate to 1.1 million workers. These results suggest that roughly half of casual employees would prefer to be in more permanent employment.

Some reference has been made to the fact that a study of Australian casuals (Keuskemp, Mackenzie, Ziersch and Baum, 2013) found that a majority of participants had chosen casual work and experienced positive outcomes from casual work. However, it should be noted that this was a qualitative study of 32 participants, and thus it is inappropriate to draw general inferences from this study about the proportion of the total casual population who have chosen casual work and who have had such experiences. Such qualitative research is important in providing insight into the kinds of experiences and choices casuals might have

and what might determine these; but not for determining how such experiences and choices are distributed amongst all casuals. We do not deny that there are casuals who choose casual work, and who have positive experiences resulting from this choice. However, for more quantitative research from which inferences may be made which can be potentially generalised to the overall casual population, see elsewhere in this and our previous reports.

Moreover, it is worth noting that the study found that the agency exercised by some casual employees in choosing their employment conditions was dependent upon a number of factors. This included access to in-demand skills and qualifications, including in industries with skills shortages, which increased their relative bargaining power and allowed them to exercise greater agency. This was also generally complemented by security of capital independent of their casual wage; including having paid off a mortgage or having received generous redundancy packages from previous employment. This access to capital appears to have been at least partly a function of having previously worked for several years in permanent employment.

The above is unlikely to describe the experiences of a majority of the casual populations, and the authors acknowledge in the study a ‘bias toward participants with good education and good health relative to the population’, which could help to ‘explain the relatively benign effects we (they) found in this study’ (Keuskemp et al, 2013: 626). Other participants in the same study, meanwhile, were less positive about their experiences as casuals. For such participants, the ‘lack of agency regarding their employment conditions was manifest....they detailed the impact of poor working conditions, such as lack of control over working hours, threat of job insecurity, and lack of power in the workplace’ (Keuskemp et al, 2013: 624).

For its part, the ACTU’s proposal would not have the effect of reducing the agency of those casuals who choose to be casual. Such casual employees would be able to remain casual according to their preference. Instead, the agency of all casuals in choosing whether or not to remain casual would be increased, so that those casuals who currently lack agency in their employment as casuals would be able to make a more meaningful choice about whether to remain casual.

### **3.2 Conversion, notification and deeming [sections 6(a) 8(a)-8(c) and 8(e) of the brief]**

It is possible that the question of whether casual employees desire more permanent employment may be a separate question from whether casuals wish to convert to permanent status in their current job. In section 4 of our first Supplementary Report, we report that the

ACTU survey found that 27.5 per cent of casual employees who had worked for their current employer longer than six months responded in the affirmative when asked whether they would wish to convert to permanent employment. If applied to the ABS figures and our finding based on HILDA data that 73 per cent of all casuals had worked for their current employer longer than six months, this would equate to over 473,000 workers. We submit that this is likely to be a conservative estimate. The over-sampling of part-time workers in the ACTU survey may have reduced this result, as it is possible that full-time casual workers may be more likely to choose to convert. At the same time, some casual employees may have mistakenly conflated permanent employment with full-time work when answering the questionnaire, and may not have responded positively due to wishing to remain part-time. One further limiting factor may be a perception that conversion to a permanent position may require other, unfavourable changes in the nature of the job and employer expectations beyond the changes to the status of employment. These findings are further complemented by the apparently overwhelming support among respondents for the notion that casuals should have the opportunity to convert to more permanent employment, if they so wish.

As we noted in section 4.2 of our first Supplementary Report, 19.8 per cent of casuals in the ACTU survey indicated having made a request to become permanent. Of those who had not made such a request, just under half (48.3 per cent) indicated that this was because they were satisfied with current arrangements. The remainder indicated either that they were afraid to ask their employer because of job security concerns (10.0 per cent), that they believed permanent status was not available (25.1 per cent), that they were not convinced their employer would allow them to change (8.3 per cent), or other reasons. These latter reasons largely imply that the employees in question desire more permanent employment, should it be offered, but feel constricted in terms of their ability to make an effective request.

In the same survey, we find evidence that the notification of a right to convert to casual employment may increase the propensity of employees to make such requests; while increasing the likelihood that those who have not made such a request are content with their current arrangements as casuals. Of the 27.0 per cent of the total sample who had received such notification, 40.3 per cent had made such a request – roughly double the rate of the sample as a whole. Of those who had received notification but had not requested conversion, 69.6 per cent had not done so because they were content with current arrangements, 5.3 per cent because of job security concerns, 6.2 per cent because they did not believe permanent status would be available, and 1.3 per cent because they did not believe their employer would

allow them to change. This indicates that notification is likely to have the effect of increasing employees' knowledge of their rights, while also increasing employees' confidence in making such requests without the risk of negative consequences.

Part of the purpose of imposing an obligation on employers to notify casual employees of a right to convert to permanent employment would be to limit the employer's ability to unilaterally and arbitrarily determine the employment relationship to be a casual one. The notification obligation implies that the employees can have a reasonable expectation of permanent employment unless the employer can clearly justify on reasonable grounds the need for the employment relationship to remain casual; with the potential for recourse through dispute resolution processes. Without such an obligation to notify, employers can continue to more unilaterally determine that the continuing employment be casual, without any apparent need to justify this to the employees or their representatives.

However, the requirement to notify may be insufficient to properly realise employee choice in their form of employment. Commentators and researchers have attributed the limited use of conversion clauses thus far to the lack of power perceived and experienced by casuals and difficulties associated with pursuing the conversion and challenging objections (ACTU, 2012; Owens, 2002; Pocock, Buchanan and Campbell, 2004), a contention supported by our own research on why many casuals do not pursue conversion, cited above. These sources support variations of conversion clauses such that a casual employee would necessarily be deemed to be a permanent employee (accruing the associated benefits) after regularly working for the employer for a period of six months; as is now being pursued for inclusion in all awards by the ACTU. According to Owens (2002: 225), 'The notion that a worker must "contract in" to enjoy the protections of the safety net, rather than gain its entitlements automatically as a matter of status, weakens the protection the law is supposed to offer to the most vulnerable'. We similarly argue that placing the onus on the employee to apply for conversion may constitute an unreasonable imposition on the employee which may leave them feeling vulnerable and unable to properly pursue their rights. An automatic conversion, with the employee able to readily 'opt out', would more clearly support employee choice in their conditions of employment.

## 4 Flexibility and minimum engagements [sections 8(d), 9, and 11 of the brief]

### 4.1 With respect to work/life balance and the HILDA data [section 9(b) of the Brief]

It has been pointed out that data from waves 1-11 of the HILDA data shows that, overall, casual workers have a higher overall satisfaction with respect to the ability to balance work and non-work commitments than permanent workers (Buddelmeyer, 2014). We address this issue particularly in section 4.2 (page 22) of our main Report. We point out that the available evidence suggests that any such perceived advantage of casual employment with respect to work/life balance is dependent not on the nature of casual employment per se, but on the fact that casuals work disproportionately part-time; and that any advantage in work/life balance can be attributed to working part-time hours. As we pointed out, other studies have found that when hours of work are accounted for, casual employment offers no advantage for work-life balance over permanent work (see Hosking and Western, 2008; Skinner and Pocock, 2014). As mentioned in our previous report, our own analysis of wave 13 of the HILDA data shows that permanent and casual part-time workers had similar satisfaction scores on this dimension, while full-time casuals had the lowest overall score (see Table 2 below). To the extent that the difference is significant at all, the very slightly higher satisfaction rating for part-time casuals over permanent part-timers is likely to be a function of the fact that part-time casuals are likely to work fewer hours on average than permanent part-time employees.<sup>1</sup> At the same time, in section 5.2 of our main Report we note that casuals have a much higher propensity than permanent part-timer workers to prefer to work *more* hours, indicating underemployment.

***Table 2 Satisfaction with flexibility to balance work and non-work commitments amongst permanent and casual workers***

	Full Time	Part Time	Total
Permanent	7.29	7.86	7.41
Casual	7.07	8.00	7.77

<sup>1</sup> Analysis of the HILDA data shows that of those that specified hours, part-time casuals worked on average around 16 hours, while permanent part-time workers worked an average of 23 hours. This excludes 120/1526 part-time casuals and 31/1319 permanent part-time workers who did not specify average weekly hours and indicated them as 'variable'.

#### **4.2 Minimum engagements, worker flexibility and the casualisation of permanent part-time work [sections 8(d), 9(a) and 11(c) of the Brief]**

We find no support for the notion that large proportions of employees desire to work fewer hours per engagement. In Table 4.3 of the first Supplementary Report, we showed that the proportion of employees agreeing with the notion that shifts should be longer substantially exceeded the proportion who disagreed. Of those who had worked a shift of 3 hours or less, only around 11.0 per cent of casuals disagreed that minimum shifts should be longer, including 2.6 per cent who strongly disagreed; 47.7 per cent agreed that minimum shifts should be longer, including 21.3 per cent who strongly agreed. Interestingly, none of the 30 employees in the Accommodation and Food Services sector who had worked a shift less than the 4 hours proposed by the ACTU disagreed that minimum shifts should be longer. Only 3 workers of the 36 in the retail sector who had worked a 3 hour shift disagreed that minimum shifts should be longer, while none of the other 11 who had worked shorter shifts of 1-2 hours disagreed. In the Health Care and Social Assistance sector, only 2 of the 40 workers who had worked a shift less than 4 hours disagreed that minimum shifts should be longer.

We also reject the notion that lowering minimum engagements would represent an increase in employee-oriented flexibility. The above data implies that this would likely have the opposite effect for a larger proportion of employees. We further discuss these issues in section 4 of our main Report. The bulk of the research and evidence on casual employment demonstrates that for many casual employees, their insecure status as casuals subjects them to hours which are not only dictated by the employer, but are unpredictable and variable, subject to short-term changes beyond the control of the employee. Minimum engagements serve as some protection against this, ensuring that employees can better balance time spent at work with time preparing for, travelling to and from, and recovering from work; and with non-work time, and better to better plan their lives. Lowering minimum engagements would serve only to exacerbate the costs and unpredictability associated with casual work for employees. We will also discuss the economic implications for employees of lowering minimum engagements in the next subsection.

Relatedly, 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 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 permanent part-time counterparts.

#### **4.3 Economic implications for employees with respect to reducing minimum engagements and the casualisation of permanent-part time work [section 11 of the Brief]**

We see no reason to suppose that reducing minimum engagements is likely to affect the rate of unemployment one way or the other. We commented on this in section 4 (4.4.2 specifically) of our first Supplementary Report. The evidence that greater numerical flexibility is associated with better employment outcomes is at best inconclusive. We see little reason to believe that substantial new jobs will be created by allowing more workers to be paid for as little as 1 or 2 hours. However, we do contend that reducing the term of minimum engagements is likely to exacerbate the problem of *underemployment* experienced by casuals, and negatively affect their overall wages, particularly in the case of the low paid. Indeed, we submit that minimum engagements tend to reduce the rate of underemployment by ensuring that workers are paid a minimum amount for each engagement. By removing this protection, the insecurity of the worker's wage is increased.

We further argued in both of our previous Reports that short shifts reduce the ratio between the money earned from a shift and the costs associated with that shift. In section 5 of our first Supplementary Report, we analysed employees' costs associated with employment. We found that a majority of costs for employees associated with employment are fixed – that is, they do not vary according to the number of hours worked. Thus, short shifts make the cost of attending the shift considerably more expensive in relation to the earnings expected from that shift.

Finally, and again, 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.

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## Statement Regarding Code Of Conduct

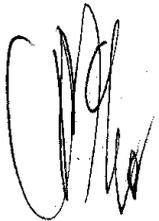
We have made all the enquiries that we believe are desirable and appropriate and no matters we regard as relevant have, to my knowledge, been withheld from the court. It should be noted that we have read, understood and complied with Practice Note CM7. In compliance with the Practice Note we have also attached our CVs detailing our specialised knowledge relevant to the analysis we present in the previous report. The opinions presented in this report are derived from this specialised knowledge.



**Professor Raymond Markey**

Director, Centre for Workforce Futures

Macquarie University



Joseph McIvor

Research Associate, Centre for Workforce Futures

Macquarie University



Dr Martin O'Brien

Senior Lecturer, Economics Discipline

Faculty of Business

University of Wollongong

1 February 2016

Professor Ray Markey  
Director  
Centre for Workforce Futures  
Faculty of Business and Economics  
Macquarie University NSW 2109

Dear Professor Markey,

**Second Supplementary Expert Report  
4 yearly review of modern awards – Casual employment and Part-time employment,  
(AM2014/196 and AM2014/197) in the Fair Work Commission**

I refer to the above Proceedings and to yours and Drs. Mclvor and O'Brien's Expert Report and Supplementary Expert Report and materials received 24 September 2015 and 14 October 2015.

We would like to further engage you to provide a second supplementary report concerning casual employment in Australia to be used in the Proceedings with the contribution of any other academic staff at the Centre for Workforce Futures as you deem appropriate.

Please provide your report by Monday, 8 February 2016 or as soon as practicable thereafter in order to give us sufficient time to prepare our submissions for filing by 22 February 2016. It is likely that you and any co-authors will be called to attend the hearing to be cross-examined on this supplementary report also.

Scope of work

The purpose of this report is to obtain your expert views in relation to various propositions advanced by other parties in the Proceedings in support of their claims to:

- 1) remove the requirement to notify workers of the right to convert from casual to permanent employment in 21 of the 120 modern awards;
- 2) reduce the minimum hours of engagement of casual and part-time employees in a number of modern awards;
- 3) increase the flexibility of part-time employment, including changing awards to allow for increased variability of days of work, lengths of daily engagements and rostered hours of work; and
- 4) to exclude casual loading from applying to overtime rates.

We have summarised and extracted various propositions underlying these claims below, along with the questions in relation to those propositions which we ask you to address in your expert report.

If it is in your view necessary to provide any contextual discussion in order to properly set out the basis of your opinion on these matters or to refer to your previous expert reports or those of your co-authors filed in these proceedings, please do so.

1. Do you agree with the proposition that the Australian economy is facing the following new challenges:
  - a) the high pace of technological development; a wide range of industries have trended down; the population is ageing; productivity growth is of increasing importance as a source of economic growth (that implicitly, other sources of productivity growth are dwindling); and there are competitive and disruptive pressures from populous industrialising countries such as China, India, and Indonesia.
  - b) While wages growth has been relatively low in the past couple of years, for most of the past decade Australian wages were growing faster than those in other countries, leaving Australian businesses in an uncompetitive cost position.
  - c) Energy costs have risen and hence one of Australia's comparative advantages has been negated;
  - d) Australia's international competitiveness has slipped in recent years, for example, Australia has fallen from 15<sup>th</sup> place on the World Economic Forum's Global Competitiveness Index in 2009-10 to 22<sup>nd</sup> in 2014-15 before rising slightly to 21<sup>st</sup> in 2015-2016.
  - e) Productivity growth rates and real GDP growth have been trending lower in recent years.
2. Can you comment on the extent to which the claimed challenges listed above in (1) are likely to be faced in each of the industries listed in Appendix A, given the level of trade exposure in those industries or other factors?
3. Do you agree with the proposition that the challenges described in (1) (or one or more of them) could be better managed by employers, materially or at all, if those employers were given the following increased flexibility regarding the employment of casual and part-time employees:
  - a) increased freedom to engage casual employees;
  - b) lower minimum hours of employment for part-time and casual employees; and/or
  - c) greater freedom for employers in setting and changing part-time employees' hours and days of work and total daily and weekly hours of work. For example, instead of guaranteeing a part-time employees certain hours of work, vary awards to provide employers with the ability to unilaterally, or in the alternative, with the agreement of the employee:
    - to guarantee only part of a part-time employee's hours and allow the other part to be variable in quantum or rostered days or times or able to be cancelled at short notice; or

- to agree set days an employee is available to work but without guarantees of work on those days.
- 4. Can you comment on any of the consequences for employees of giving employers the increased labour flexibility described above in (3) in light of the matters traversed in the reports you have provided in these proceedings? In addition, is it probable that there might be negative economic impacts for others (for example, for employers) of adopting the increased flexibility described in (3) above.
- 5. Do you agree with the proposition that the forms of increased flexibility for employers described above at (3) will, or are essential in order to:
  - a) increase productivity,
  - b) increase business' competitiveness,
  - c) increase employment growth;
  - d) increase workforce participation. In particular, do you agree that lowering the minimum engagement period for casual employees will increase the employment of younger people, older and retired people and secondary school students and help better accommodate parents with family or caring responsibilities? Further, do you agree that a correlation between the increase in female workforce participation and a higher incidence of females working in a casual capacity<sup>1</sup>, suggests that casual employment is critical in enabling greater female workforce participation during the periods in which those workers also have caring responsibilities?
  - e) increase the performance and competitiveness of the national economy; and/or
  - f) help workers and employers by preventing plant closures due to un-competitiveness and inflexibilities.
- 6. Do you agree with the following propositions:
  - a) The removal of the obligation to notify casual employees of a right to convert to permanent employment would not change whether or not a casual employee has ongoing employment as this is generally determined by an employer's operational needs; and/or
  - b) Increasing levels of casualisation of the workforce would result in increased productivity, greater efficiency and better utilisation of resources, encourage employment growth and the sustainability, performance and competitiveness of the economy.
- 7. Are there options other than providing the increased flexibility for employers outlined in (3) for promoting productivity, flexible work practices, economic growth and/or reducing costs to business?
- 8. Can you comment on the following propositions, especially in relation to the survey results referred to in your previous reports:

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<sup>1</sup> See ABS, Labour Force Status (STLM2) by Detailed Age, Capital City/Balance, Sex – from February 1978, 2013; ABS (2013), Forms of Employment, Australia, November 2012, cat. no. 6359.0, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6359.0>.

- a) A very low number of casual (or casual labour hire) employees, if any, wish to convert to permanent employment.
  - b) A very low number of casual (or casual labour hire) employees, if any, have tried to convert to permanent employment and, in particular, a very low number of employees who were notified of a right to convert elected to convert.
    - Of any casual labour hire employees wishing to convert to permanent work, are such workers generally interested in permanent employment with their employer (the labour hire company) or with the host employer?
    - Are casual (and casual labour hire workers) likely to be adequately informed of any right to convert to permanent employment?
  - c) A requirement for employers to notify people of their right to convert from casual to permanent employment is unnecessary given employees' existing means of informing themselves of their workplace rights is satisfactory.
  - d) A significant number of employees want to work less hours per engagement but might be prevented from doing so because of minimum engagement periods.
  - e) The majority of casual employees freely choose to engage or remain in casual employment.
9. Could you also please comment on the following propositions:
- a) Lowering minimum engagement periods would allow casual employees to have greater influence over how their working hours are structured and to better balance work and non-work commitments.
  - b) Casual workers enjoy a higher level of satisfaction in relation to the flexibility afforded them to balance work and life, and this is supported by the HILDA survey (extract below)<sup>2</sup>:

	Job satisfaction					
	Overall	Balancing work and non-work	Hours	Pay	Job security	The work itself
<b>Males</b>						
Permanent/ongoing	7.57	7.26	7.19	6.97	8.14	7.58
Casual	7.41	7.64	7.00	6.88	7.54	7.25
Fixed-term contract	7.61	7.23	7.18	7.01	7.64	7.70
Labour-hire	7.16	7.11	7.09	6.66	6.43	7.17
Self-employed	7.65	7.54	6.75	6.49	7.42	7.85
<b>Females</b>						
Permanent/ongoing	7.67	7.33	7.33	6.88	8.35	7.61
Casual	7.69	7.91	7.20	7.07	7.67	7.40
Fixed-term contract	7.66	7.33	7.33	6.89	7.15	7.73
Labour-hire	7.42	7.65	7.29	6.88	6.74	7.07
Self-employed	7.97	8.00	7.16	6.61	7.81	8.03

10. Can you comment on the findings of the following study:

*“Almost a third of all participants explained that they had deliberately chosen casual work because it was protective of their health and wellbeing. Reduced*

<sup>2</sup> See Families, Income and Jobs (Volume 9), Melbourne Institute of Applied Economic and Social Research at 63.

*responsibility, less 'workplace politics', less work-life conflict, and less job stress than in their prior (permanent) job were determining factors in their decision. For some, ill health was linked to prior permanent employment. Over half of workers in our study deliberately chose casual work, to the extent that almost a third felt casual work was protective of their health. These workers tended to report that less stressful working conditions, reduced work-life conflict through control of working schedule, and greater remuneration (via the wage loading) in casual work outweighed the costs associated with the lack of leave entitlements. For some, the choice of casual employment was in response to the perceived impact of permanent employment on their health and wellbeing. Overall the participants in this study enjoyed comparatively good health, and this enabled them to trade their perceived lack of need for sick leave for the greater remuneration offered by the wage loading in the casual contract".<sup>3</sup>*

11. Are you able to answer the following questions:

- a) Is reducing minimum engagement periods for casual or part-time workers likely overall to reduce unemployment and/or underemployment?
- b) Is reducing minimum engagement periods for casual or part-time employees likely to affect workers' wages or have other adverse effects on workers?
- c) Would reducing the number of guaranteed hours of part-time workers (by making part-time workers' quantum of hours more flexible and shifts more easily able to be cancelled without pay) be likely to impact such workers' wages and earnings security, or create adverse impacts on workers and, if so, how?

Please identify all authors and their contributions in your report. We refer to the Federal Court Practice Note CM7 on the use and conduct of expert witnesses, issued under Rule 23.12 of the *Federal Court Rules 2011*, previously provided. Please note that the Practice Note does not formally apply to the proceedings but we nonetheless again ask that you and any contributing authors review it before commencing work on the report and that you treat yourselves as bound by it. Please note the declaration required by clause 2.2 of the Practice Note.

If you wish to discuss this request further, please do not hesitate to contact me by telephone on (03) 9664 7388 or email at [jfleming@actu.org.au](mailto:jfleming@actu.org.au).

Yours faithfully,



**James Fleming**  
Legal and Industrial Officer

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<sup>3</sup> Keuskamp D, Mackenzie CR, Ziersch AM, Baum FE. Deliberately casual? Workers' agency, health, and nonstandard employment relations in Australia. *Journal of Occupational and Environmental Medicine*. 2013 Jun;55(6):620-7.

## Appendix A

	<b>Industry (ANZSIC division)</b>
1.	Accommodation and Food Services
2.	Administrative and Support Services
3.	Agriculture, Forestry and Fishing
4.	Construction
5.	Education and Training
6.	Electricity, Gas, Water and Waste Services
7.	Financial and Insurance Services
8.	Health Care and Social Assistance
9.	Information Media and Telecommunications
10.	Manufacturing
11.	Mining
12.	Other Services
13.	Professional, Scientific and Technical Services
14.	Public Administration and Safety
15.	Retail Trade
16.	Transport, Postal and Warehousing