The statement of John Moller was withdrawn on 10 March 2016, see correspondence

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission
AM2014/196 & AM2014/197
Casual Employment & Part-Time Employment

26 February 2016
# 4 Yearly Review of Modern Awards

AM2014/196 & AM2014/197

Casual & Part-Time Employment Table

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1. INTRODUCTION

1. The Australian Industry Group (Ai Group) files this reply submission in opposition to the variations sought by the Australian Council of Trade Unions (ACTU) and its affiliates, in accordance with the Fair Work Commission’s (Commission) directions of 29 June 2015. This submission should be read in conjunction with our submission of 14 October 2015, which was filed in support of variations sought by Ai Group.

2. The ACTU and certain union affiliates are seeking sweeping changes to award provisions that apply to casual and part-time employees in 111 of 122 awards as part of the 4 yearly review of modern awards (Review).

3. Whilst the variations sought have a common subject matter – that is, the regulation of casual and part-time employment – the specific terms of the changes sought to each award differ. Further, their impact would also vary significantly from award to award, industry to industry.

4. The Commission has nonetheless decided that the claims will be heard by one Full Bench “to ensure that the range of issues are dealt with efficiently and to minimise the risk of inconsistent decisions”. The Commission has made it clear that the referral of the claims to the Full Bench “simply relates to the process adopted for the hearing and determination of the claims” and “it does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards”.

5. There is currently a great deal of diversity amongst the casual employment and part-time employment provisions of modern awards. This diversity is necessary and appropriate. Any attempt by the Commission to develop model provisions for casual and part-time employment would not be workable or appropriate.

6. We commence our response to the claims before the Commission by considering the need to maintain a flexible labour market, the role that casual

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and part-time employees play in facilitating such flexibility, and data that establishes recent trends in casual and part-time employment. We then proceed to deal with the various elements of the claims by examining the arguments presented, the evidence called, the relevant history that precedes the issues to be ventilated, the potential impact of the claims if they were granted and the underlying rhetoric that appears to have motivated the case mounted by the ACTU and its affiliates.
2. THE UNIONS’ CLAIMS

7. The unions’ claims now before the Commission relate broadly to the following matters:

- Casual conversion;
- Minimum engagement periods;
- A prohibition on engaging and re-engaging an employee to avoid award obligations;
- A prohibition on increasing the number of casual and part-time employees unless certain conditions are met;
- The requirement to provide certain information to casual employees upon engagement;
- The exclusion of casual employees from a requirement for a minimum 10 hour break after overtime;
- Variations sought by the ACTU’s affiliates to specific awards; and
- Matters arising from the exposure drafts that have been referred to this Full Bench.

8. Whilst we deal with the variations sought in greater detail throughout our submission, we here summarise each of the claims to which we seek to respond in this submission and categorise them in accordance with their subject matter and proponent.

9. Given the vast amount of material filed by the unions and other parties in respect of a very large number of awards, this submission does not deal with all award-specific claims in which Ai Group has an interest. Ai Group will seek to file submissions on the remaining award-specific claims as soon as possible.
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<td>A new provision that would give a casual employee, other than an irregular casual</td>
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<td>employee, an absolute right to convert to permanent employment.</td>
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<td><strong>2 AMWU casual conversion claim – ‘deeming’ clause</strong></td>
<td>A new provision that would deem a casual employee, other than an irregular casual</td>
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<td>employee, to have converted to permanent employment.</td>
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<td><strong>3 AMWU – Vehicle Division casual conversion claim – ‘deeming’ clause</strong></td>
<td>A new provision that would deem a casual employee, other than an irregular casual</td>
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<td>employee, to have converted to permanent employment.</td>
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<td><strong>4 ACTU minimum engagement periods claim</strong></td>
<td>The introduction of a minimum engagement period of 4 hours or an increase in a</td>
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<td>pre-existing minimum engagement period to 4 hours for casual and part-time employees.</td>
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<td>• Part-time employees: 70 awards</td>
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<td>hours.</td>
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<td>• Limiting the extent to which an employer and employee can agree to</td>
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\(^4\) See Attachment B to the ACTU’s submissions dated 19 October 2015.

\(^5\) The Manufacturing Award also forms part of the ACTU’s claim. See Attachment B to the ACTU’s submissions dated 19 October 2015.

\(^6\) The FBT Award also forms part of the ACTU’s claim. See Attachment B to the ACTU’s submissions dated 19 October 2015.
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| reduce the minimum engagement period (i.e. to 3 hours).  
- Limiting the extent to which an employer and casual employee can agree to reduce the minimum engagement period (i.e. to 3 hours). | |
| **6 AMWU – Vehicle Division minimum engagement claim** | Vehicle Award⁷ |
| - The introduction of a 4 hour minimum engagement period for part-time employees, with a facilitative provision to agree to 3 hours.  
- The introduction of a 4 hour minimum engagement period for casual employees. | |
| **7 ACTU, AMWU and AMWU – Vehicle Division’s claims to insert a prohibition on engaging and re-engageing an employee to avoid an award obligation** | 109 awards⁸ |
| The introduction of a provision that prohibits the engagement and re-engagement of an employee for the purposes of avoiding an award obligation. | |
| **8 ACTU, AMWU and AMWU – Vehicle Division’s claims to insert a prohibition on increasing the number of casual or part-time employees** | 109 awards⁹ |
| The introduction of a provision that prohibits an employer from employing additional casual or part-time employees until pre-existing employees are provided with an opportunity to increase their normal working hours. | |

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⁷ The Vehicle Award also forms part of the ACTU’s claim. See Attachment B to the ACTU’s submissions dated 19 October 2015.

⁸ See Attachment B to the ACTU’s submissions dated 19 October 2015.

⁹ See Attachment B to the ACTU’s submissions dated 19 October 2015.
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<td>employee must be informed in writing that they are employed as a casual, by</td>
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<td>whom they are employed, their classification level, rate of pay and the likely</td>
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<td>regular pattern of ordinary hours and that such hours are agreed between the employer</td>
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<td>• The introduction of a new clause</td>
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<sup>10</sup> See Attachment B to the ACTU’s submissions dated 19 October 2015.
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3. THE STATUTORY FRAMEWORK

10. The unions’ claims are pursued in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (the Act or FW Act).

11. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

12. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission’s powers under Part 2-3 of the Act, which includes s.156.

13. Section 136(1) of the Act is also relevant. It deals with what a modern award can include. Relevantly, s.139(1) provides a list of matters about which a modern award can include terms.

14. Section 139(1) reflects s.576J of the *Workplace Relations Act 1996*¹¹, which established the matters about which a modern award was permitted to include terms when the awards were made pursuant to the Part 10A Award Modernisation Process. Section 576J was inserted by the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*. The Explanatory Memorandum to the Bill¹² identified the list of matters in the former s.576J as allowable modern award matters. The Explanatory Memorandum also said that each allowable award matter would have its ordinary workplace relations meaning. The phrase ‘allowable award matter’ and the principle that each

---

¹¹ See the Explanatory Memorandum to the *Fair Work Bill 2008* at paragraph 529
¹² See paragraph 42.
allowable matter would have its ordinary workplace relations meaning derives from s.89A of the *Workplace Relations Act 1996*.

15. A Full Bench of the Australian Industrial Relations Commission (AIRC) in the Award Simplification Decision\(^{13}\) considered s.89A. The Full Bench referred to a decision made by another Full Bench regarding the *Commonwealth Bank of Australia Officers Award*.\(^{14}\) The Full Bench in that earlier case held that (emphasis added):

“The list of allowable award matters is comprised of concepts of particular kinds of award benefits and conditions of employment. The construction of Section 89A(2) demands that each concept be given a meaning consistent with the use of the concepts in industrial relations practice in Australia. In its context, section 89A is not a provision for which there is a need for either a restrictive or a generous construction. The terms in it are to be given their ordinary meaning in regard to industrial relations usage. Most of the allowable award matters listed are industrial concepts formulated around entitlements and conditions of employment ubiquitously the subject of award provisions in State and Federal industrial jurisdictions. Even within the standard award concepts, the formulation of an award provision covering employment entitlements and conditions has long allowed room for craft and drafting skills. Conceivably, some conditions of employment could be formulated in sufficiently various ways to bring the conditions within one, another, or more than one of the allowable award matters. The categories of allowable award matters are not mutually exclusive. However it is generally the case that established award provisions are of a sufficiently standard content and form to be identifiable as coming within one or occasionally, more of the allowable award categories, or as not coming within the category at all.”

16. The Full Bench in the *Award Simplification Decision* made the following additional points (emphasis added):

“... In the first place, s.89A(2) does not contain a grant of power at all, but a limitation on power. Secondly, even if the principle applied, it cannot be used to broaden the scope of the power itself, but only to provide the means to carry it into effect. Each head of power in s.51 of the Constitution describes a category of laws which are within the competence of the Commonwealth Parliament to enact. By contrast, s.89A specifies particular subjects for award regulation. An example illustrates the distinction. The decision in Burton v. Honan [cited above] was concerned with the scope of the power to make laws with respect to trade and commerce with other countries contained in s.51(i) of the Constitution. Specifically, the Court had to consider whether a provision for forfeiture and seizure of goods was a law with respect to trade and commerce. An inquiry of this kind is not analogous to an inquiry as to the breadth of a specified subject

\(^{13}\) Print P7500.

\(^{14}\) (1997) 74 IR 446.
(such as annual leave) for the purpose of the exercise of the Commission's arbitral power. Thirdly, the WR Act itself, in s.89A(6), establishes the limits of the category. That subsection makes it clear that the matters specified in s.89A(2) are not to be expanded, but that an award provision which is incidental to one of the matters is permitted, provided it is also necessary for the effective operation of the award. The State of New South Wales, supported by the LTU and the ACTU, submitted that the implied incidental power is not restricted to that which is "necessary or essential" for the effective operation of the express power. It cited authorities (to which we have already referred) concerning the construction of various grants of power in s.51 of the Constitution in support of that proposition. It went on to submit that, even if s.89A(6) is more restrictive than the implied incidental power, the implied incidental power is still available. We do not accept these submissions. We have already pointed out the difference in character between a constitutional grant of power and the specification of allowable award matters. In addition, it is impossible to construe s.89A(6) by resort to an implied power which is inconsistent with the clear words of that subsection. In enacting s.89A(6), the legislature has given direct guidance on the extent to which the Commission may make provisions extending beyond the subject matters specified in s.89A(2). We see no reason to depart from the language of the statute, as explained in the CBACOA Case [cited above], and limited by s.89A(6)."

17. These decisions are of relevance to the construction of s.139(1) as the list of allowable award matters at s.89A was in similar terms to that now found in the Act.

18. Consideration was given to the interpretation of s.139(1) during the two year review of modern awards by a Full Bench that was dealing with numerous claims regarding apprenticeship and traineeship provisions. The decisions above were cited by that Full Bench, after which it stated that the terms of s.139(1) should be given their ordinary meaning.\textsuperscript{15} We concur.

19. Section 142 also provides a basis upon which a modern award term may be included in a modern award. Specifically, s.142(1) provides for the inclusion of incidental terms:

\begin{center}
142 Incidental and machinery terms
\end{center}

\textit{Incidental terms}

\begin{enumerate}
\item A modern award may include terms that are:
\begin{enumerate}
\item incidental to a term that is permitted or required to be in the modern award; and
\end{enumerate}
\end{enumerate}

\textsuperscript{15} \textit{Modern Awards Review 2012 – Apprentices, Trainees and Juniors} [2013] FWCFB 5411 at [95].
(b) essential for the purpose of making a particular term operate in a practical way.

20. This provision was also considered by a Full Bench during the review of apprenticeship and traineeship provisions in 2012, in which it observed the narrow basis upon which it allows for the inclusion of an award term: (emphasis added)

“[101] We should, however, say something about s.142(1), which allows terms to be included in an award that are incidental to a term that is permitted or required to be in an award and which is essential to make the particular term operate in a practical way. The terms of this section are to be contrasted with s.89A(6) of the WR Act. That section provided that the AIRC “may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award”. We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word “essential” suggests that the term needs to be “absolutely indispensable or necessary” for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).”

16 Modern Awards Review 2012 – Apprentices, Trainees and Juniors [2013] FWCFB 5411 at [101]
4. THE COMMISSION’S GENERAL APPROACH TO THE 4 YEARLY REVIEW

21. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission’s Preliminary Jurisdictional Issues Decision provides the framework within which the Review is to proceed.

22. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

“[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABi’s submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”

23. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

“[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”

24. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

“[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):

“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.”20

25. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated “as a matter of significance” and that “no particular primacy is attached to any of the s.134 considerations”. The Commission identified its task as needing to “balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net”.

26. Section 138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms (emphasis added):

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“[36] ... Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.”

27. The frequently cited passage from Justice Tracey’s decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

“... a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.”

28. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

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29. In a subsequent decision considering multiple claims made to vary the Security Services Industry Award 2010, the Commission made the following comments, which we respectfully commend to the Full Bench: (underlining added)

“[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.”

30. The unions’ claims conflict with the principles in the Preliminary Jurisdictional Issues Decision and accordingly the claims should be rejected.

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22 Re Security Services Industry Award 2010 [2015] FWC 620 at [8].
5. CASUAL AND PART-TIME EMPLOYMENT ARE
AWARD-SPECIFIC ISSUES

31. There is currently a great deal of diversity amongst the casual employment and
part-time employment provisions of modern awards.

32. The diversity in the length of minimum engagement periods (if any) for casual
and part-time employees and whether casual conversion is included in the
award, is highlighted by the table in Attachment 5A.

33. Such diversity is necessary and appropriate. Any attempt by the Commission to
develop model provisions for casual and part-time employment would not be
workable or appropriate.

34. Diversity is necessary for casual and part-time employment provisions in
awards because:

- There are significant differences in the needs and characteristics of
  industries and occupations covered by modern awards;

- There are significant differences in the current incidence of casual and
  part-time employment amongst the industries and occupations covered
  by modern awards;

- There are significant differences in the current casual and part-time
  employment provisions of modern industry and occupational awards;

- There are significant differences in the casual and part-time
  employment provisions of the pre-modern industry and occupational
  awards upon which the modern awards were based;

- Any attempt to standardise provisions would create significant ‘winners’
  and ‘losers’. Many industries would lose critical existing flexibility,
  resulting in higher costs, reduced productivity, reduced competitiveness
  and reduced customer service levels.
35. For the above reasons, in a submission of 11 November 2014 Ai Group expressed opposition to the issues of casual employment and part-time employment being dealt with as common issues. In response to Ai Group’s submission and similar submissions by other parties, in a Statement of 1 December 2014, Justice Ross said (emphasis added):

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

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

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

“Some ACCI members may seek to address concerns relating to part-time and casual provisions within particular awards and it seems such applications would likely only address particular industry or occupational considerations. The form and incidence of casual and part-time employment and matters such as rostering arrangements and working patterns vary among industries and occupations and ACCI maintains these circumstances favour individual treatment. The award stage may still provide the most efficient way of dealing with such claims but if they are left as a part of the common issues proceedings, they may warrant discrete treatment.”

[17] The FW Act gives the Commission considerable latitude in relation to the process by which the Review is to be conducted. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review (see ss.616(1), (2) and (3) of the FW Act). Section 582 provides that the President may give directions about the conduct of
a Review and the general provisions relating to the performance of the Commission’s functions apply to the Review (see particularly ss.577 and 578).

[18] Subsection 156(5) of the FW Act provides that in a Review each modern award must be ‘reviewed in its own right’, however, this does not prevent the Commission reviewing two or more modern awards at the same time. In National Retail Association v Fair Work Commission the Full Court of the Federal Court considered the meaning of the expression ‘[t]he review must be such that each modern award is reviewed in its own right’, in Item 6 (2A) of Schedule 5 of the Fair Work (Transitional Provisions and Consequent Amendments) Act 2009 (Cth) . The Full Court held that the review of a particular modern award may be conducted through a number of different hearings in which different aspects of the award are determined. The Full Court rejected the proposition that Item 6 (2A) required that the review of each modern award is to be confined to a single holistic assessment of all of its terms and said:

“... The purpose of the requirement to review a modern award “in its own right” is to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations. It is not directed to the manner in which intra-award considerations are to be dealt with.

That the review of each modern award must focus on the particular terms and the particular operation of the particular award does not suggest that the review of that award was intended to be confined to a single holistic assessment of all of its terms. The conclusion that a modern award fails to comply with the modern awards objective may be based upon a single offending provision. There is no reason in principle why the FWC could not come to that conclusion without reviewing the entire award. Nor can we discern any reason why the review of a modern award was intended to be confined to a single holistic exercise. ...

... It should not be assumed that, in requiring the FWC to conduct the very substantial task of reviewing all modern awards, Parliament intended to impose practical constraints upon the manner in which that task was to be performed, unless such constraints served a useful purpose. No such purpose is apparent to support the constraint for which the NRA contends. Further, the very wide procedural discretion conferred on the FWC, to which we referred at [18], suggests that Parliament intended to confer upon the FWC a great deal of flexibility in the way the transitional review was to be conducted.”

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

“Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.”

[20] The presiding Member of the Casual and Part-time Employment Full Bench (Vice President Hatcher) will list these matters for mention and programming in due course.”

36. Consistent with the above Statement, we submit that the Full Bench should proceed on the assumption that the proposals of employer and union parties to vary casual and part-time employment provisions in particular awards have been included in the current Full Bench proceedings merely to ensure that the matters are dealt with efficiently and to minimise the risk of inconsistent decisions. Of course, decisions of the Commission are not inconsistent just because they result in very different outcomes from one award to another.

37. Ai Group opposes the development of any model clauses relating to casual and part-time employment. The concept of model clauses is inconsistent with the imperative that casual and part-time employment be dealt with on an award by award basis. If any model clauses are developed, there would be a significant risk that inadequate weight and attention will be given to the needs of employers and employees in particular industries and to the unique characteristics of those industries.

6. TRENDS IN CASUAL AND PART-TIME EMPLOYMENT

38. The Australian Bureau of Statistics (ABS) data on ‘forms of employment’ (Nov 2013) show that within the total paid workforce (see Table 6.1):

- The proportion who are permanent employees (employees with paid leave entitlements, regardless of the number of hours they work) has been drifting up slowly over many years. 63.3% of the paid workforce were permanent employees in November 2013, up from 59.6% in 2004 and 60.8% in 1998.

- The proportion who are working on a casual basis (employees with no entitlement to paid leave, regardless of the number of hours they work) has been reasonably stable since 1998 at 19% to 20% of all workers. Indeed, it may have fallen a touch, with an average of 19.3% of workers in casual employment from 2008-2013, versus an average of 20.3% for the period from 1998 to 2007 (albeit with incomplete annual data in these earlier years). The proportion of employees with no leave entitlements peaked at 20.9% in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0% in 2012.
Table 6.1: Forms of employment in Australia, 1998 to 2013

<table>
<thead>
<tr>
<th>% of all employed, status in main job</th>
<th>Employees</th>
<th>Non-employee workers</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>With paid leave</td>
<td>Without paid leave</td>
<td>Owner-managers of unincorporated businesses</td>
</tr>
<tr>
<td></td>
<td>With employees</td>
<td>Without employees</td>
<td>With employees</td>
</tr>
<tr>
<td>Aug 1998</td>
<td>60.8</td>
<td>20.1</td>
<td>3.5</td>
</tr>
<tr>
<td>Nov 2001</td>
<td>60.6</td>
<td>19.9</td>
<td>3.7</td>
</tr>
<tr>
<td>Nov 2004</td>
<td>59.6</td>
<td>20.6</td>
<td>3.1</td>
</tr>
<tr>
<td>Nov 2006</td>
<td>60.8</td>
<td>20.4</td>
<td>3.0</td>
</tr>
<tr>
<td>Nov 2007</td>
<td>60.9</td>
<td>20.9</td>
<td>2.9</td>
</tr>
</tbody>
</table>

Independent contractors | Business operators
Nov 2008       | 61.8       | 19.1                  | 9.1                  | 10.0                  |
Nov 2009       | 61.4       | 19.8                  | 9.6                  | 9.1                  |
Nov 2010       | 61.6       | 19.3                  | 9.8                  | 9.2                  |
Nov 2011       | 62.2       | 19.3                  | 9.0                  | 9.2                  |
Nov 2012       | 63.4       | 19.0                  | 8.5                  | 9.0                  |
Nov 2013       | 63.3       | 19.4                  | 8.5                  | 8.8                  |

Source: ABS, Forms of Employment, to Nov 2013

39. Across the major industry groups, there are concentrations of employees, casual workers, contractors and self-employed business operators (see Table 6.2) that clearly reflect the typical operational requirements of each industry.

40. Permanent employment (with paid leave entitlements) accounts for very high proportions of employment in mining (88%), utilities (84%), finance and insurance (84%) and public administration (89%). These industries tend to be extremely capital-intensive and concentrated into a small number of very large corporations.

41. Casual employment (without paid leave entitlements) is the dominant form of employment in accommodation and food services, with 58% of workers (440,000 people) in the hospitality industry in this form of employment. For women in this industry, 61% are in casual employment (265,000 women). Of these female casuals, 85% (227,000 women) work part-time. This single group – part-time women in hospitality work – account for 18% of all female casual workers and 10% of all casual workers in the Australian workforce. Other industries that have relatively high proportions (and numeric concentrations) of
casual workers include retail trade (36%), arts and recreational services (33%) and administrative services (22%).

Table 6.2: Forms of employment, major industries (2013 & 2014)

<table>
<thead>
<tr>
<th>Industry (ANZSIC groups)</th>
<th>All employees (May 2014)</th>
<th>Forms of employment (Nov 2013)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>People &amp; &amp; Female</td>
<td>Paid leave</td>
</tr>
<tr>
<td></td>
<td>'000</td>
<td>%</td>
</tr>
<tr>
<td>Agriculture</td>
<td>321.4</td>
<td>27.4</td>
</tr>
<tr>
<td>Mining</td>
<td>264.6</td>
<td>3.5</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>921.5</td>
<td>14.1</td>
</tr>
<tr>
<td>Utilities</td>
<td>144.2</td>
<td>9.0</td>
</tr>
<tr>
<td>Construction</td>
<td>1,029.2</td>
<td>15.5</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>385.6</td>
<td>17.1</td>
</tr>
<tr>
<td>Retail trade</td>
<td>1,228.9</td>
<td>49.1</td>
</tr>
<tr>
<td>Accomm. &amp; food services</td>
<td>765.2</td>
<td>58.9</td>
</tr>
<tr>
<td>Transport &amp; post</td>
<td>590.0</td>
<td>19.6</td>
</tr>
<tr>
<td>IT &amp; telecomms</td>
<td>195.6</td>
<td>21.8</td>
</tr>
<tr>
<td>Financial &amp; insurance</td>
<td>404.0</td>
<td>17.5</td>
</tr>
<tr>
<td>Real estate services</td>
<td>229.5</td>
<td>24.3</td>
</tr>
<tr>
<td>Professional services</td>
<td>937.6</td>
<td>20.6</td>
</tr>
<tr>
<td>Administrative services</td>
<td>397.1</td>
<td>41.4</td>
</tr>
<tr>
<td>Public admin. &amp; safety</td>
<td>730.2</td>
<td>17.1</td>
</tr>
<tr>
<td>Education</td>
<td>902.5</td>
<td>38.1</td>
</tr>
<tr>
<td>Healthcare &amp; social services</td>
<td>1,392.9</td>
<td>43.9</td>
</tr>
<tr>
<td>Arts &amp; recreation services</td>
<td>183.5</td>
<td>48.2</td>
</tr>
<tr>
<td>Personal and other services</td>
<td>506.6</td>
<td>29.7</td>
</tr>
<tr>
<td><strong>All industries</strong></td>
<td><strong>11,529.9</strong></td>
<td><strong>30.4</strong></td>
</tr>
</tbody>
</table>

Source: ABS, Forms of Employment, to Nov 2013

42. The occupational profile of people working in various forms of employment largely reflects their industry distribution (Chart 6.1):

- A higher proportion of casual workers are employed in sales occupations (44% of this occupation and 50% of women in this occupation), labouring (41% of this occupation and 46% of women in this occupation) and community and personal service occupations (35% of this occupation and 38% of women in this occupation).
- A higher proportion of independent contractors are employed in technicians or trades (17%), labouring (10%), machinery operators/drivers (10%) and professional occupations (9%).

**Chart 6.1: Forms of employment, major occupation groups (2013)**

![Chart 6.1](chart1.png)

Source: ABS, Forms of Employment, to Nov 2013

**Chart 6.2: Forms of employment: age and gender distribution (2013)**

![Chart 6.2](chart2.png)

Source: ABS, Forms of Employment, to Nov 2013
43. The recent Productivity Commission (PC) final report into Australia’s Workplace Relations Framework describes the unions’ views on non-standard forms of work as ‘overly negative’ and characterises casual work as a ‘now critical part of the labour market’.

44. The final report notes that the:

“...increase in employment share of non-standard forms of employment has abated, and to some extent even reversed. For example, the share of female employees without leave entitlements — the most commonly used description of a casual worker — scarcely grew between 1992 and 2000, and has since dropped significantly (figure 2.8). While male casual rates grew strongly from 1992 to 2000, they have since stabilised. The share of casuals working part-time has also stabilised.”

45. Relevantly the PC acknowledges that there:

“...is little evidence that casualisation or other non-traditional forms of employment have been increasing in importance over the last decade, except among the young. On average, job security has been increasing.”

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7. THE IMPORTANCE OF FLEXIBILITY IN THE LABOUR MARKET

46. Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia’s national competitiveness and our capacity to further improve Australian living standards. Employers need more flexibility to employ casual and part-time employees, not less.

47. In recent years, the emphasis on improving Australia’s productivity performance has lifted as productivity outcomes across a wide range of industries have trended down and, particularly in the face of demographic factors, the relative importance of improved productivity as a source of growth has risen.

48. The Australian economy is facing a number of important challenges. The global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked or are embarking on their processes of industrialisation. This is profoundly disruptive and is throwing down major competitive challenges to Australian companies.

49. The pace of technological development is similarly creating far-reaching challenges. It is essential that award provisions enable Australian employers to remain agile and in a position to readily adapt to technological changes. This includes ensuring that employers have a high degree of flexibility to engage casual and part-time employees.

50. Demographic developments present other challenges. Australia is set on a course of demographic change that is seeing a steady increase in the proportion of older people. The ageing of our population will put a premium on workplace flexibility. A fall in the proportion of the population in the workforce will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential. Many people prefer casual and part-time work, and are not available or willing to work on a full-time basis.
51. There are a number of other major economic challenges which Australia is experiencing at this time:

1. The strength and extent of the mining investment boom and the now-reversing surge in commodity prices that were such dominant forces over the past decade have changed our economy much more significantly than is often credited. The associated lift in the value of our currency substantially weakened significant parts of the domestic economy. It reduced industry’s capacity to invest and innovate and it meant that segments of industry were simply unable to compete. As a result we have lost or are losing some industries (e.g. automotive assembly). Others industries are much weaker. For some supply chains there are now lost capabilities; some of these are irreversible.

2. While there are some areas of recovery as the mining investment boom is fading and as commodity prices and the exchange rate have fallen, non-mining sources of growth remain thin on the ground and fragile.

3. Australian industry has quite of bit of recovery to do and many industry sectors remain cash strapped.

4. In addition to lost capabilities, our cost structures have also shifted. While wages growth has been relatively low in the past couple of years, for most of the past decade our wages were growing faster than those in other countries and our pace of productivity growth has been slower. This has left Australian businesses with high, and indeed rising unit labour costs reinforcing an uncompetitive cost position. Increased productivity is the key to restoring competitiveness.

5. Domestic energy costs have also risen substantially over recent years. What was once a source of comparative advantage has now been negated.

52. The reality is that Australia needs modern awards that are truly modern, and consistent with the needs of 21st century workplaces. Many of the trends that
will reshape the workplace of the future are already apparent, including the following:

- The ‘sharing economy’ is a new way of organising production, consumption and the use of assets, enabled by cheap computing and ubiquitous communications. Services like Uber and Airbnb create huge efficiencies and new possibilities. They are also creating new working arrangements where flexibility is the key. The last thing that is needed in this environment is the imposition of more restrictions on casual and part-time employment.

- Automation is moving well beyond the factory floor to shake up an ever wider set of activities, including many personal and professional services. Some kinds of jobs will disappear, but many more will transform as workers shift focus to managing machines and programs to augment and increase their total productivity. Modern awards need to support constant evolution in the nature of jobs.

53. The World Economic Forum’s (WEF) Global Competitiveness Index and other data sources indicate that Australia’s global competitiveness has slipped in recent years, falling to 22nd in 2014-15 before rising slightly to 21st in 2015-16, from an all-time national best ranking of 15th place in 2009-10. These numbers are the statistical expression of the commonly heard comment from business leaders that “Australia has become a very expensive country in which to make things or to do business” (see Table 7.3).

<table>
<thead>
<tr>
<th>Year</th>
<th>Overall competitiveness</th>
<th>Flexibility of wages</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>19</td>
<td>87</td>
</tr>
<tr>
<td>2008</td>
<td>18</td>
<td>90</td>
</tr>
<tr>
<td>2009</td>
<td>15</td>
<td>75</td>
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<tr>
<td>2010</td>
<td>16</td>
<td>110</td>
</tr>
<tr>
<td>2011</td>
<td>20</td>
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<tr>
<td>2013</td>
<td>21</td>
<td>135</td>
</tr>
<tr>
<td>2014</td>
<td>22</td>
<td>132</td>
</tr>
<tr>
<td>2015</td>
<td>21</td>
<td>117</td>
</tr>
</tbody>
</table>

Source: WEF Global Competitiveness Reports
54. In its latest assessment of the Australian economy, the OECD noted that ‘with
the end of the mining boom, Australia must look toward non-resource sectors
for future growth’. In order to achieve this, economic policy must seek
‘rebalancing to sustain growth’ and that it must “enable the economy to
diversify towards more sectors of high-value added activity’. The OECD
recommends that in response, Australian economic policy should focus on:

“further improving the operating environment for the private sector, most
importantly in infrastructure, taxation, labour skills and innovation. Improving
educational and labour market opportunities for minority groups would not only
reduce social exclusion but also boost growth potential.”

55. Far from improving labour market opportunities, the unions’ claims in these
proceedings would destroy opportunities.

56. The Australian Treasury’s latest Intergenerational Report (March 2015)
highlights the urgency of implementing policy that fosters business flexibility
and sustainability. The Report calls for a:

“policy agenda [that] will support productivity growth by helping to position
Australian businesses to be flexible, competitive and robust in the face of
dynamic global conditions.”

57. Australian productivity growth rates have been trending lower, in a similar
pattern to real GDP growth and other key indicators. At a national level,
Australian multifactor productivity has flatlined at best since the turn of this
century. And compared to our global competitors, Australia has performed
especially poorly, with national multifactor productivity falling by an average of
1.2% p.a. from 2007 to 2011 and by 1.3% in 2012 and 2013, compared with
global estimates of an improvement of 0.6% p.a. from 2007 to 2011, 0.2% in
2012 and -0.1% in 2013.

58. These global and domestic factors mean that Australian businesses need to lift
their competitiveness and, in particular, they need to raise productivity.

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27 OECD (Dec 2014), 2014 OECD economic survey of Australia: rebalancing to sustain growth, and
OECD (February 2015), Economic Policy Reforms 2015: Going for Growth (pp. 141-144).
28 Productivity Commission estimates calculated from the Conference Board Total Economy
Database, in PC 2014.
59. Maintaining or imposing barriers to competitiveness and productivity adversely impact employers and employees. Employees are of course amongst those worst affected when their employers decide to close plants, relocate, downsize or offshore because the operating environment in Australia imposes too many inflexibilities and other hurdles.

60. Against this background, it is of the utmost importance that businesses retain the ability to utilise the most efficient organisational structures and methods of organising work.

61. To remain efficient and globally competitive, businesses need to have the flexibility to engage the forms of labour which they need.

62. As highlighted earlier, the PC its final report on Australia’s Workplace Relations Framework stated that casual work is ‘a now critical part of the labour market’\(^{29}\) and described the perspective of the ACTU and others on non-standard work, including casual work, as ‘an overly negative one’.\(^{30}\)

63. Modern awards need to enable businesses to rapidly respond to changes in markets, the economy, technology and demographics. The need to promote agility, not rigidity. The unions’ claims conflict with the community's interests and should be rejected.


8. THE IMPORTANCE OF CASUAL AND PART-TIME EMPLOYMENT TO INCREASED WORKFORCE PARTICIPATION AND GENDER EQUALITY

64. It is very widely recognised that Australia’s participation rate must increase if Australia is to avoid falling living standards as the population ages over the years ahead.

65. Indeed, the modern awards objective emphasises this need by requiring that the Commission consider the need for ‘increased workforce participation’\(^{31}\) whenever dealing with a proposal to vary an award.

66. It is important that casual and part-time employment remains accessible to persons seeking to enter into, or remain within, the labour market. Parents (in particular women), older workers, carers, workers with a disability, students and others often view casual and part-time work as desirable or essential as these forms of employment enable a level of flexibility not available to full-time workers.

67. In the 21\(^{st}\) century, casual and part-time employment should not be seen as a secondary or less desirable form of employment. It is not appropriate for awards to discourage or block access to casual or part-time employment as to do so would have a substantial adverse impact on workforce participation. Clearly many employees prefer casual or part-time work and have no desire to work full-time. Also, many employers need the flexibility that casual and part-time employment arrangements offer.

68. The unions’ claims, if granted by the Commission, would limit the opportunities for employers’ to make casual and part-time employment available, thereby imposing unnecessary barriers to employment and workforce participation.

Intergenerational Report

69. The 2015 Intergenerational Report released by the Australian Treasury reveals that the proportion of the population participating in the workforce is expected

\(^{31}\) Section 134(1)(c) of the FW Act.
to decline over the next 40 years.\textsuperscript{32} Increasing workforce participation is critical to Australia’s productivity performance and to address skills and labour shortages.

70. The Government emphasises, within the 2015 Intergenerational Report, that the:

“declining participation rate is projected to detract slightly from real GDP growth per person over this period. Encouraging and valuing greater workforce participation, in particular amongst older age groups, presents an opportunity to further lift GDP growth per person.”\textsuperscript{33}

71. The report goes on to say that ‘continued efforts to encourage higher participation across the community would have widespread benefits for Australia’s economy and society’.\textsuperscript{34}

72. Increasing the workforce participation of, firstly, the older population group, secondly, prospective parents and parents (particularly women), and, thirdly, workers with a disability, will become essential to maintain and lift the Australian economy as the Australian population continues to age.

73. The report states that:

- The number of Australians aged 65 and over is projected to more than double by 2054-55, with 1 in 1,000 people projected to be aged over 100. In 1975, this was 1 in 10,000.\textsuperscript{35}

- ‘Australians will live longer and continue to have one of the longest life expectancies in the world. In 2054-55, life expectancy at birth is projected to be 95.1 years for men and 96.6 years for women, compared with 91.5


\textsuperscript{33} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.2.

\textsuperscript{34} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 3.2.3.

\textsuperscript{35} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.
and 93.6 years today.\textsuperscript{36}

- ‘The average annual rate of growth in the population is projected to be 1.3 per cent, compared with 1.4 per cent over the past 40 years.’\textsuperscript{37}

- ‘By 2054-55, the participation rate for people aged over 15 years is projected to fall to 62.4 per cent, compared to 64.6 per cent in 2014-15.’\textsuperscript{38}

- ‘The number of people aged 15 to 64 for every person aged 65 and over has fallen from 7.3 people in 1975 to an estimated 4.5 people today. By 2054-55, this is projected to nearly halve again to 2.7 people.’\textsuperscript{39}

- ‘The average number of hours worked is projected to fall slightly over the next 40 years. Population ageing is expected to be the main driver of the decline in average hours worked. Historically, those in older age groups have worked for fewer hours per week, on average, than those in younger age groups. This is expected to continue.’\textsuperscript{40}

74. In respect of female participation, the report states:

- ‘Female employment is projected to continue to increase, following on from strong growth over the past 40 years. In 1974-75, only 46 per cent of women aged 15 to 64 had a job. Today around 66 per cent of women aged 15 to 64 are employed. By 2054-55, this is projected to increase to around 70 per cent.’\textsuperscript{41}

- ‘Australia’s female participation rate is around 4 percentage points lower

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\textsuperscript{36} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.
\textsuperscript{37} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.
\textsuperscript{38} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.
\textsuperscript{39} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts.
\textsuperscript{40} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.4
\textsuperscript{41} The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, chapter 1, key facts
than that in New Zealand and Canada. If Australia’s female participation rate reached that of Canada, the Grattan Institute estimate that Australia’s GDP would be a permanent $25 billion higher.42

- ‘Over the past three decades, the average number of hours worked per week has decreased, due partly to an increase in the number of people working part-time, reflecting the increase in female and older workers, who particularly benefit from a flexible workplace environment.’43

75. The Intergenerational Report notes that:

“Policy settings that seek to remove barriers to participation of females and older age groups in Australia and encourage them to work, if they wish to do so, can drive gains in GDP and income growth. These policy settings include availability of childcare, flexible working arrangements, and removal of discrimination. Policies seeking to remove barriers or support participation for other groups where this has been challenging, for example, young unemployed people and people with disability, would also be expected to generate gains in GDP and income growth.”44

76. The unions’ claims run counter to the policy settings that are so necessary given the demographic challenges facing the community.

Productivity Commission Report on Australia’s Workplace Relations Framework

77. The final report of the PC Review into Australia’s Workplace Relations Framework identifies some of the positive trends that have contributed to Australia’s increased workforce participation rate over time (emphasis added):

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42 The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3
43 The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.4
44 The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3
“2.2 Who works? Participation and the composition of the labour force

The composition of Australia’s labour force has changed substantially over the past 40 years. Women who work are now the norm, rather than the exception (figure 2.1), more mature age Australians are participating in the labour force, and skilled migrants are forming an increasing share of Australia’s migrant intake. These shifts have all contributed to an increased participation rate over time.

Figure 2.1 Female participation rates up, male rates down
February 1978 to February 2015


More women are in the workforce

Female participation rates have increased over the last 40 years, both in Australia and other advanced economies. In Australia, they have risen from just under 45 per cent to almost 60 per cent. A number of factors have contributed to this increase, including several social and economic developments. Educational attainment has increased substantially among females since 1960, while fertility rates have declined over the same period. Moreover, increasing access to childcare has facilitated entry into the workforce. Such changes have been partly reflected in regulatory developments. For example, the equal pay cases in the late 1960s and 1970s established the principle of equal pay for work of equal value, overturning the ‘Harvester Man’ view of the minimum wage.

More mature age people are working

Mature age workers (those aged 55–64 years) have been growing as a share of both the population and labour force. While female mature age workers have traditionally had lower rates of workforce participation, this has increased markedly over the last three decades. Moreover, the decline in male participation rates among mature age workers has reversed in the last 15 years (figure 2.2).
Figure 2.2  Mature age workforce participation has been increasing
February 1978 to February 2015, 55-64 year olds

The trend of rising participation rates of older workers is likely to continue for some time — partly offsetting the decline in participation rates resulting from the shift in the age structure of the labour force (PC 2013a).

The increase in mature age workforce participation is attributable to a range of factors, such as increased life expectancy and improved health in the years before retirement. Additionally, mature age workers have had increasing access to flexible work practices, such as part-time and casual work, while the growth of employment in the services industries has allowed for work in less physically strenuous roles.\(^{45}\)

78. As identified by the PC, part-time and casual work is particularly important for mature aged workers. The increased flexibility in these areas over time has had a major positive impact on the increased participation of mature aged workers and on Australia’s overall participation rate.

79. In its final report the PC identified the risks and adverse consequences associated with imposing more restrictions on the engagement of casuals (emphasis added):

“Moreover, enhancing the conditions of certain forms of work (relative to others) may lead employers to choose to use one form over another, with consequences for certain types of workers. For example, moving to give casual workers a legal right to become permanent employees may be attractive to casuals looking for permanency and prepared to give up the loading, but where it dampens the employer’s motivation to hiring casuals and instead leads to an increased use of labour hire staff, it will likely disadvantage the workers with few skills and experience that welcome casual work and the associated loading (particularly when the alternative is unemployment).”\textsuperscript{46}

80. It is vital that existing flexibility is maintained, and that the unions’ ill-conceived claims to limit flexibility be rejected.


81. In August 2012, the Consultative Forum on Mature Age Participation released its final report.

82. The Forum was chaired by Mr Everald Compton AM. The Members of the Forum included the Age Discrimination Commissioner, the Chief Executives of Ai Group and the BCA, a representative of ACCI, the Secretary of the ACTU, the Chief Executives of National Seniors Australia and the Council of the Ageing, and Government representatives.

83. The forum identified 14 key barriers facing mature age Australians in the workplace or looking for a job. One of the key barriers was: ‘Flexibility of Employment Arrangements’, with ‘increasing access to part-time working arrangements’ identified as a key way to overcome this barrier. Another of the 14 barriers was: ‘Care-giving Responsibilities” which of course can be assisted through flexible work arrangements.

84. The final report relevantly states (emphasis added):

\textit{“Care-giving responsibilities are a significant barrier to mature age employment, with 28% of respondents being carers for an average 33.5 hours per week, and 14% caring for someone with a long-term illness or disability. These responsibilities prevent over one-third of care-givers from working and just}

\textsuperscript{46} Productivity Commission Inquiry Report, Workplace Relations Framework, 30 November 2015, p.806.
under one-third from working more hours; caring disproportionately affects the workforce participation of females, people aged 45-54, and carers of the long-term ill and people with a disability. An enabler to increase employment participation and hours worked is suitable external care, which help almost half of respondents whose caring responsibilities affect workforce participation to find work or work more hours.

Another means of improving the workforce participation of carers is more flexible employment arrangements. Flexible work patterns would help 61% of non-employed carers and half of employed carers, whose caring prevents their workforce participation, from working or working more. Flexible work arrangements are also a significant enabler of workforce participation of the ill and injured. Flexible work patterns have been used by one-quarter of those who have been ill, and would help 59% of non-employed currently ill people to be able to work. Flexible work would most likely help younger workers re-enter the workforce. A reduction in hours as they approach retirement would also help current workers work more years, although for an average of less than one more year.  

85. The final report includes the following projection on the cost of failing to increase the flexibility of workplace arrangements:

“The flexibility of workplace arrangements for care-givers and the ill barrier results in a loss of almost 450 000 potential employees by 2031, translating to just under 12.5 million hours foregone.”

86. Far from contributing to the greater flexibility needed to boost the workforce participation of mature age workers, the unions’ claims in these proceedings, if granted, would substantially decrease existing flexibility with a major adverse impact on workforce participation.

87. The impacts of the unions’ claims would become progressively worse over the years ahead as the population ages.

Willing to Work Inquiry - National Inquiry into Employment Discrimination against Older Australians and Australians with Disability

88. The ‘Willing to Work Inquiry’ is underway. The inquiry is looking at employment discrimination against older Australians and Australians with a disability.

89. Both the discussion paper dealing with employment discrimination against older Australians and the discussion paper dealing with employment discrimination of

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workers with a disability identify the lack of access to flexible working arrangements as a barrier to employment for older workers and workers with a disability.48

90. Ai Group is a member of the Employer Reference Panel for the inquiry, which is expected to conclude by mid-2016.

Productivity Commission Report on Childcare

91. The availability of part-time and casual work is a major contributor to the participation of maternal participation in the workforce.

92. In the final report of the PC inquiry into Childcare and Early Childhood Education,49 the PC identified the importance of flexible work arrangements, particularly the importance of being able to work fewer hours than full-time employees.

93. The report relevantly states (emphasis added):

“6.1 Why are we interested in the workforce participation of parents?

There are a range of benefits from increasing the workforce participation of mothers — whether in terms of their joining the workforce or increasing the hours of work of those already in the workforce. Many participants and others have commented on these benefits (box 6.1).

Private benefits (benefits to the mother and her family) include or arise from:

- the mother’s receipt of wages, on-the-job training, opportunities for career progression, superannuation and other work-related benefits
- increased satisfaction for the mother in engaging with others in the community beyond the family.

Community-wide benefits from increased maternal workforce participation, which incorporate the private benefits above, may include or arise from:

- a boost in measured economic output
- increased productivity of the workforce by ensuring the continued workforce attachment of educated and skilled working parents


• reduced risk of long-term unemployment and reliance on the welfare system
• increased return on public expenditure on higher education of women (including the repayment of HECS-HELP loans)
• increased tax revenues and reduced government expenditures (such as on the Newstart Allowance, Parenting Payment and Age Pension)
• improved level of social engagement.

Some studies have estimated the gross value to the economy from improving the workforce participation of women — that is, not including factors such as the value of unpaid activities (such as childcare) undertaken by women prior to entering the workforce. PriceWaterhouseCoopers (sub. DR648, 2014, pp. 4, 19, 29) estimated that the employment of an extra 0.3 per cent of the female partnered working age population would increase gross domestic product (GDP) in net present value terms by $3.7 billion. The Grattan Institute (sub. 445, p. 4) estimated that GDP would be $25 billion higher in a decade if Australian women did as much paid work as women in Canada — implying an extra 6 per cent of women in the workforce. The Organisation of Economic Co-operation and Development (OECD 2012a) estimated that increasing the workforce participation of women (so as to reduce the gap with men by 75 per cent) could increase Australia’s projected average annual growth in GDP per capita between 2011 and 2030 from 2.0 per cent to 2.4 per cent. The Commission considers that the workforce impacts from changing Early Childhood Education and Care (ECEC) funding are likely to have complex effects on GDP. These effects are discussed in chapter 16.\footnote{Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014, p.184}

94. The report goes on to state (emphasis added):\footnote{Productivity Commission Inquiry Report, Childcare and Early Childhood Education, 31 October 2014, p.223-225}

“Flexible work and other family-friendly arrangements

In contrast to the negative drivers of maternal workforce participation discussed above, is the availability of flexible work and other family-friendly arrangements, which is a key positive workforce participation driver (as noted, for example, by the ACTU, trans., pp. 109, 113–14, Melbourne, 18 August 2014). It can be viewed as a complement to accessible and affordable childcare:

Flexible and caring friendly working arrangements are not a substitute of accessible and affordable good quality childcare, rather they work together to enhance the abilities of mothers and fathers to undertake paid employment whilst having children. (Women and Work Research Group, sub. DR800, p. 7)

These arrangements cover:

• changing the hours of work (for example, working part time or changing start or finish times)
• changing patterns of work (for example, working split shifts, or job sharing)
• changing the place of work (for example, working from home)
• using leave arrangements including paid parental leave
• adopting specific occupational health and safety measures (for example, for pregnant employees)
• applying specific employer supports such as for ECEC (for example, employers providing onsite childcare or reserving places in a childcare centre).

For women who are not in the workforce or who work part time, the ability to 'work part time hours', 'vary start finish/times' and 'work school hours' are 'very important' or 'somewhat important' incentives to join or increase participation in the workforce, particularly when compared with men (figure 6.8). Indeed, some of these incentives rate above childcare-related incentives.

Most mothers used some type of flexible work or other family-friendly arrangements to assist with childcare (table 6.6). Around 74 per cent of mothers with a child aged under 13 years (around 1.3 million) and around 86 per cent of mothers with a child aged under 2 years who started or returned to work after the birth of their child (205 500) used some sort of work arrangement to assist with the care of their child. The most common working arrangements used were part-time work, flexible work hours and working from home. However, 7 per cent (over 14 000) of these mothers reported that flexible working arrangements were not available to use.

The findings of other surveys — for example, the Australian Institute of Management Survey 2008 of executives; Baseline Australian Mothers Survey 2010; CareforKids.com.au Survey 2014 of parents; and the Finance Sector Union survey of its members (sub. 174, p. 4) — also reinforce the importance to parents of the availability of flexible work and other family-friendly arrangements. For example, the Baseline Australian Mothers Survey (Martin et al. 2012, pp. 50–51) of some 2600 mothers found that in 2010, many mothers who returned to work after the birth of their child made use of flexible work and other arrangements — 57 per cent used flexible hours, 54 per cent went permanent part time, 39 per cent used shorter hours and 33 per cent worked from home. Also, 70 per cent of mothers who changed jobs on or following return to work did so because they wanted shorter or more flexible hours. A reason for 18 per cent of mothers not returning to work before 13 months was 'couldn't negotiate suitable work conditions'.

There are differences between mothers and fathers in their use of flexible work and other family-friendly arrangements. For example, ABS data indicate that mothers are more likely than fathers to use paid and unpaid leave to provide care, whereas fathers are more likely to use flexible working hours or rostered days off, or work from home to provide care (table 6.7). The subsequent introduction of the Australian Government's Paid Parental Leave scheme is likely to have had an impact on the uptake of parental leave since the survey was undertaken."
**Table 6.6 Use of work arrangements by mothers to assist with the care of children**

2011

<table>
<thead>
<tr>
<th></th>
<th>Mothers with a child aged under 2 years</th>
<th>Mothers with a child aged under 13 years</th>
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<tbody>
<tr>
<td></td>
<td>'000</td>
<td>%</td>
</tr>
<tr>
<td>Part-time work</td>
<td>134.1</td>
<td>76</td>
</tr>
<tr>
<td>Flexible working hours</td>
<td>71.3</td>
<td>40</td>
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<tr>
<td>Work from home</td>
<td>53.3</td>
<td>30</td>
</tr>
<tr>
<td>Shift work</td>
<td>18.9</td>
<td>11</td>
</tr>
<tr>
<td>Job sharing</td>
<td>13.1</td>
<td>7</td>
</tr>
<tr>
<td>Any other work arrangements&lt;sup&gt;a&lt;/sup&gt;</td>
<td>10.5</td>
<td>6</td>
</tr>
<tr>
<td>All work arrangements used to assist with care of child&lt;sup&gt;b&lt;/sup&gt;</td>
<td>176.5</td>
<td></td>
</tr>
</tbody>
</table>

<sup>a</sup> Includes women who used leave arrangements.  
<sup>b</sup> Individual components do not sum to all work arrangements as more than one working arrangement might be used.

*Source: ABS (2012a, 2012b, p. 28).*

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**The Australian Workplace Relations Study**

95. In the First Findings report of the Australian Workplace Relations Study (AWRS) it was revealed that:

- ‘Flexibility to balance work and non-work commitments was considered to be the most important aspect of employment for almost one-third (32%) of employees when considering their overall satisfaction with their current job.’<sup>52</sup>

- ‘A higher proportion of female employees (37%) considered the flexibility to balance work and non-work commitments to be the most important aspect of employment, compared to males (26%).’<sup>53</sup>

- ‘Employees were most satisfied with having flexibility to balance work and non-work commitments (5.67) and the freedom to decide how to do their

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work (5.66).\textsuperscript{54}

- ‘Female employees were most satisfied with the flexibility to balance work and non-work commitments (5.78).\textsuperscript{55}

96. The results highlight the importance of flexible forms of employment to all workers, particularly women.

97. It is essential that existing flexibility is not lost and that the unions’ claims are rejected.

**Metal Industry Casual Employment Case**

98. The 2000 decision of a Full Bench of the AIRC in the *Metal Industry Casual Employment Case*\textsuperscript{56} in 2000 is discussed in later sections of this submission. In terms of workforce participation, it is noteworthy that the Full Bench made the following comments which recognise that restrictions on casual employment would have an adverse impact on younger and less advantaged employees:

\begin{quote}
“...However, in selecting six months, we take into account what we consider to be the potential adverse impact on younger and less advantaged employees of having a lower limit.”\textsuperscript{57}
\end{quote}

**Gender Equality**

99. As is evident from the above discussion on workforce participation, the availability, and accessibility, of casual and part-time employment is important in furthering gender equality in Australia.

\textsuperscript{54} Fair Work Commission, Australian Workplace Relations Study, First Findings Report, January 2015, chapter 6.

\textsuperscript{55} Fair Work Commission, Australian Workplace Relations Study, First Findings Report, January 2015, chapter 6.

\textsuperscript{56} Print T4991. In any analysis of the outcomes of this case it is necessary to consider the decision of December 2000 as well as the orders made by the Full Bench in February 2001 as a result of the decision (AW789529, PR901028). After the initial decision was handed down, there were substantial negotiations between Al Group and the AMWU regarding the wording of the final orders and a contested ‘settlement of orders’ process before the Full Bench.

\textsuperscript{57} Print T4991 at para [116].
100. It is without doubt that the unions’ claims, if granted, would impose barriers to workplace gender equality.

101. Despite many decades of increasing female workforce participation, women generally continue to assume the primary caring responsibilities for children and unpaid domestic work. This cultural reality drives the necessity for flexible forms of work, such as casual and part-time employment.

102. It naturally follows that reducing access to flexible forms of work like casual and part-time employment, would have a greater adverse impact on women than men.

103. We refer to the witness statement of Ms Kay Neill of Corporate Health Group Pty Ltd who states that the impact of the ACTU claims would result in her business employing fewer people. Corporate Health Group employs more than twice as many women as men, with women occupying many casual positions, such as nursing positions.

104. As noted above, cultural factors are currently a barrier to gender equality in the workplace. Projects like The Equilibrium Man Challenge undertaken by the Workplace Gender Equality Agency attempt to introduce (and normalise) flexible working practices for all workers (not just women).58

105. Imposing barriers to men working flexibly would have an adverse impact on women. If a greater number of men worked to facilitate parental responsibilities flexibly (including through the use of casual and part-time employment), a greater number of women would be able to participate in the workforce.

106. In addition, access to casual and part-time work can assist in rectifying gender inequality between men and women in retirement. For example, providing opportunities to increase female participation in the workforce enables women to increase their retirement saving via contributions to superannuation.

107. It is important that flexible work practices are a normal feature of Australian workplaces. The unions’ claims, by discouraging the use of casual or part-time employment, would limit the opportunity for flexible work; not only for women, but for men, thereby perpetuating existing cultural barriers to female workforce participation.
9. THE IMPACT OF THE UNIONS’ CLAIMS ON LABOUR HIRE EMPLOYERS AND EMPLOYEES

108. A high proportion of employees in the labour hire industry are casuals, given the uncertainty surrounding the length of time that a client firm will need the labour provided by a labour hire employee.

109. A recent PC Paper from 2013 confirmed that despite the rapid growth in labour hire in the 1990s, labour hire workers probably became less prevalent at the end of the decade than at the start. 59

110. Labour hire provides a number of benefits to the community in enabling businesses to operate more efficiently and by providing pathways to employment for job-seekers.

111. The ABS, in August 2014 60 reported that 5% of all employed persons (599,800) had found their job through a labour hire firm/employment agency.

112. Approximately 124,400 persons, or 21% of those who had found their job through a labour hire firm/employment agency, were paid by a labour hire firm/employment agency.

113. Labour hire workers were most prevalent in the manufacturing industry (19%) and in administrative and support services (16%). Labourers (21%) and Technicians and trades workers (19%) were the most common occupational groups for labour hire workers.

114. The unions’ claims, if accepted would have a particularly harsh impact on labour hire firms and labour hire workers. If existing flexibility regarding casual employment is lost, obviously it will be less likely that client companies will use the services of labour hire firms, and labour hire firms will employ far fewer employees.


60 ABS, 6333.0 Characteristics of Employment, August 2014.
10. WORK HEALTH AND SAFETY

115. The witness statements of Elsa Underhill and Deborah Vallance draw on research evidence and, in the case of Dr Vallance, a survey of 156 members of the AMWU. In their statements there is reference made to two key ‘risk’ areas which are allegedly associated with a range of temporary employment arrangements:

- Firstly, the work related risks associated with work that is more hazardous, such as insufficient training, sub-standard personal protective equipment, and reduced access to consultation and representation arrangements; and

- Secondly, the psychological risk that is allegedly inherent with the perceived level of job insecurity.

Casual Employment does not Inherently Create Work Related Risks

116. Ai Group does not accept that casual employment typically leads to poor health and safety outcomes.

117. The fact that some temporary employment arrangements may be managed poorly by a small minority of employers is not a valid rationale for all temporary work to be demonised.

118. Work Health and Safety (WHS) and Occupational Health and Safety (OHS) laws across Australia impose obligations on employers in respect of their employees and contractors, as well as other persons relating to the workplace or the employer’s undertaking. These obligations require an employer to eliminate risk or to minimise risk as far as is reasonably practicable; in doing so there is a specific obligation to consult with the workers when there is likely to be an OHS/WHS impact of a workplace decision. The obligations apply whether the engagement is an ongoing employment arrangement of one that is for a very short period of time.
119. In addition, the WHS laws (which apply in all states other than Victoria and Western Australia) include specific obligations for duty holders with overlapping obligations to consult, cooperate and coordinate with each other in relation to health and safety duties.

120. All jurisdictions have guidance material in place to assist employers to understand the obligations they have to those workers who are not in their permanent employment: contractors, casuals and labour hire employees. This information has been available, and widely promulgated, for more than 10 years.

121. Temporary employment arrangements should not, in themselves, reduce the safety of workers. The obligations of the employer are not lowered because the worker is engaged in an arrangement outside permanent employment.

122. Directly engaged casual employees should receive induction, training, supervision and other support appropriate to the level of risk associated with the tasks to be undertaken. There is no legal or ethical reason why standards should be less than those provided to permanent employees.

**Casual Employment is not Hazardous to Mental Health**

123. In 2011, Professor Richardson, Lester and Zang published ‘Working Paper No. 166: Are Casual and Contract Terms of Employment Hazardous for Mental Health in Australia?’. The paper’s Abstract summarises the research and the findings (emphasis added):

“Abstract
The risk that flexible forms of employment are harmful to the health of workers is a major public health issue for the many countries, including Australia, where such forms of employment are common or have been growing. We ask whether the century-old system of arbitrated protections for workers and the distinctive welfare state in Australia averts any such harm to mental health. If Australian workers are harmed despite these protections, this adds weight to the international concerns about the hazards of flexible employment. Employing nine waves of panel survey data and dynamic random-effects panel data regression models, we examine the mental health consequences of unemployment, and of employment on a casual or fixed-term basis, compared with permanent employment. We control for demographic and socio-economic characteristics, occupation, disabilities status, negative life events, and the level of social
support. We find almost no evidence that flexible employment harms mental health. Unemployed men (but not women) have significantly and substantially lower mental health. But among the employed, only men who are on fixed term contracts, most especially graduates, have lower mental health than those who are employed on full-time permanent terms. Women have significantly higher mental health if they are employed full-time on casual terms.”

124. As stated in the research paper (emphasis added):

“Australia is an interesting case. There has been an increase in flexible employment, and it remains at high levels. But there are distinctive protections against and compensation for the risks of such employment that are provided by the welfare state and the industrial relations system: we expect these to ameliorate their adverse consequences for workers. First, neither health care nor unemployment benefits are tied to prior employment history (unlike the insurance schemes variously used in North America and Europe). Second, the industrial relations system requires that casual employees be paid at a higher hourly rate than permanent workers doing the same work, in explicit compensation for the lack of security and paid leave. The typical ‘casual premium’ is 20-25 percent of the hourly wage. It is being progressively raised to 25 per cent for all modern awards. In addition, employers are equally obligated to contribute to the individual superannuation accounts of casual workers as for permanent workers. Third, casual workers have the same protections as permanent workers against unfair dismissal and discrimination. Fourth, casual employees are entitled to compassionate and carer’s leave, although unlike permanent employees, this is unpaid. They are entitled to penalty rates for work done outside normal business hours and in most cases, a minimum shift of three hours.

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An important consequence of the conditions surrounding casual and contract employment in Australia is that these forms of employment might reasonably be preferred by some workers, including people with significant caring responsibilities, workers approaching retirement and full-time students. Casual jobs are not necessarily bad jobs, taken because a permanent job was not available.”

125. The researchers concluded (emphasis added):

“Conclusion

We employed 9 waves of nationally representative panel data, for Australia, to examine the impacts of employment on fixed-term contract or casual terms, in contrast to permanent full-time terms, on the mental health of employees. Given the distinctive characteristics of the Australian labour market, in particular the unusual levels of protection for casual employees, we hypothesised that the harmful effects found in other countries might be avoided in Australia. To the extent that we observed harmful effects, we expected them to be more substantial for men than for women.

Our analysis supports the primary hypothesis: we find almost no evidence that casual or fixed term contract employment was harmful to the mental health of women or men. Indeed, the analysis suggests that women have higher mental health if employed full-time on a casual contract, including those who did not
complete high school. This latter finding is reassuring, since employment on casual terms is particularly concentrated among those who did not complete high school and they show evidence of relatively high persistence in this form of employment. Surprisingly, for women even being unemployed does not significantly reduce their mental health. As expected, the same cannot be said for men, for whom unemployment seems to be quite harmful. With few exceptions, however, the flexible forms of employment are not harmful even for men.

Our findings do not demonstrate that no one suffers from being employed on casual or contract terms. Rather, we interpret the results as showing that if some are harmed, others benefit, so that on average there is no systematic relationship. The particular conditions around employment on casual and contract terms in Australia—in particular the pay premium for casual employment and the shared access to other employment benefits such as unfair dismissal protections, superannuation contributions, health and unemployment benefits—
together with the flexibility they offer (casual) and access to otherwise good jobs 18 (contract) means that for some people these are the preferred forms of employment, or at least are not on balance disliked.

We have dealt with the vexed issue of endogeneity by using 8 waves of panel data, an estimated initial level of mental health, and a lagged value of mental health. We cannot conclusively rule out the possibility that endogeneity is not only present but is confounding the results in a way that undermines our main finding, but we think it quite unlikely.

Model results also support previous research that shows mental health depends importantly on individual attributes and circumstances—and in particular, adverse life events, disability and social support. It also shows that some work conditions do matter, including a negative impact from working longer hours than preferred and from financial stress.

It appears that the protections offered to Australian flexible workers, combined with their own social support and resilience, are sufficient to ameliorate any harmful effects of employment on casual and fixed contract terms. Australia has been called "the workers’ welfare state" (Castles, 1985). Our results suggest it still is.”

Labour Hire Arrangements

126. The majority of employees in the labour hire industry are engaged on a casual basis given the uncertainty surrounding the length of time that a client firm will need the labour provided by a labour hire employee.

127. The labour hire relationship does not typically adversely impact upon safety.

128. When engagement involves a labour hire scenario, workers will have two organisations focusing on their safety. This should result in an approach where discussions are occurring between the labour hire company and host employer about how best to provide a healthy and safe workplace.
129. Labour hire companies are well-placed to provide support and assistance to smaller organisations into which they place their workers. Many labour hire companies provide training and system support to their hosts, thus increasing the safety of their own workers and, potentially, the permanent employees of the host employer.

130. We refer to the statement of Mr Robert Blanche of the Bayside Group where at paragraph [18] and Annexure ‘RB-1’ he describes the WHS training delivered through their program WorkPro; a program designed for labour hire companies and their clients to provide and record WHS training delivered to labour hire employees. This is an example of the integrated systems and services provided by leading labour hire companies to ensure the maintenance of high standards of WHS and compliance.

131. The best cooperative systems effectively work together to ensure that all issues are addressed, with responsibility for each clearly allocated to either the labour hire agency or host organisation, e.g. induction responsibilities that identify what the labour hire company will cover and provide and what the host employer will cover and provide.

132. Furthermore, significant changes introduced by the model WHS laws over the past few years (since 2011) have assisted in better reflecting the arrangements common to the labour hire industry. With the introduction of the term ‘person conducting a business or undertaking’ (PCBU), which replaced the term ‘employer’, suggestions that on-hire workers were the sole responsibility of the labour hire firm have been strongly dispelled. The introduction of the term ‘worker’ replacing the term ‘employee’ also recognised and captured a broader scope of employment and contracting relationships.

133. There is a misguided view that labour hire workers are more vulnerable to safety risks. The client company and labour hire firm are considered to be PCBU’s and are therefore both responsible for the safety of labour hire workers.
134. A series of cases have clarified the legal responsibilities of labour hire companies and client companies. These authorities demonstrate that labour hire companies and host firms have a joint responsibility under WHS legislation to ensure the safety and health of labour hire workers:

- In *Kelly v Humanis Group Limited*[^61], the Court found that the safety of a worker at a mine site was beyond the labour hire firm’s responsibility and extended to the client company.

- In *Inspector McGrath v DMP Container Labour Pty Ltd*[^62], the Industrial Relations Commission found that the on-hire firm and the host employer had the same obligations to the on-hire workers, whilst the workers were under their management and control. Either party could not delegate their duties or rely solely on the other party to provide a safe working environment. Both the labour hire firm and client company were required to develop, implement and monitor systems of work to meet their obligations.

- In *B v Rand Transport (1986) Pty Ltd*[^63], a truck driver successfully claimed damages from a storage and distribution company for a head injury caused by the a forklift operator whilst unloading a truck, even though the forklift operator was not an employee of the company where the uploading took place.

135. These WHS legislative changes and cases have already had a significant, positive impact on the labour hire industry.

136. It is unnecessary and would be counterproductive to introduce further regulation in the form of increased restrictions on casual and part-time employment.

[^61]: [2014] WADC 43.
11. THE JOINT EMPLOYER SURVEY

137. In support of this submission, Ai Group joined with the Australian Chamber of Commerce and Industry and other employer groups to formulate and conduct a survey (Joint Employer Survey) of employers about casual and part-time employment.

138. The Joint Employer Survey asked respondents a series of closed, numeric and importantly, open-ended questions about their employment practices, including casual and part-time employment practices, and for their views about the impact of the ACTU’s claims.

139. The Joint Employer Survey is significant. Some 3,162 employer respondents completed the survey, operating in a diverse range of industries. The process of conducting the survey is described in the witness statement of Benjamin Waugh and attachments to it.

140. Collectively the employer respondents surveyed employ 46,402 employees.\(^6^4\)

**Industries in which Casual Employment is More Prevalent**

141. The Joint Employer Survey contains a significant representation of employers in those industry sectors identified by the\(^6^5\) ABS as employing higher proportions of people as casual employees. This is in contrast with the ACTU survey, which does not.

142. The majority of employer respondents identified with one of the following ANZSIC descriptions of their industry, (ranked in order of top five):

- Retail Trade (492 responses, 15.56% of responses);
- Accommodation and Food Services (463 responses, 14.65% of responses);
- Manufacturing (422 responses, 13.35% of responses);

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\(^6^4\) See the Second Global Report, Witness Statement of Ben Waugh, Attachment H

\(^6^5\) ABS, 6399.0, Forms of Employment, Australia, November 2013
• Health Care & Social Assistance (412 responses, 13.03% of responses);
• Other services (287 responses, 9.08% of responses).

143. To this extent, Ai Group submits that the survey is representative of a large number of respondents who would be affected by modern award changes to casual and part-time employment.

144. Employer respondents were also spread around all Australian States and Territories. The top three most common States or Territories identified by respondents in which their business operates are:

• New South Wales (1560 responses, 49.35%);
• Victoria (1173 responses, 37.11%); and
• Queensland (590 responses, 18.66%).

Coverage of Modern Awards

145. At an award level, the top five modern awards that were most frequently identified by respondents as covering their businesses were:

• Clerks - Private Sector Award 2010 (Clerks Award) (694 responses, 26.58%);
• Hospitality Industry (General) Award 2010 (Hospitality Award) (407 responses, 15.59%);
• Manufacturing Award (389 responses, 14.90%);
• General Retail Industry Award 2010 (Retail Award) (284 responses, 10.88%); and
• SACS Award (194 responses, 7.43%).
146. Of those respondents who employed casual employees, 80.27% of respondents cited that all their casual employees were covered by a modern award.

147. Of those respondents who employ part-time employees, 63.79% of respondents reported that all their part-time employees were covered by a modern award. 10.14% of respondents reported that most of their employed part-time employees were covered by a modern award.

**Employment of Casual Employees**

148. Some 81.15% of employer respondents had employed a casual employee in the preceding month prior to completing the survey.

149. The portion of casual employees employed of a respondent’s total workforce was an average of 16.13%.

150. 54.82% of respondents employed casual employees on an irregular basis.

151. Only an average of 17.42% of casual employees employed by respondents regularly worked full-time hours, indicating that the use of casual labour for full-time positions, is not a widespread practice among the survey respondents.

152. An average of 50.13% of casual employees employed by respondents regularly worked part-time hours.

153. Of the casuals who were employed by respondent employers on a regular basis, the average period of service reported by respondent employers were:

<table>
<thead>
<tr>
<th>Period of Service</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 3 months</td>
<td>21.49%</td>
</tr>
<tr>
<td>Between 3 months and 6 months</td>
<td>18.34%</td>
</tr>
<tr>
<td>More than 6 months</td>
<td>60.17%</td>
</tr>
</tbody>
</table>

154. Respondents were also asked an open-ended question about why they employ casual employees. It is our observation that many of these responses had strong links to the industry of the employer and award coverage. For this reason we refer the Commission to **Attachments 11A – 11U** to our
submissions. The tables there contained set out responses to the following survey questions in respect of employers covered by certain awards:

- Does your organisation employ casual employees on an irregular basis?
- Why does your organisation employ casual employees on an irregular basis?
- What percentage of your employees who are employed on a casual basis regularly work full-time hours?
- Why does your organisation employ regular full-time casual employees?
- What percentage of your employees who are employed on a casual basis regularly work part-time hours (less than 38)?
- Why does your organisation employ regular part-time casual employees?
- If casuals were given the right to convert to permanent full-time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?

155. The responses we have set out were provided by all employers who indicated that their organisation is covered by the following modern awards:

- **Attachment 11A:** Aged Care Award;
- **Attachment 11B:** *Banking, Finance and Insurance Award 2010* (Banking Award);
- **Attachment 11C:** Clerks Award;
- **Attachment 11D:** *Commercial Sales Award 2010* (Commercial Sales Award);
• **Attachment 11E:** Electrical, Electronic and Communications Contracting Award 2010 *(Electrical Contracting Award)*;

• **Attachment 11F:** Fast Food Award;

• **Attachment 11G:** FBT Award;

• **Attachment 11H:** Retail Award;

• **Attachment 11I:** Graphic Arts Award;

• **Attachment 11J:** Health Professionals Award;

• **Attachment 11K:** Horticulture Award;

• **Attachment 11L:** Hospitality Award;

• **Attachment 11M:** Manufacturing Award;

• **Attachment 11N:** Nurses Award;

• **Attachment 11O:** Professional Employees Award 2010 *(Professional Employees Award)*;

• **Attachment 11P:** Restaurant Industry Award 2010 *(Restaurant Award)*;

• **Attachment 11Q:** Road Transport and Distribution Award 2010 *(Road Transport Award)*;

• **Attachment 11R:** SACS Award;

• **Attachment 11S:** Storage Services and Wholesale Award 2010 *(Storage Services Award)*;

• **Attachment 11T:** Vehicle Award; and

• **Attachment 11U:** Wine Award.
156. The Joint Employer Survey also provides the Commission with quantitative data of casual and part-time employment practices across all industries. The Joint Employer Survey demonstrates, in clear terms, that casual and part-time employment practices are:

- diverse;
- influenced by the industry or modern award of the employer; and
- linked closely to differing business models.

157. The survey results demonstrate that casual and part-time employment are award-specific issues, and that the ACTU and AMWU's claims need to be considered on an award by award basis. Clearly, any attempt to implement 'one-size-fits-all' arrangements would be unworkable and damaging for employers and employees.

158. The ACTU has failed to provide any compelling evidence to support the variation of specific awards, and the claims have no connection to the nature of the industry some modern awards cover.

159. **Attachments I – AE** to the statement of Benjamin Waugh are reports produced through the Lime survey system of quantitative survey data at an award-specific level. These reports reveal that there are differing casual employment practices as measured on a numeric or quantifiable basis based on the modern award covering the business.

**Casual Conversion**

160. Employer respondents were asked about casual conversion practices. 39.38% of employer respondents were covered by a modern award providing for casual conversion provisions.
161. For employer respondents who employed casuals who had been entitled to request conversion to permanent employment, some 73.72% of respondents reported that no requests had been received from such employees since 1 January 2010.

162. Only an average of 9.36% of casual employees eligible to request conversion to permanent employment had in fact made a request to convert to permanent employment since 1 January 2010.

163. Furthermore of those casual employees who did request to become permanent, a clear majority of those requests, (an average of 62.58%) were granted by employers.

164. The Joint Employer Survey is strongly suggestive that the desire among casual employees to work permanently, where they are presently eligible, is not widespread. This directly challenges a key premise of the ACTU’s claim for a casual conversion clause with choice only for the employee. The ACTU’s claim is based on practices that occur in a small minority of circumstances.

165. Importantly employer respondents were asked an open-ended question about the impact on their organisation if casual employees were given the right to request permanent full-time or part-time employment after 6 months of regular employment, with the employer having no right to refuse. Some 2,566 employer respondents answered the question. All open-ended responses to this question are contained at Attachment 11V to these submissions.

166. Overwhelmingly, the responses report that casual conversion without an employer right of refusal would have negative consequences for business.

167. Some responses identifying an increase in employment costs are quoted below:

- “It would require us to massively refactor our business model. We would have to impose significant additional costs on our clients and it would put our business at risk. In a broader industry sense it would result in less scrupulous companies continuing to operate outside the Fair Work
system, instead using independent contracting to meet this client need.”

- “Would hurt us very badly, as we do not have enough work to carry additional costs such as labour in what is a very cost competitive industry. In fact we would have to re-assess whether we could remain in manufacturing at all.”

- “We would have more people to sweep the car park and our bank balance would dip severely.”

- “We will invest in machinery which will replace the workers. No one will have a job.”

- “It may cause serious financial drain on the business e.g. if a casual employee became a full time/part time employee & the contract or work finished we are left with all the costs associated with a full time employee but not the work to cover that expense.”

168. Respondents also referred to the adverse impact upon their casual employees, given the decisions that the businesses would take if the unions’ casual conversion claims were granted:

- “This would have a significant impact on host employers who have peaks in demand for workers. I feel this could lead to casual workers loosing their positions when they are close to reaching 6 months, and new casuals replacing them - simply because the cost of a permanent worker due to payment of public holidays/annual leave for small/medium businesses in particular, is quite significant. The outcome of this could

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66 Response ID 84.
67 Response ID 32.
68 Response ID 53.
69 Response ID 62.
70 Response ID 56.
be that more businesses would fail, the cost of products would need to increase and more people become unemployed.\textsuperscript{71}

- “We would become insolvent during periods of reduced work from clients so we would have to embark on a rigid programme of terminating casuals before 6 months regular employment expired.\textsuperscript{72}

- “It would restrict my flexibility & I would have to reconsider my options. I would make sure that a different employee was employed on a regular basis.\textsuperscript{73}

- “We would lose flexibility. Currently, we are able to extend Casual employment to suit the Casual Employee and/or the Employer (as needs change). If this restriction were put in place, we would necessarily divest ourselves of each Casual before the defined Term could be attained so as to retain flexibility. This would disadvantage the employee and the employer.\textsuperscript{74}

- “We would have to cease employment at 5 months. Seasonality means we couldn’t carry unused staff.\textsuperscript{75}

169. Responses going to reduced employment or job loss were also frequent. For example:

“This would have a major impact on our employees. We would have to adjust pay structures (this would greatly negatively effect employees remuneration). Therefore, based on remuneration and flexibility with leave would equate to a less attractive employment offer. The ability for our business to respond with an appropriate workforce to the required productivity would be dramatically decreased. This would equate to a change in workforce planning with an expected impact of less employees being required.”\textsuperscript{76}

\textsuperscript{71} Response ID 28.  
\textsuperscript{72} Response ID 137.  
\textsuperscript{73} Response ID 88.  
\textsuperscript{74} Response ID 88.  
\textsuperscript{75} Response ID 92.  
\textsuperscript{76} Response ID 2143.
170. Responses that go to severity of impact should also be given due weight by the Commission. Alarmingly, 124 responses featured the consequential closure of their business, creating job losses in the community. This is in addition to those companies who also cited ‘job losses’ or ‘reduced employment’ in their responses. For example:

“It would jeopardize the stability of the business and bring excessive financial burden to the company.”

171. In reviewing the responses, and for ease of presenting the data, Ai Group has coded the responses as per Table 11.1 below.

172. The purpose of the coding of responses is to demonstrate the range and types of issues employer respondents would face if forced to convert casual employees after 6 months with no right for the business to refuse. 18 codes have been created based on the words used by the respondents themselves.

173. The responses provided by the respondents vary and go to:

- whether or not the impact is negative or positive;
- how a particular element of the business is affected;
- whether the reasons for using casual employment would be undermined or removed; or
- the consequences on business decision making – such as the hiring and firing of employees, or business closure.

174. Many of the respondents may have identified more than one coded response, for instance, loss of flexibility and change in hiring practices. In such instances, the response has been attributed each relevant ‘code’.

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77 Response ID 5244.
Table 11.1

<table>
<thead>
<tr>
<th>If casuals were given the right to convert to permanent full-time or part-time employment after 6 months of regular employment, with the employer having no right to refuse, what impact, if any, would this have on your organisation?</th>
<th>Number of responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Significant impact on the organisation (including unviability for business)</td>
<td>437</td>
</tr>
<tr>
<td>Loss of flexibility for the employer</td>
<td>294</td>
</tr>
<tr>
<td>Concerns regarding costs (including increased costs)</td>
<td>291</td>
</tr>
<tr>
<td>Change of hiring practices (including ceasing to engage casuals or engaging fewer casuals)</td>
<td>245</td>
</tr>
<tr>
<td>Concern that there will be insufficient work for converted employees to perform</td>
<td>222</td>
</tr>
<tr>
<td>Termination of employment before or after 6 months of engagement</td>
<td>203</td>
</tr>
<tr>
<td>Concerns relating to the seasonality of work</td>
<td>192</td>
</tr>
<tr>
<td>Fewer employment opportunities (including increasing hours of permanent employees and decreasing hours of casual employees)</td>
<td>146</td>
</tr>
<tr>
<td>Redundancies, increased turnover of labour and higher unemployment</td>
<td>130</td>
</tr>
<tr>
<td>Possible closure of operations and/or risk of insolvency</td>
<td>124</td>
</tr>
<tr>
<td>Other - negative impact</td>
<td>124</td>
</tr>
<tr>
<td>Greater use of contractors or labour hire employees</td>
<td>54</td>
</tr>
<tr>
<td>Some concern regarding proposal</td>
<td>47</td>
</tr>
<tr>
<td>Loss of flexibility for the employee</td>
<td>34</td>
</tr>
<tr>
<td>Assess employee’s performance and terminate prior to 6 months if necessary</td>
<td>33</td>
</tr>
<tr>
<td>Change to business model or operations</td>
<td>32</td>
</tr>
<tr>
<td>Preference for permanent employees over casual employees (for reasons including lower wage bill)</td>
<td>30</td>
</tr>
<tr>
<td>Concern about extra administration/regulatory burden</td>
<td>28</td>
</tr>
</tbody>
</table>

Minimum Engagement/Payment

175. Employer respondents were asked the following open-ended questions:

- What would be the effect on your organisation if all part-time employees were entitled to four (4) hour minimum engagement periods per day/shift?"
• What would be the effect on your organisation if all casual employees were entitled to four (4) hour minimum engagement periods per day/shift?”

176. It is clear that these responses have a strong connection to the industry of the employer, their award coverage and whether or not the relevant modern award presently contains a minimum engagement/payment and if so, to what degree. We refer the Commission to chapter 16 of our submissions in this regard.

Prohibition on Hiring New Casual and Part-time Employees

177. Employer respondents were asked: “Before you increase the number of casual and part-time employees in your business, do you currently offer the hours to be performed by that casual or part-time employee to existing casual and part-time employees performing similar work?”

178. 33.87% respondents reported that they always do. 23.23% reported that they often do and 27.10% said that they sometimes do.11.61% reported that they do not.

179. While the responses show that a large number of employers already offer additional hours to existing part-time and casual staff prior to increasing the number of part-time and casual employees in the business, this can be explained by the fact that there is already a financial incentive on many businesses to do so. Increasing employee head count can still increase the cost base for many businesses. Minimising those costs where existing employees are able to work more ordinary hours is an outcome that many employers would consider attractive.

180. The employer responses in this area are covered in more detail in Section 18 of this submission.

Labour Hire

181. 19.61% of employer respondents reported that their organisations use labour hire workers. Of the employer respondents using labour hire workers, an
average of 17 workers were working at those respondents as labour hire employees.

182. Employers were asked an open-ended question “Why does your organisation engage labour hire workers?”. Some of these reasons included:

- “For the flexibility. They tend to range from 1 day to 4 week assignments”.78
- “To fill periodic peaks in production levels with skilled workers”.79
- “For seasonal work”.80
- “To give us flexibility to meet productions needs and also replace sick and injured employee as well as employees on leave”.81

183. In response to forced casual conversion, labour hire providers would be disproportionately affected because of the high number of casual employees they engage and the employment services they provide to client companies who regularly control the duration of the work assignment. The following response identifies typical concerns raised:

“The organisation covers many awards. Almost all casual employees do not want to convert to permanent employment as it would mean a 25% reduction in pay. If compulsory the impact would be huge - as a labour hire employer it would have difficulty recovering the additional accrued costs from clients. It would result in short fixed term contracts and a prohibition on extensions for those employees.”82

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78 Response ID 59.
79 Response ID 39.
80 Response ID 14.
81 Response ID 98.
82 Response ID 2049.
12. THE ACTU SURVEY

184. The ACTU commissioned a survey, which the ACTU, the AMWU and the AMWU – Vehicle Division seek to rely on for the purposes of these proceedings. We commence our analysis of this survey by taking the Commission to the ACTU’s submissions of 19 October 2015. At paragraph 6 of those submissions, the ACTU states:

“6. The Expert Report [Attachment RM-2 to the statement of Professor Markey] includes an analysis of a survey commissioned by the ACTU and conducted by Survey Sampling International (‘ACTU Survey’) on which the ACTU also relies. The Supplementary Expert Report [Attachment RM-3 to the statement of Professor Markey] confirms the ACTU survey is reliable, well designed and robust and the findings are consistent with data from the Australian Bureau of Statistics (‘ABS’) and the Household, Income and Labour Dynamics in Australia survey (‘HILDA’).”83

185. The report and the supplementary report are attached to Professor Markey’s statement. We proceed on the basis that his statement and its attachments will be tendered as evidence during the upcoming proceedings before the Commission.

186. The ACTU’s submissions say little more about the survey, other than to cite the results on four occasions in support of its contentions.

187. We move then to the statement of Professor Markey and the reports attached therewith. Attachment RM-1 is titled ‘Report and Part-time Employment in Australia’. It has been co-authored by Professor Markey and Dr McIvor. Section 1.2 of the report sets out the method adopted by the authors in preparing this report. It states the following regarding the ACTU survey:

“We also make use of a survey commissioned by the ACTU from April-June 2015 (see Appendix 1 for questions). The study included 838 casuals, 43 labour hire workers and 215 permanent workers. We have largely excluded comparison with permanent workers in our analysis of the data, due to the low relative proportion of workers surveyed, and have treated the survey as primarily one of casual workers. However, HILDA data suggests that labour hire workers are only

83 See ACTU’s submission of 19 October 2015 at paragraph 6.
a small proportion of the workforce as a whole (around 2 per cent), and so some observations on this workforce may be used, acknowledging the small sample.”

188. The report goes on to set out certain limitations to the casual sample of the ACTU survey when compared to ABS data, to which we later return. The authors then conclude:

“Acknowledging some limitations – that it is primarily a survey of part-time and not full-time casuals, that older workers are over-represented, and that certain industries are under-represented – we treat the ACTU survey as a useful but less precise guide than the ABS or HILDA data, and defer to those where there is overlap or repetition between the sets of data. Nonetheless, the ACTU survey does provide some unique insights into particular aspects of the experiences of casuals.”

189. The remaining report summarises and at certain points draws conclusions based on academic literature, ABS data, the Household, Income and Labour Dynamics in Australia survey and the ACTU survey. Appendix 1 sets out the ACTU survey questions, which we deal with later in this submission.

190. On 2 October 2015, the ACTU wrote to Professor Markey. That correspondence is annexed to Attachment RM-3 to Professor Markey’s statement. The purpose of the correspondence was to engage the Professor to provide a supplementary report for the purposes of these proceedings. In respect of the ACTU survey, the correspondence states:

“In section 1.2 of your report you refer to a Survey conducted by the ACTU. Are you able to comment on why it was that the survey was conducted and at whose suggestion it was conducted? Did you have any input into the design of the survey? In addition to the comments you have made as to the limitations of that survey, are there any comments that could be made on its design or validity.”

191. Having been so prompted, the supplementary report, at page 6, deals with the ACTU survey as follows:

“3. The ACTU survey was suggested by one of this Reports author’s (sic), Professor Markey, to the ACTU in February 2015, in order to provide data on some issues pertaining to its claim that were not covered by ABS or HILDA data. It was suggested by Professor Markey that to enhance the survey’s validity, it was important that it be representative of the working population as a whole and

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84 See Attachment RM-2 to statement of Professor Markey at page 10.
85 See Attachment RM-2 to statement of Professor Markey at page 10 – 11.
that it include both union and non-union members. So as to achieve these requirements Professor Markey also suggested that the ACTU engage a survey panel provider such as SSI. The ACTU adopted these suggestions and accordingly, Professor Markey initially approached SSI on their behalf to conduct the survey. The ACTU subsequently contracted the SSI to conduct the survey.

4. Professor Markey also participated in the survey design. The ACTU designed a draft questionnaire and sought Professor Markey’s professional opinion regarding its viability, as well as that of other academics from other institutions. Professor Markey’s main advice was that the survey draft was too long, which we understand was the advice of other academics consulted. Professor John Buchanan from the University of Sydney suggested a pared down design, and Professor Markey agreed that it was an adequate design for the purpose. After the survey was administered by SSI, we were provided with the raw data results that have formed the basis of our analysis of the ACTU Survey. 86

The Conduct of the Survey

192. The complete absence of evidence as to how the ACTU’s survey was conducted is startling and allows for very little (if any) confidence to be placed in its results. In the material filed to date, the ACTU has not been forthcoming with respect to a range of matters regarding its survey, which raises significant doubt as to how the survey was administered.

193. For instance, the following questions arise:

- How was the sample selected? Was it a random selection? If not, on what basis were it chosen?

- Who is SSI? What was the extent of their involvement?

- Who selected the sample of respondents? Was it the ACTU, its affiliates, SSI or the authors of the reports that we have here considered?

- What was the constitution of the sample in terms of gender, age, industry in which they work, modern award by which they are covered, modern award reliance, union membership and so on?

86 See Attachment RM-3 to statement of Professor Markey at page 6.
• By what medium was the survey conducted – electronically, by hard copies, by telephone or a combination of these? If electronically, using what software or program? Why was it chosen as the means of conducting the survey? Was it suitably rigorous? How did it work? How was it accessed by respondents? Were measures taken to ensure that it could not be tampered with? If so, what were they? Was the survey conducted anonymously?

• What information about the survey was provided to respondents? Were they informed of these proceedings? If so, what were they told? How was this information communicated and by whom? Was it communicated to all respondents? How was that information presented? When was that information presented – at the time that the survey was completed or preceding it?

194. Given that so very little is known about the conduct of the survey, a raft of questions arise as to the veracity of its results. The scarcity of material before the Commission allows for a number of adverse inferences to be drawn. For instance, there is nothing to suggest that the sample of respondents was not carefully and deliberately selected such that it would result in biased responses. It is entirely possible that the sample was taken from employees employed by only selected businesses in which there is heavy union presence.

195. Full details regarding demographic characteristics of the sample are also not known, subject to the critique of the survey in the report of Professor Markey and Dr Mclvor which we set out below. This is of course important because a sample that is skewed can have a significant impact on the results. For instance, over-representation of older workers is more likely to produce higher results of employees seeking longer minimum shift lengths as compared to younger workers who are undertaking secondary or tertiary education.

196. All that is known about the demographics of the survey respondents is that which is set out in the report found at RM-2 to the statement of Professor
Markey at page 10, where the authors of the report identify certain limitations of the ACTU survey when compared to ABS data:

- Casuals working part-time hours were over-represented in the sample. Around 95% of casuals in the sample work part-time, much higher than the 71% in the ABS figures.

- Women were over-represented. 66% of the sample of casuals are women as compared to 54% in the ABS figures.

- Middle aged and older workers are over-represented. Around 54% of the sample is aged 45 and over, including 31% who are 55 and over. By contrast, workers aged over 45 represent only 27% of casuals in the ABS data, including only 13% aged 55 and over.

197. A series of questions can arise regarding the medium by which the survey was in fact conducted. The use of an online survey platform is not immune from discredit. As we understand it, there are various options or functionalities open to the administrator of the survey when it is established and during its operation that can have a significant bearing upon its reliability. The ACTU has not provided any insight into the process that was involved in setting up the survey and whether any such safeguards were implemented. If the survey was conducted by paper, any number of other concerns regarding the responses can arise.

198. We are also left entirely unadvised as to manner in which respondents were informed of the survey and invited to participate. Was the conduct of the survey preceded by union campaigns that sought to drive the rhetoric underlying the claims before the Commission and were designed to elicit certain responses from survey participants? Were participants of the survey invited to union organised events in order to encourage them to participate in the survey and if so, what were they told?
199. The Commission should have little confidence in the survey commissioned by the ACTU. There is no evidence before it about a substantial number of issues associated with the administration of the survey. Such a lack of transparency gives rise to doubt as to the manner in which it was conducted and whether the results that flow from it are statistically sound. Indeed it is our submission that an adverse inference can and should be drawn from the absence of any evidence in this regard given the significance of the issues raised.

200. We note that the ACTU and its affiliates have been involved in a number of previous Commission proceedings in which either they have sought to rely on a survey or have responded to a survey conducted by another interested party. The unions are therefore well aware of the types of criticisms that are likely to be made of surveys. Despite this, the ACTU has not sought to shield its case from the obvious evidentiary gaps that we have here highlighted. These matters are neither novel nor particularly complex in the context of proceedings such as these. It is surprising that the ACTU has not, in mounting its case, addressed this readily apparent defect.

**The Survey Questions**

201. A list of survey questions can be found at Appendix 1 to RM-2. The supplementary report suggests that they were prepared by the ACTU in consultation with Professor Markey, Professor Buchanan (who has not been called to give evidence in these proceedings) and other academics, the identities of whom are unknown.

202. Despite the advice sought by the ACTU in respect of the questions and the manner in which they have been crafted, there are several flaws that become readily apparent upon a brief review of them.

203. It also appears that the ACTU has not provided a complete picture of the questions that were asked. That is, where a question was to be answered by selecting one or more of the provided options, these have not necessarily been set out in the ACTU’s material.
204. Attachment 5 to the AMWU’s submissions of 13 October 2015 at page 51 sets out the ‘ACTU Survey’. As the Commission will quickly identify from the table below, the numbers assigned to the questions do not align and there appear to be some discrepancies in the text of the questions.

<table>
<thead>
<tr>
<th>Appendix 1 to RM-2</th>
<th>Attachment 5 to AMWU Submissions</th>
</tr>
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</table>
| **Q1**  Which of the following describes your employment situation? | **Q2** Which of the following describes your employment?  
   a) Casual worker  
   b) Labour hire worker  
   c) Seasonal worker  
   d) Contractor/self employed  
   e) Permanent worker  
   f) Currently unemployed |
| **Q1A** Thinking back to when you started your current employment, did you become permanent after starting as a casual? | **Q2A** Did you become permanent after starting in your current position as a casual? |
| **Q1B.1** Thinking back to when you started your current employment, how long were you a casual employee before you became permanent? | NA |
| **Q1B** Could you describe the process of how you became permanent? | **Q2B** Could you describe the process of how you became permanent? |
| **Q2_1** Thinking back to when you were a casual at the start of your current employment did you receive any of the following. Do you receive any of the following? Paid annual leave | **Q1** Do you receive any of the following?  
   a) Paid annual leave  
   b) Paid sick leave  
   c) Casual sick leave (25%) |
<p>| <strong>Q2_2</strong> Thinking back to when you were a casual at the start of your current employment did you receive any of the following. Do you receive any of the following? Paid sick leave | As above |
| <strong>Q2_3</strong> Thinking back to when you were a casual at the start of your current employment did you receive any of the following. Do you receive any of the following? Casual loading (eg. 25%) | As above |
| Q2_4 | Thinking back to when you were a casual at the start of your current employment did you receive any of the following. Do you receive any of the following? None of the above | NA |
| Q3 | What is your age? | Q3 | What is your age? |
|   | a) 15 – 17 years | a) 15 – 17 years | b) 18 – 20 years |
|   | b) 18 – 20 years | b) 18 – 20 years | c) 21 – 24 years |
|   | c) 21 – 24 years | c) 21 – 24 years | d) 25 – 35 years |
|   | d) 25 – 35 years | d) 25 – 35 years | e) 35 – 44 years |
|   | e) 35 – 44 years | e) 35 – 44 years | f) 45 – 54 years |
|   | f) 45 – 54 years | f) 45 – 54 years | g) 55 – 64 years |
|   | g) 55 – 64 years | g) 55 – 64 years | h) 65+ years |
| Q4 | What is your gender? | Q4 | What is your gender? |
|   | a) Female | a) Female | b) Male |
| Q5 | Which of the following best describes the industry you generally work in, in your main job? | Q5 | Which of the following best describes the industry you generally work in, in your main job? |
|   | - Agriculture, Forestry and Fishing | - Agriculture, Forestry and Fishing | - Mining |
|   | - Mining | - Mining | - Manufacturing |
|   | - Manufacturing | - Manufacturing | - Electricity, Gas, Water and Waste Services |
|   | - Electricity, Gas, Water and Waste Services | - Electricity, Gas, Water and Waste Services | - Construction |
|   | - Construction | - Construction | - Wholesale Trade |
|   | - Wholesale Trade | - Wholesale Trade | - Retail Trade |
|   | - Retail Trade | - Retail Trade | - Accommodation and Food Services |
|   | - Accommodation and Food Services | - Accommodation and Food Services | - Transport, Postal and Warehousing |
|   | - Transport, Postal and Warehousing | - Transport, Postal and Warehousing | - Information, Media and Telecommunications |
|   | - Information, Media and Telecommunications | - Information, Media and Telecommunications | - Financial and Insurance Services |
|   | - Financial and Insurance Services | - Financial and Insurance Services | - Rental, Hiring and Real Estate Services |
|   | - Rental, Hiring and Real Estate Services | - Rental, Hiring and Real Estate Services | - Professional, Scientific and Technical Services |
|   | - Professional, Scientific and Technical Services | - Professional, Scientific and Technical Services | - Administrative and Support Services |
|   | - Administrative and Support Services | - Administrative and Support Services | - Public Administration and Safety |
|   | - Public Administration and Safety | - Public Administration and Safety | - Education and Training |
|   | - Education and Training | - Education and Training | - Health Care and Social Assistance |
|   | - Health Care and Social Assistance | - Health Care and Social Assistance |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Options/Details</th>
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<tbody>
<tr>
<td><strong>Q5_20_OTHER</strong> Which of the following best describes the industry you generally work in, in your main job? Other</td>
<td>As above</td>
</tr>
</tbody>
</table>
| **Q6** How did you become a [casual/labour hire] worker? | **Q6** How did you become a casual worker?  
- a) I was offered a choice between casual and permanent, and chose to be casual  
- b) I was never offered a choice, casual employment was all that was offered  
- c) I was previously permanent (part time/full time) and chose to become casual  
- d) I was previously permanent and was asked by my employer to become casual  
- e) Other situation |
| **Q6_5_OTHER** (How did you become a [casual/labour hire] worker? Other situation (please describe)) | As above |
| **Q7** Why do you, or did you, work as a [casual/labor hire]? | **Q7** Why do you work as a casual?  
- a) It was the only suitable work available, I had no choice  
- b) I freely choose to work casual because it is more flexible/convenient for me  
- c) I need the higher wage with casual loading  
- d) Other reasons (please describe) |
| **Q7_4_OTHER** Why do you, or did you, work as a [casual/labor hire]? Other | As above |
| **Q8** Has your employer informed you of your right to convert to permanent employment? | NA |
| **Q9** Have you asked your employer if you could change from being a [casual/labour hire] to be a permanent employee? | **Q8** Have you asked your employer if you could change from being a casual to be a permanent employee?  
- a) Yes  
- b) No |
| **Q9A** You mentioned that you asked your employer to convert from casual to permanent employment, can you please tell us what happened: | **Q8(a)** If yes, what happened:  
- a) I was able to convert to ongoing/fixed term status  
- b) My request was refused |
<table>
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<tr>
<th>Question</th>
<th>Description</th>
<th>Options</th>
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</table>
| Q9A_4_OTHER | You mentioned that you asked your employer to convert from [casual/labour hire] to permanent employment, can you please tell us what happened: Other | c) My request is still being considered  
d) Other (please specify) |
| Q9B | You mentioned that you have never asked your employer to convert from [casual/labour hire] to permanent employment, can you please tell us why: | Q8(b) If no, why not:  
a) I am content with current arrangements  
b) On-going, permanent or fixed term status is not possible or available  
c) I am not convinced my employer would allow me to change  
d) Other (Please specify) |
| Q9B_5_OTHER | You mentioned that you have never asked your employer to convert from casual to permanent employment, can you please tell us why: Other | As above |
| Q10 | To what extent do you agree that [casual/labour hire] workers such as yourself should be able to convert to permanent status, if that is their preference? | Q9 To what extent do you agree that casual workers such as yourself should be able to automatically convert to permanent status, if that is their preference?  
a) Strongly agree  
b) Agree  
c) Neutral  
d) Disagree  
e) Strongly Disagree |
| Q11 | What is your occupation/job title? | Q10 What is your occupation/job title or Which of the following best describes your usual occupation?  
- Manager  
- Professional  
- Technician and Trade Worker  
- Community and Personal Service Worker  
- Sales Worker  
- Machinery Operator and Driver  
- Call Centre Worker |
<p>| Q11_9_OTHER | What is your occupation/job title? Other | As above |
| Q12 | Do you know how your pay and | Q11 Do you know how your pay and |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tbody>
<tr>
<td>conditions are set at work?</td>
<td>conditions are set at work? a) Under an industry award (e.g. the Manufacturing/Metals Award) b) By an enterprise/collective agreement for your workplace c) Under and (sic) individual contract d) I'm not sure</td>
</tr>
<tr>
<td>Q12A Do you know which award applies to you?</td>
<td>Q11a) Do you know which award applies to you? a) 122 awards – list can be found here [link to FWC webpage] b) I’m not sure</td>
</tr>
<tr>
<td>Q13 How long have you worked in your current job?</td>
<td>Q12 How long have you worked in your current job? a) Less than 3 months b) 3 to 6 months c) 6 months to 1 year d) 1 year to 3 years e) 3 to 5 years f) 5 to 10 years g) 10 years or more</td>
</tr>
<tr>
<td>Q14 On average how many paid hours do you work each week?</td>
<td>Q13 On average how many paid hours do you work each week? a) 1 – 4 hours b) 5 – 8 hours c) 9 – 12 hours d) 13 – 16 hours e) 17 – 20 hours f) 21 – 24 hours g) 25 – 28 hours h) 29 – 32 hours i) 33 – 36 hours j) 37 – 38 hours k) More than 38 hours</td>
</tr>
<tr>
<td>Q15 In the past 3 months, what is the minimum number of hours you have worked in a single shift?</td>
<td>Q14 What is the minimum number of hours you would work in a single shift? a) 1 hour b) 2 hours c) 3 hours</td>
</tr>
<tr>
<td>Question</td>
<td>Options</td>
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<tr>
<td><strong>Q16</strong> To what extent do you agree that workers such as yourself should have a longer minimum shift length?</td>
<td>d) 4 hours&lt;br&gt; e) 5 hours&lt;br&gt; f) 6 hours&lt;br&gt; g) 7 hours&lt;br&gt; h) 8 hours&lt;br&gt; i) 9 hours&lt;br&gt; j) 10 hours&lt;br&gt; k) 11 hours&lt;br&gt; l) 12 hours&lt;br&gt; m) More than 12 hours</td>
</tr>
<tr>
<td><strong>Q15</strong> Would you like to work more or less hours in a single shift?</td>
<td>a) More&lt;br&gt; b) Less</td>
</tr>
<tr>
<td><strong>Q16A</strong> You said you agree that workers should have a longer minimum shift length, could you please tell us why?</td>
<td></td>
</tr>
<tr>
<td><strong>Q15a)</strong> Why?</td>
<td></td>
</tr>
<tr>
<td><strong>Q16B</strong> You said you disagree that workers should have a longer minimum shift length, could you please tell us why?</td>
<td></td>
</tr>
<tr>
<td><strong>Q15a)</strong> Why?</td>
<td></td>
</tr>
<tr>
<td><strong>Q17</strong> How are your working hours set?</td>
<td>a) I work a regular roster (same hours each week)&lt;br&gt; b) I work a rotating roster (different hours week to week, but a set pattern)&lt;br&gt; c) I work irregular hours</td>
</tr>
<tr>
<td><strong>Q16</strong> How are your working hours set?</td>
<td>a) I work a regular roster (same hours each week)&lt;br&gt; b) I work a rotating roster (different hours week to week, but a set pattern)&lt;br&gt; c) I work irregular hours</td>
</tr>
<tr>
<td><strong>Q18</strong> How much say do you have over the hours you work?</td>
<td>a) Very little say (my boss sets the hours)&lt;br&gt; b) Some say (I can vary hours when I need, but usually set by my boss)&lt;br&gt; c) A lot of say (I can choose when I work)</td>
</tr>
<tr>
<td><strong>Q17</strong> How much say do you have over the hours you work?</td>
<td>a) Very little say (my boss sets the hours)&lt;br&gt; b) Some say (I can vary hours when I need, but usually set by my boss)&lt;br&gt; c) A lot of say (I can choose when I work)</td>
</tr>
<tr>
<td><strong>Q19_1</strong> Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? I would like the opportunity to become permanent</td>
<td></td>
</tr>
<tr>
<td><strong>Q18</strong> Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise?</td>
<td>a) I would like the opportunity to become permanent&lt;br&gt; b) Not having paid leave affects my health&lt;br&gt; c) I don't get access to training at work because I'm casual</td>
</tr>
<tr>
<td>Q19.2 Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? Not having paid leave affects my personal life</td>
<td>As above</td>
</tr>
<tr>
<td>Q19.3 Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? I don't get access to training at work because I'm casual</td>
<td>As above</td>
</tr>
<tr>
<td>Q19.4 Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? I don't get promotions or reclassifications because I'm casual</td>
<td>As above</td>
</tr>
<tr>
<td>Q19.5 Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? I like working as a casual because of the flexibility it provides</td>
<td>As above</td>
</tr>
<tr>
<td>Q19.6 Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? I feel vulnerable and don't speak up about workplace issues/safety because I'm casual</td>
<td>As above</td>
</tr>
<tr>
<td>Q19.7 Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? Any other issues or comments</td>
<td>As above</td>
</tr>
<tr>
<td>Q19.7_OTHER Thinking about working as a casual, do you have any comments about your experience or issues you would like to raise? Other</td>
<td>As above</td>
</tr>
</tbody>
</table>

d) I don’t get promotions or reclassification because I'm casual

e) I like working as a casual because of the flexibility it provides

f) I feel vulnerable and don’t speak up about workplace issues/safety because I’m casual

g) Any other issues or comments (free text)
205. Despite this, we proceed on the basis that the two sets of questions are in respect of one survey that was conducted by the ACTU. The material does not state that, for instance, there was in fact more than one survey conducted by the ACTU. The discrepancies that arise from the above two documents, however, casts some doubt over the veracity of the material before the Commission. It appears that neither the parties nor the Commission are in a position to review an accurate full and final set of questions that were asked in the survey. This poses an obvious difficulty when attempting to dismantle the ACTU’s survey results and the analysis undertaken in the reports relied upon by the ACTU.

206. Nonetheless, we hereafter attempt to deal with the drafting of the questions posed in the survey, as documented in either or both sets of material cited in the table preceding this paragraph, for the purposes of establishing that the crafting of the questions themselves is flawed. The question numbers referred to below correspond with those found in Appendix 1 to MR-2.

207. The first concern issue from the opening questions of the survey. We first consider page 51 of Attachment 5 to the AMWU’s submissions. The first question asks whether the employee currently receives paid annual leave, paid sick leave or a casual loading. If the respondent receives paid annual leave and paid sick leave, the survey ends there for that respondent. It appears that the intention is to eliminate respondents who are engaged on a permanent basis in receipt of paid leave entitlements. If however, the employee receives a casual loading or if the respondent receives either paid annual leave or paid sick leave but not both, the respondent is able to continue responding to the survey.

208. Question 2 then asks the respondent to describe their employment. Of the options there available, if the respondent selects ‘casual worker’, ‘labour hire worker’, ‘seasonal worker’ or ‘contractor/self employed’, they are able to continue. We note that the term ‘seasonal worker’ is not defined and that a seasonal employee is not necessarily a casual employee. For example, the Alpine Resorts Award 2010 (Alpine Resorts Award) allows for seasonal employment. Such employees are to be engaged on a full-time or part-time
basis. The FBT Award also refers to seasonal employees. Further, seasonal employees are referred to in s.386(1)(a) of the FW Act.

209. In addition, contractors or those that are self-employed are clearly not ‘employees’ for the purposes of the modern awards system. It is unclear why they are nonetheless permitted to continue to complete the survey. Many of the questions asked are not relevant to such respondents and their responses may have skewed the final results.

210. If the respondent identifies that they are a ‘permanent worker’, they are taken to question 2(a), after which they are to finish the survey. That is, the respondent will next be asked if they became a permanent employee after starting in their current position as a casual employee and if so, they will be asked to describe the process by which they became a permanent employee. That the survey thereafter ends for such employees necessarily means that the remaining questions (from question 3 onwards) have been answered only by respondents who identified that they are casual employees, labour hire employees, seasonal workers or contractors/self employed. Those that identified that they are “permanent employees”, or were deemed to be as such from their responses to question 1, are eliminated in the very early stages of the survey. This is reflected in the manner in which the remaining survey questions have been crafted, as they are directed towards the current status of the respondent as a casual employee.

211. In contrast, Appendix 1 to RM-2 does not reveal how a respondent would pass through the opening questions to the survey. That is, the sequence in which the questions are posed and the extent to which a particular question is asked only if the respondent answers an earlier question in a specific way has not been explained. Therefore, it is not clear whether the entire survey was completed by both casual employees and permanent employees. The drafting of the questions (see for example, Q2_1 – Q2_4 and Q7) suggests that the survey questions were open to employees presently engaged as casuals and those

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87 See clause 11 of the Alpine Resorts Award 2010.
88 Clause B.2.1.
who were engaged as casuals but are presently engaged as permanent employees.

212. As can be seen, a respondent’s eligibility to complete the survey and the extent to which responses provided to the various questions include both casual and permanent employees is not clear.

213. **Question 8** asks: ‘*Has your employer informed you of your right to convert to permanent employment?*’ The question presupposes that the respondent does in fact have a right to convert. It is important to first observe that at present, the modern awards system does not, as such, afford employees a right to convert. Pre-existing casual conversion clauses rather provide employees with a right to *request* to convert. In this way, the question mischaracterises the entitlement.

214. In any event, the questions preceding number 8 do not seek to ascertain whether the respondent is covered by a modern award or enterprise agreement that contains a casual conversion provision. Therefore, the responses to it are not indicative of the extent to which employers are complying with their obligation under pre-existing casual conversion clauses to notify employees of their right to request conversion. That is, the responses do not provide an indication of the number of employees who have or have not been notified of their right to request conversion under such clauses.

215. **Question 9** asks: ‘*Have you asked your employer if you could change from being a [casual/labour hire] to be a permanent employee?*’ The following two questions are contingent upon the response provided to question 9. They inquire as to “what happened” if a request to convert was made or to request the respondent to explain why they have not made a request to convert.

216. Question 9 is not confined to respondents who presently have a right to request to convert under the industrial instrument that applies to them. That is, the questions preceding number 9 do not seek to ascertain whether the respondent is covered by a modern award or enterprise agreement that contains a casual conversion provision. Thus, the question invites a positive response even in circumstances where a casual employee who does not have a right to request
conversion has done so by way of, for example, an informal discussion with their employer in which they have inquired whether there is any possibility that they may transfer to a permanent position.

217. For this reason, the responses to this question are not indicative of the extent to which pre-existing casual conversion clauses are being utilised. That is, the responses do not provide an indication of the number of requests that are made pursuant to such clauses.

218. The responses to question 9A must also be seen in this light. Of those respondents who indicate that their request was not granted, the Commission cannot determine the proportion of such employees who do not have a right under an award or enterprise agreement to request conversion to permanent employment. Thus, the responses to this question cannot be considered evidence of the extent to which requests to convert under pre-existing casual conversion clauses are granted.

219. We note that the text of questions 9A and 9B in Appendix 1 to MR-2 is not in the same terms as that cited by the AMWU. Therefore, the precise terms in which these questions were posed is not clear.

220. Assuming that the second potential response to question 9B was in the terms found in the AMWU’s materials, we make the following observation. Option (b) provides that the respondent has not made a request to convert because ‘On-going, permanent or fixed term status is not possible or available’. To the extent that this response was selected by respondents, we note that it is indicative only of their perception that ongoing, permanent or fixed term status was not possible or available. The response does not indicate that this has in fact been the advice, information or response to a request to elect that was provided to the employee by their employer. It rather appears to apply where the employee has decided not to seek conversion based on their understanding or belief that that is the case, which may be due to any number of factors and could in fact be entirely misconceived. The survey does not allow for this level of analysis.
221. **Question 10** is in the following terms: ‘To what extent do you agree that [casual/labour hire] workers such as yourself should be able to convert to permanent status, if that is their preference?’ The question is clearly a leading one. It is predicated on the basis that the respondent agrees with the proposition that workers such as the respondent should be able to convert to permanent status if that is their preference. Further, it does not explain what the consequences of such conversion would be (for instance, the employee would no longer receive their 25% loading). This necessarily means that the responses provided to this question should be given little if any weight by the Commission.

222. In any event, it is virtually impossible to contemplate circumstances in which an employee might not agree that employees such as themselves should be afforded a further or greater entitlement. Respondents to the survey are bound to agree to such a proposition.

223. **Question 15** asks: ‘In the past 3 months, what is the minimum number of hours you have worked in a single shift?’ The question appears to ask the respondent to identify the length of the shortest shift that they have worked in the preceding three months. The question is framed such that where an employee has worked a shift of a particular length just once in the previous few months, it would be identified by their response.

224. The data gathered from responses to this part of the survey do not establish that there is a phenomenon of ‘short shifts’ as alleged by the ACTU. Indeed if an employee was recalled to work overtime on a particular occasion in the preceding three months for a period of two hours, but the employee otherwise works shifts that are longer, the respondent’s answer to question 15 would be ‘two hours’. The responses to this question reveal nothing of the frequency ir regularity with which such shifts are worked.

225. Further, neither question 15 nor any other question in the survey deals with why the employee worked a shift of that length. For instance, a ‘short shift’ may well have been worked to accommodate the needs of the employee due to their
school or university commitments or caring responsibilities. For this reason, the responses to this question are of little probative value as they are provided in the abstract, absent any context.

226. As can be seen in the question above, Attachment 5 to the AMWU’s submissions sets out the following question as having been posed in the ACTU survey: ‘Q14 What is the minimum number of hours you would work in a single shift?’ The question is ambiguous. An assessment as to the minimum hours that an employee ‘would work’ is a hypothetical. The basis upon which the respondent is to formulate their response is unclear and of little value.

227. Question 16 asks: ‘To what extent do you agree that workers such as yourself should have a longer minimum shift length?’ We make the very same observations about this question as we have earlier regarding question 10.

228. We note that the AMWU’s submissions contain a question in the following terms: ‘Q15 Would you like to work more or less hours in a single shift?’ That question does not appear in Appendix 1 to MR-2. However, if the question did form part of the survey, we make the following observations.

229. The question is poorly drafted and ambiguous. It does not refer expressly to the minimum shift length that is worked by an employee or that is prescribed by an award. Rather it asks whether, as a general proposition, the employee would like to work more or less hours in a shift.

230. The length of an employee’s shift can vary on each occasion that they are required to work. Therefore, there may be no one answer to the question above. The answer may vary from shift to shift. It is also not clear what an analysis of the responses to the question would establish, if anything.

231. Question 18 asks: ‘How much say do you have over the hours you work?’ According to the AMWU’s submissions, the options provided were:

(a) Very little say (my boss sets the hours)
(b) Some say (I can vary hours when I need, but usually set by my boss)
(c) A lot of say (I can choose when I work)
232. We make the obvious observation once again that the responses to this question can be put no higher than an employee’s perception of the level of ‘control’ that they have over their working hours. This is particularly important in the context of casual employees who cannot be compelled or required to work a particular shift. To the extent that a casual employee is ‘rostered’ to work at a particular time and the employee is unable to do so, this in fact gives a casual employee considerable ‘say’ over their hours.

233. We also note that the responses are drafted such that they include the reason for which the employee considers that they have ‘very little say’, ‘some say’ or ‘a lot of say’. We anticipate that this may have altered the way in which a respondent answered this question. That is, if an employee’s circumstances do not meet any of the descriptors contained in brackets, or where an employee’s circumstances are such that they do not fit neatly within any of the options provided, the response may not necessarily be representative of the extent to which they in fact have control over their hours.

234. **Question 19** asks the respondent if they have ‘any comments about [their] experience or issues that [they] would like to raise’ regarding working as a casual. It then provides six different options that the employee may choose from, most of which (unsurprisingly) suggest negative consequences or experiences. The question and the responses provided are, in this way, tailored to lead the employee towards identifying adverse effects of casual employment.

235. Further, option (c) (‘I don’t get access to training at work because I’m casual’) and option (d) (‘I don’t get promotions or reclassification because I’m casual’) draw a causal connection between the absence of access to training and promotions/reclassifications and the respondent’s employment as a casual. That is, a respondent that selects either of these options believes that they face these consequences because they are a casual employee. The responses can be put no higher. They do not establish that the employee does not have access to training, promotions or reclassification because in fact they are a casual employee.
The Survey Results

236. It is trite to observe that the ACTU has not provided the Commission with the raw data of responses to its survey. The reason for this is not apparent. It is rather curious that it has not done so, given that its absence is likely to give rise to questions surrounding the integrity of the data and the extent to which the responses provided by its respondents in fact supported its case. Rather, the reports filed state that the raw data was provided to its authors, ‘which [has] formed the basis of [their] analysis of the ACTU survey’. 89

89 See Attachment RM-3 to statement of Professor Markey at p.6.
13. THE ACTU’S ‘LIVES ON HOLD’ REPORT


238. The Lives on Hold Report was published in 201291 after an inquiry into ‘insecure work’, which was commissioned by the ACTU92. The inquiry was conducted by a panel of four93 and it received written submissions and conducted hearings.94.

239. The inquiry preceding the publication of the Lives on Hold Report has repeatedly been referred to by the ACTU and union movement as an ‘independent inquiry’.95 Without any disrespect to those who conducted the inquiry, on no reasonable assessment could the inquiry be considered ‘independent’. The inquiry was commissioned by the ACTU,96 the panel was selected by the ACTU,97 the panel members were paid by the ACTU, the terms of reference were drafted and provided to the panel by the ACTU98, the ACTU made submissions to the inquiry,99 the ACTU urged its affiliated unions and union members to make submissions to the inquiry, ACTU staff assisted with the conduct of the inquiry and the preparation of the Lives on Hold Report,100 the ACTU conducted the inquiry at a time when it was pursuing a campaign against ‘insecure work’, and since then it has relied on the Report as part of its further campaigns against ‘insecure work’, including in these proceedings.

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90 See attachment R001 to the ACTU’s submissions of 19 October 2015; annexure to statement of Jill Biddington and annexure to statement of Brian Howe.
91 ACTU Lives on Hold Report at p.78.
92 ACTU Lives on Hold Report on the sixth page (no page number appears).
94 ACTU Lives on Hold Report on the eighth page (no page number appears).
95 See for example cover page to Lives on Hold Report.
96 ACTU Lives on Hold Report on the sixth page (no page number appears).
100 ACTU Lives on Hold Report at p.7.
240. The terms of reference for the inquiry can be found at page 1 of the Lives on Hold Report. The panel was asked to consider:

- The extent of insecure work in Australia;
- The causes of insecure work and its prevalence in modern Australia;
- The workers that are most at risk of insecure work and why;
- The level of compliance with applicable labour laws and any barriers to their effective enforcement;
- The effect of insecure work on:
  - Financial security;
  - Occupational health and safety of workers and workplaces,
    - Wellbeing and health of workers outside the workplace, including impact on family and other relationships,
    - Training and skills development,
  - Career progression and opportunities;
  - Regional communities;
  - Social inclusion;
  - Community organisations;
- The social and economic cost of insecure work to employees, employers, government, and the Australian community;
- The rights and entitlements/working conditions that can best assist to provide security for workers;
• Relevant international human rights and labour standards.\textsuperscript{101}

241. For the purposes of the inquiry, ‘insecure work’ was defined by the ACTU as ‘that which provides workers with little social and economic security, and little control over their working lives’.\textsuperscript{102}

242. The terms of reference are not balanced. For example, they do not refer to assessing the benefits of casual and part-time employment to employers, employees and the community.

243. The terms or reference proceed on the basis that ‘insecure work’, as defined by the ACTU, is a prevalent and negative feature of the labour market in Australia.

244. The inquiry received written submissions between November 2011 and January 2012.\textsuperscript{103} It is important to note that those submissions were primarily provided by unions and workers. Not one of the submissions was filed by an organisation that represents employer interests. At the time that the inquiry was conducted, associations like Ai Group decided against making submissions as we took the view that the inquiry was not in fact ‘independent’ and was part of a union campaign.

245. The inquiry featured hearings, where evidence was heard primarily from union officials and workers.\textsuperscript{104} No employer groups participated in the hearings. Transcript of these proceedings is not publically available and the evidence taken was not tested by way of cross examination, nor was it subject to the rules of admissibility. The ‘case studies’ found in the Lives on Hold Report are based on the evidence provided by workers and ‘further interviews’\textsuperscript{105} The Report does not specify by whom those interviews were conducted, nor does transcript appear to be available. These ‘case studies’ are effectively only hearsay.

\textsuperscript{101} ACTU Lives on Hold Report at p.1.
\textsuperscript{102} ACTU Lives on Hold Report at p.1.
\textsuperscript{103} ACTU Lives on Hold Report at p.78.
\textsuperscript{104} ACTU Lives on Hold Report at pp.78–81.
\textsuperscript{105} ACTU Lives on Hold Report on the sixth page (no page number appears).
246. The panel also allegedly ‘met with and heard from academics, civil society
groups, local indigenous leaders, national union leaders, representatives of The
Productivity Commission and members of the roundtable for the Committee for
Economic Development of Australia’. The details of whom the panel met with
and the details of those discussions are not known.

247. At its highest, the Lives on Hold Report represents the views of a panel that
was constituted by the ACTU for the purposes of examining what the ACTU
describes as ‘insecure work’, based on anecdotal, untested evidence and
submissions that were filed predominantly by the ACTU, affiliate unions and
their constituents.

248. The Lives on Hold Report does not offer a fair, balanced or thorough
examination of any of the issues that arise in these proceedings.

249. The panel assessed the extent of insecure work in Australia by reference to
ABS data that goes to the proportion of employees who are engaged in casual
employment, fixed-term employment, the number of independent contractors,
the proportion of workers that are employed by labour hire agencies, and so
on. However, the methodology for arriving at their figure of 40% of the
workforce being in ‘insecure work’ is grossly flawed and overstated. The
report cites that Australia’s workforce is made up of the following types of
workers:

- 62.4% - full-time and part-time;
- 19.3% - casual;
- 9% - independent contractors; and
- 9.3% - business operators.

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106 ACTU Lives on Hold Report at p.78.
250. To derive the figure of 40% of the workforce being in ‘insecure work’, every casual, every business operator and every independent contractor in Australia, as well as some full-time and/or part-time employees would need to be included. This is clearly nonsense. Most independent contractors are happy with their arrangements and have no desire to be employees. Also, business operators cannot be regarded as being in insecure work – they run their own businesses, and commonly employ other people.

251. The report states that about 1.25% of workers are employed by labour hire firms, but these employees are included in the above figures, mostly as casuals, and should not be double-counted.

252. The report also states that 4% of workers are engaged on fixed term contracts but these are also included in the above figures for full-time and part-time employees and should not be double-counted.

253. Whichever way the statistics are cut or added, the alleged figure of 40% of the workforce being in insecure work does not withstand the most cursory scrutiny.

254. It may be that the 40% figure has been derived by adding employees who work particular patterns of hours. The report states that ‘(w)orking time insecurity is also experienced in the form of excessive hours’.

255. The Lives on Hold Report simplistically seeks to demonise all casual employment, irrespective of the circumstances surrounding the employee’s engagement, and characterises it as ‘insecure work’. It reaches this conclusion absent any rigorous consideration of or evidentiary case regarding the circumstances in which casual employees are engaged, why they are so engaged or their working conditions.

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256. The Lives on Hold Report is not a substitute for the need for the unions to mount a proper evidentiary case in these proceedings. It does not provide the ACTU and its affiliates with a means by which it can rectify the deficiencies in their material. The context in which the inquiry was conducted and the manner in which the Lives on Hold Report was prepared necessarily means that it does not carry the same weight that might otherwise be attributed by the Commission to admissible evidence to which the relevant witness has attested and the veracity of which has been tested.

257. For the reasons we have here provided, the Commission should not give any weight to the Lives on Hold Report. Its observations, characterisation of casual employment, conclusions and recommendations must be seen in light of the nature of the inquiry and the terms of reference pursuant to which it was conducted. The unions’ assertions that it provides a valid and robust consideration of the impact of casual employment or its characteristics should be wholly disregarded.
14. DEFINITION OF ‘CASUAL EMPLOYMENT’

258. We refer to the ACTU’s submissions of 19 October 2015. From paragraph 26 onwards, the ACTU goes to some length to set out various decisions that have contemplated the legal conception or definition of casual employment. As we understand it, it is the ACTU’s contention that there are, in effect, two lines of authority that emerge from their study of the case law. One is that an assessment of whether an employee is a ‘casual employee’ is to be made by considering ‘the true nature of the employment relationship’. The other is that the ‘manner of initial engagement is determinative of casual status’. The ACTU sets out its discomfort with both of these outcomes. However, no clear connection is articulated by the ACTU between these issues and its claims.

259. Fortunately, regardless of the position under common law, ‘casual employment’ has a meaning under modern awards that is clear and uncontested. Under modern awards and pre-modern awards, a casual employee is very widely defined as ‘one engaged and paid as such’. It is important to note that the definition of a ‘casual employee’, as found in modern awards, has not been put in issue in these proceedings. Neither the ACTU nor its affiliates have called into question or sought to vary the current definition, and therefore there is no need for the Full Bench to deal with the definition of ‘casual employment’.

260. Nonetheless, in light of the detailed submissions made by the ACTU, we consider it incumbent upon us to set out our view as to the position at common law and its relationship with award definitions of casual employment.

261. Ai Group submits that ‘casual employee’, even under the common law, needs to be given a contemporary meaning which reflects the fact that:

- A very high proportion of casuals are employed under industrial instruments and contracts of employment that define a casual employee as ‘one engaged and paid as such’ and where the pattern of hours, type of work and length of the engagement are irrelevant to the determination of whether or not the employee is a casual;
• The FW Act recognises that casuals are often employed on a regular and systematic basis for lengthy periods (for example, see ss.65(2)(b), 67(2) and 384(2));

• Nowadays State and Territory long service leave laws recognise that casuals are often employed on a regular and systematic basis for lengthy periods and these casuals have been granted long service leave entitlements; and

• Many employees prefer casual employment to full-time and part-time employment because it suits their family responsibilities, lifestyle preferences, study commitments or income preferences.

262. The common law meaning of ‘casual employee’ reflected in some of the old cases harks back to a bygone era when Australia’s workplace relations system was rigid. At that time Australian employers were protected from global competition through high tariffs and hence the need for workplace flexibility was less vital. Also, there was little recognition of the importance of increased workforce participation and the need to promote diversity and gender equality in the workplace. Indeed, workforce participation levels were much lower than they now are.

263. The common law meaning of ‘casual employee’ has changed over time, as is evident from many of the more recent decisions of Courts and Industrial Commissions. For the past 15 years, Courts and Industrial Commissions have in most instances adopted a contemporary meaning for ‘casual employee’ and rejected union attempts to impose an outdated and inappropriate meaning upon employers and employees.

264. This is a natural and logical development of the law, given changes in workplaces and society over the past 20 years. As recently stated by a Full Bench of the Commission in *LCR Mining Group v CFMEU*: 
“[46]...History is riddled with support for the notion that law that remains static invariably becomes archaic. Law that impedes innovation and is resistant to change has oft been seen to result in injustice and inefficiency”.  

265. In *Ryde-Eastwood Leagues Club v Taylor*, 111 a Full Bench of the NSW Industrial Relations Commission determined that regular, ongoing employment pursuant to a roster was not inconsistent with casual employment within the meaning of the award. The award defined a casual as a person ‘engaged and paid as such’.

266. In *Markwell Pacific Limited v AWU-FIME*, 112 the Full Court of the NSW Industrial Relations Court held that a group of regular, long-term casual employees were not entitled to severance payments. Although the employees had an ongoing employment relationship with the employer (in some cases extending beyond 10 years’ service) and worked a fairly consistent pattern of hours, the Full Court held that they were casual employees. The relevant award defined a casual as an ‘employee engaged and paid as such’.

267. In *Bluesuits Pty Ltd t/as Toongabbie Hotel v Graham*, 113 a Full Bench of the AIRC (Judice P, McIntyre VP and Jones C) held than an employee engaged as a casual and paid a casual loading was a casual despite union arguments to the contrary. The employee worked a four day week in accordance with a predetermined roster. The relevant award defined a casual as one ‘engaged as such’. The Full Bench held that ‘an engagement which involves regular work at the same or similar times each week is within the concept of casual employment’. 114

268. In *CPSU v State of Victoria*, 115 Justice Marshall of the Federal Court held that two employees who were designated as ‘casual employees’ and paid a casual loading were casuals, despite union submissions to the contrary. Marshall J

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111 (1994) 56 IR 385.
112 (1995) AILR 5-044 per Fisher CJ, Baur and Hungerford JJ.
113 Print S0282, 3 November 1999.
114 Ibid at para 14.
said: ‘it is not inconsistent with a casual employment relationship for employees to be engaged on a regular basis pursuant to a roster’\textsuperscript{116} and that casual employment does not need to be ‘informal, uncertain or irregular’.\textsuperscript{117} Justice Marshall’s findings were not disturbed by the Full Court of the Federal Court (Ryan, Moore and Mansfield JJ) on appeal.\textsuperscript{118}

269. A contemporary meaning of ‘casual employee’ was adopted by a Full Bench (Munro J, Polites SDP and Lawson C) of the AIRC in the \textit{Metal Industry Casual Employment Case}\textsuperscript{119} in 2000.

270. This major case continued for 18 months from August 1999 until orders were issued varying the award in February 2001. The definition of ‘casual employee’ was a central aspect of the case and was highly contested between Ai Group and the AMWU, as highlighted in the following extract from the decision (emphasis added):

“[\textbf{93}] The debate before us about the purpose and effect of defining the concept of casual employment was intense. The dynamic of that debate is the conflict about the desirability and extent of any award restriction on the use of casual employment. From the AMWU’s point of view, the merits of such restriction justify the imposition of a criterion or identification of the circumstances in which casual employment is a type of employment within the application of the Award. That approach precedes from an analysis of the circumstances in which there is the greatest justification for use of a contract for irregular, intermittent, or contingent employment. It is predicated upon casual employment not commencing unless the proposed criterion is met.”\textsuperscript{120}

271. In the case, the AMWU sought to include the following definition of casual employee:

\begin{itemize}
\item \textbf{4.2.3(a)} A casual employee is to be employed by the hour. A casual employee shall only be engaged in the circumstances in 4.2.3(b).
\item \textbf{4.2.3(b)} Casual employees may only be engaged in the following circumstances:
\begin{itemize}
\item to meet short term work needs; or
\end{itemize}
\end{itemize}

\begin{footnotes}
\item[116] Ibid at 57.
\item[117] Ibid at 57.
\item[118] [2000] FCA 759.
\item[119] 29 December 2000, Print T4991.
\item[120] 29 December 2000, Print T4991.
\end{footnotes}
to carry out work in emergency circumstances; or
• to perform work unable to be practicably rostered to permanent employees.”

272. The Full Bench rejected the AMWU’s proposed definition and decided that a casual should be defined in the Metal, Engineering and Associated Industries Award 1998 (Metals Award 1998) as follows (emphasis added):

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

273. The standard definition of ‘casual employee’ inserted into the Metals Award 1998 by the Full Bench was consistent with the one that was in place for many years under the Metal Industry Award 1984 – Part I.121

274. The standard definition inserted into the Metals Award 1998 is identical or very similar to the definitions in the vast majority of modern awards (about 80%), including the modern Manufacturing Award. Nearly all of the remaining approximately 20% of awards either define casuals as ‘employed by the hour’ or do not include a definition.

275. During the Review, the Commission has slightly reworded the standard definition in numerous exposure drafts as follows:

‘A casual employee is an employee who is engaged and paid as a casual employee’.122

276. The above definition reflects the contemporary meaning of casual employee. That is, the key factors which determine that an employee is a ‘casual’ are:

• The employee is engaged as a casual.
• The employee is paid an hourly rate of pay and a casual loading.

121 Subclause 6(c).
122 For example see clause 6.5(a) of the Exposure Draft – Cement, Lime and Quarrying Award 2014.
277. A very relevant recent FWC Full Bench decision, in which the meaning of ‘casual employee’ under modern awards and the NES was considered, is Telum Civil v CFMEU. 

278. The Full Bench relevantly stated (emphasis added):

“[12] It appears not to have been in dispute that Telum had recorded all of the Employees in its books as casual employees and had paid them a casual loading, recorded as such on their pay slips. It is more than tolerably clear from the Commissioner’s reasons for decision that the case had proceeded before the Commissioner on an assumption that the Employees had been expressly engaged as casuals at the time of their employment, had been paid as casuals throughout their employment and had otherwise been treated as casuals by Telum (see especially [2012] FWA 10684 at [54])

... 

[21] We do not propose to set out a detailed summary of the state of the general law on what constitutes casual employment. A useful conspectus of the authorities was provided by Boland P in Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Department of Justice and Attorney General (Corrective Services NSW) [2010] NSWIRComm 148. It is sufficient to note for present purposes that the notion of casual employment remains “ill-defined” under the general law and calls for the application of criteria that do not deliver a clear and unambiguous answer in many cases but, rather, lead to results on which reasonable minds may differ.

... 

[24] There is a long history of regulation of casual employment in Federal awards - including grappling with the issues arising from the nature of casual employment, the increasing casualisation of the workforce and problems associated with employees who are labelled and paid as casuals notwithstanding that they have a regular and ongoing pattern of engagement indistinguishable from ‘permanent’ full time or part-time employees. That history is set out at length in the decision of the Full Bench of the AIRC in Re Metal, Engineering and Associated Industries Award 1998 (2000) 110 IR 247 (Munro J, Polities SDP and Lawson C; 29 December 2000) (Metals Casuals Case) and we will not repeat it here. That careful decision is of particular importance and repays close study. The Metal, Engineering and Associated Industries Award 1998 (pre-reform Metals Award) was the centrepiece of the Federal award system in the decades prior to the award modernisation process. The Full Bench was dealing with an application by the AMWU to vary the provisions relating to casual employment in pre-reform Metals Award to restrict casual employment under the pre-reform Metals Award to what have been described as “true” casuals (employees who work under arrangements characterised by ‘informality, uncertainty and irregularity’ - (2000) 110 IR 247 at para [109]) and to increase the casual loading.

[25] The Metals Casuals Case demonstrates how and why the specification of casual employment in Federal awards had diverged from the (ill-defined) general

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123 [2013] FWCFB 2434
law position to a position where, by the time of award modernisation process, for
many, if not most, Federal awards, an employee was a casual employee if they
were engaged as a casual (that is, identified as casual at the time of
engagement, perhaps with a requirement of a writing) and paid a casual loading.
The Full Bench recognised that this approach had led to a position where
employees with regular and systematic hours on an ongoing basis could still be
“casual employees” under a Federal award.

... 

[38] All of the modern awards contain a definition of casual employment. Those
definitions, notwithstanding some variation in wording, have the same core
criteria:
(i) That the employee was “engaged” as a casual - that is, the label of “casual” is
applied at the time of time of engagement; and
(ii) That the employee is paid as a casual, and specifically, the employee is paid
a casual loading (set at 25% in all of the modern awards, subject to transitional
arrangements), which loading is paid as compensation for a range of
entitlements that are provided to permanent employees but not to casual
employees.

... 

[42] Again, this approach to the identification of casual employees was not an
innovation in the modern awards. Many, if not most, of the pre-reform awards,
and certainly the main pre-reform awards, adopted this approach.

[43] None of the modern awards adopt the general law approach to the
identification of casual employees. Indeed, a number of modern awards contain
‘casual conversion’ provisions (typically where casual conversion was a feature
of the key Federal awards and or NAPSA replaced by the modern award) that
allow for an employee who is engaged and paid as a casual, but who works
systematic and regular hours for a sufficient period, to seek conversion to
permanent full time or part time employment. For example, the Construction
Modern Award contains such a provision, clause 14.8, which includes the
following:.....

... 

[44] Such ‘casual conversion’ provisions were not uncommon in pre-reform
Federal award and presuppose that the general law approach to identifying
casuals does not apply in the Federal award context and that a provision such as
this is required if an employee who is engaged and paid as a casual is to be
treated as anything other than a casual for the purposes of a modern award.

[45] The general approach to casual employment in the modern awards is a
continuation of the approach explained and adopted in the Metals Casuals
Case and underscored in Redundancy Case 2004 (PR032004).

[46] It will be noted that a range of NES entitlements do not apply to a “casual
employee”:

- parental leave and related entitlements (Div 5 - see s.67(2)),
- annual leave (Div 6 - see s.96)
- personal/carer’s (sick) leave and compassionate leave (Div 7 - see s.86)
- notice of termination and redundancy pay (Div 10 - see s.123)
- public holidays (Div 10 - casual employees are not paid unless rostered on for the public holiday)


[48] To adopt the construction of s.123(1)(c) adopted by the Commissioner would allow for double dipping by employees engaged as casuals and paid the casual loading, but who work regular and systematic hours, of the sort that the Full Bench in the Redundancy Case 2004 set its face against (PR032004 at [154]). It is unlikely that the legislature intended that outcome. It is an outcome that is inconsistent with the purpose and objects of the FW Act. It is an outcome that would tend to impede productivity and flexibility (cf s.3(a) and (f)) for the reasons explained by the Full Bench in the Metals Casuals Case.

[49] Other uses of the expression “casual employee” or the word “casual” in the FW Act support the conclusion that they refer to the characterisation of the employee under the applicable modern award or enterprise agreement.

[50] The FW Act defines the expression “long term casual employee” in s.12 to mean

long term casual employee: a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

[51] This very definition suggests that legislature did not intend the expression “casual employee” to call up the general law approach. If the criterion in (b) is satisfied then the employee would likely not be a “casual employee” under the general law approach but the definition presupposes that an employee who satisfies the criterion in (b) can still be a “casual employee” within the meaning of (a).

[58] In summary, the FW Act provides for the regulation of terms and conditions of employment of national system employees through an interrelated system of the National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, it is obvious that the legislature intended that those components should interact consistently and harmoniously. We conclude that on the proper construction of the FW Act the reference to “casual employee” in s.123(3)(c) and the rest of the NES - and, indeed, elsewhere in the FW Act - is a reference to an employee who is a casual employee for the purposes of the Federal industrial instrument that applies to the employee, according to the hierarchy laid down in the FW Act (and, if applicable, the Transitional Act). That is, the legislature intended that a “casual employee” for the purposes of the NES would be consistent with the categorisation of an employee as a “casual employee” under an enterprise agreement made under Part 2-4 of the FW Act (or under an “agreement based transitional instrument” such as a workplace agreement or certified agreement made under the WR Act) that applies to the employee or, if no such agreement applies, then consistent
with the categorisation of an employee as a “casual employee” within the modern award that applies to the employee. Subject to any terms to the contrary, a reference to a “casual employee” in an enterprise agreement (or agreement based transitional instrument) will have a meaning consistent with the meaning in the underpinning modern award (or pre-reform award/NAPSA).

[59] The CFMEU placed particular reliance on the decision of Barker J in Williams v MacMahon Mining Services Pty Ltd (2010) 201 IR 123. That case was relevantly concerned with the meaning of “casual employee” in s.227 of the Workplace Relations Act 1996. Barker J noted (at [31]) that “[t]he parties accept that the WR Act does not define the expression “casual employee” and so the expression should be given its ordinary common law meaning." This case is concerned with a different statutory context and Barker J’s decision does not assist in the proper construction of the expression “casual employee” in s.123(1)(c) of the FW Act.”

279. The decision of Full Bench in Telum Civil v CFMEU provides a very thorough, logical and compelling analysis of the interaction between the modern award definition of ‘casual employee’ and the provisions in the FW Act which do or do not apply to casuals. We concur with the conclusion reached by the Full Bench; that an employee is a casual employee for the purposes of the FW Act if they are a casual employee for the purposes of the industrial instrument that applies to them.

280. The reasoning in Telum Civil v CFMEU was also recently discussed and adopted by Justice White of the Federal Court in Fair Work Ombudsman v Devine Marine Group.124 Justice White stated (emphasis added):

“141. The word “engaged” in cl 14.1 of the Award is capable of more than one meaning. On one view, it can refer to the way in which the parties themselves identified their arrangement at its commencement. On another view, it can be a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances. Support for the former construction is seen in the decision of the Full Bench of the Fair Work Commission in Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWCFB 2434. The Full Bench said at [38]:

[38] All of the modern awards contain a definition of casual employment. Those definitions, notwithstanding some variation in wording, have the same core criteria:

(i) That the employee was “engaged” as a casual - that is, the label of “casual” is applied at the time of time of engagement; and

(ii) That the employee is paid as a casual, and specifically,

the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.

...  

144. It is sufficient in my opinion to state that, in the present case, the former construction draws support from two considerations and should be adopted. First, the term “specifically engaged” in cl 12 indicates that the focus is on the agreement of the parties at the commencement of the employment as to the character of the employment. Secondly, the requirement in cl 14.3 for the observance of formality at the time of engagement of a casual employee suggests that the word “engaged” is directed to the agreement made between the parties rather than to the manner and circumstances in which the employee does in fact carry out his or her work.”

281. As determined by the Full Bench in Telum Civil v CFMEU, it would not be appropriate for the Commission to place reliance upon Barker J’s judgment in Williams v MacMahon Mining Services for the purposes of determining entitlements under the Act because the case was concerned with a different statutory context.

282. Further, we submit that the Commission should not rely upon Barker J’s judgment for the purposes of determining entitlements under modern awards or the Act for the following additional reasons:

- It appears that the relevant employee in Williams v MacMahon Mining Services was not engaged under an award, enterprise agreement or contract of employment which defined ‘casual employee’;

- It appears that the employee in Williams v MacMahon Mining Services had working arrangements which were relatively unusual;

- The employee in Williams v MacMahon Mining Services was paid a flat hourly rate that, while purporting to include ‘a loading in lieu of paid leave entitlements’, did not separately identify the casual loading or the quantum of it;

126 [2013] FWCFB 2434 at para [59].
• The decision in *Williams v MacMahon Mining Services* was made in 2010 by a single judge of the Federal Court and is not binding on the Commission. Far more weight should be given by the Commission to:
  
  o The decision of Justice Marshall of the Federal Court in *CPSU v State of Victoria*;\(^{127}\)
  
  o The decision of the Full Court of the Federal Court in *CPSU v State of Victoria*;\(^ {128}\)
  
  o The 2014 decision of Justice White of the Federal Court in *Fair Work Ombudsman v Devine Marine Group*;\(^{129}\)
  
  o The 2012 decision of a Full Bench of the Commission in *Telum Civil v CFMEU*;\(^{130}\)
  
  o The decision of a Full Bench of the AIRC in *Bluesuits Pty Ltd t/as Toongabbie Hotel v Graham*;\(^ {131}\) and
  
  o The decision of a Full Bench of the AIRC in the *Metal Industry Casual Employment Case*.\(^ {132}\)

283. As stated at the start of this section, ‘casual employee’ has a meaning under modern awards that is clear and uncontested. No variation has been sought to that definition in these proceedings and therefore the Full Bench does not need to address the issue.

\(^{127}\) (2000) 95 IR 54  
\(^{128}\) [2000] FCA 759  
\(^{129}\) [2014] FCA 1365 at paras [137] – [146]  
\(^{130}\) [2013] FWCFB 2434  
\(^{131}\) Print S0282, 3 November 1999  
\(^{132}\) Print T499129, AW789529 and PR901028
15. CASUAL CONVERSION CLAIMS

15.1 THE UNIONS’ CLAIMS

284. There are essentially two types of casual conversion clauses being pursued by the unions in the context of these proceedings.

285. The proposed clause sought in the context of most awards (103) is a clause that enables certain casual employees to ‘elect’ to covert to permanent employment after a specified period (Election Proposal). There is no capacity for the employer to refuse the conversion.

286. In a small number of awards (5) certain unions are proposing clauses intended to have the effect of “deeming” certain casuals to be permanent employees, without the need for such employees to have actually indicated that they want this to occur (Deeming Proposal). That is, the conversion would occur by force of law and without any active steps being taken by either the employer or employee. There are essentially two materially different versions of deeming proposals being advanced. The primary proponents of deeming proposals are the AMWU and AMWU Vehicle Division.

287. 11 modern awards are not the subject of any proposal to insert a casual conversion provision. No explanation is provided by the unions for this.

The Election Proposal

288. In the majority of awards which are the subject of the ACTU claim, the inclusion of a casual conversion provision that affords an employee a right to elect to become a permanent employee is sought. Subject to differences in cross referencing the proposed clause is in the following terms:

“14.4 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.
(b) For the purpose of this clause, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 14.4 if the employer fails to comply with clause 14.4(d).

(e) An employee who would otherwise be deemed a full-time or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under 14.4(d) or after the expiry of the time for giving such notice.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss and document:

   (i) whether the employee will become a full-time or part-time employee; and
   (ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment.

(g) A casual employee who is deemed to be employed on a full-time or part-time basis may only revert to casual employment by written agreement with the employer at any time.

(h) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 14.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 14.4(a).

(i) A casual employee who is deemed to be employed on a full-time or part-time basis shall have their service prior to conversion recognized and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual employee.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full-time or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) An employer shall not reduce or vary an employee’s hours of work in order to avoid or affect the provisions of this clause."
The Deeming Proposal

289. In a small number of awards the unions have advanced a proposed clause that would provide for employees to be *deemed* to be permanent employees.

290. The Deeming Proposal is being pursued with respect to the following awards:

- Graphic Arts Award;
- *Higher Education Industry – General Staff – Award 2010 (Higher Education General Staff Award)*;
- Manufacturing Award;
- *Timber Industry Award 2010 (Timber Award)*; and
- Vehicle Award.

291. With the exception of the Higher Education General Staff Award, each of the aforementioned awards currently contain casual conversion provisions. The unions are advocating for a change to the existing, longstanding award provisions.

292. There are differences between the deeming proposals for particular awards.

293. Relevantly, the claim advanced by the ACTU and AMWU in the context of the Manufacturing Award is as follows:

"14.4 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

(b) For the purpose of this clause, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed
to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period. The employee retains their rights under Clause 14.4 if the employer fails to comply with clause 14.4(d).

(e) An employee who would otherwise be deemed a full-time or part-time employee may elect to remain a casual employee by providing notice in writing to their employer within four weeks of receiving the notice required under 14.4(d) or after the expiry of the time for giving such notice.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss and document:
   i. whether the employee will become a full-time or part-time employee; and
   ii. if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment.

(g) A casual employee who is deemed to be employed on a full-time or part-time basis may only revert to casual employment by written agreement with the employer at any time.

(h) Subject to clause 8.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 14.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 14.4(a).

(i) A casual employee who is deemed to be employed on a full-time or part-time basis shall have their service prior to conversion recognized and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual employee.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a full-time or part-time basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) An employer shall not reduce or vary an employee’s hours of work in order to avoid or affect the provisions of this clause."

294. A comparable clause is proposed by the unions for the Graphic Arts Award and the Vehicle Award.

295. The ACTU has advanced a different deeming proposal for the Timber Award and the High Education General Staff Award. The clause proposed for these
instruments is set out below, with the relevant differences to the Manufacturing Award proposal underlined:

“12.3 Casual Conversion

(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to be employed on a permanent full-time or part-time basis unless the employee elects to remain employed as a casual employee.

(b) An irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee.

(d) The employer must give the employee notice in writing of the provisions of this clause at least four weeks prior to the employee attaining the six month period.

(e) An employee who would otherwise become a permanent employee may elect to remain a casual employee by providing notice in writing to their employer.

(f) Unless the employee elects to remain a casual employee, the employer and employee must discuss, and document:

   (i) whether the employee will become a full time or part-time employee; and

   (ii) if the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in subclause 10.2—Part-time employment.

(g) A casual employee’s conversion to full-time or part-time employment is not affected if the employer fails to comply with the notice requirements in this clause.

(h) A casual employee who is deemed to be employed on a permanent basis may only revert to casual employment:

   (i) by providing written notice within 7 days of the deeming occurring; or

   (ii) by written agreement with the employer at any time.

(i) A casual employee who is deemed to be employed on a permanent basis shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.

(j) Nothing in this clause obliges a casual employee who would otherwise be deemed to be employed on a permanent basis to elect to remain a casual employee, nor does it permit an employer to require an employee to remain in casual employment if the employee does not wish to do so.

(k) Casual employees (including irregular casuals) must be given written notice of the provisions of this clause by their employer within four weeks of commencing employment.
(l) An employer shall not reduce or vary an employee’s hours of work in order to avoid or affect the provisions of this clause.

(m) Any disputes about the application or operation of this clause shall be dealt with under the procedures set out in clause 9 - Dispute Resolution.”

296. The key difference between the proposed clauses relates to an employee’s capacity to revert to casual employment.

297. Although paragraphs (k) and (m) are not contained within the AMWU’s Deeming Proposal, comparable provisions are either already contained in the relevant awards or comparable amendments are being proposed to other provisions in the award.

15.2 THE HISTORY OF CASUAL CONVERSION PROVISIONS

298. Casual conversion provisions can be traced back to the decision of Stevens DP of the South Australian Industrial Relations Commission (SAIRC) in the SA Clerks Case.133 Even though the clause devised by Stevens DP was modified substantially on appeal, his Honour’s decision influenced the outcome in the Metal Industry Casual Employment Case.134

299. Ultimately, the outcome in the federal metal industry case also had a significant influence on the South Australian case, because the appeal against Stevens DP’s decision was determined after the AIRC Full Bench had handed down its decision. The Full Bench in the South Australian appeal case adopted the ‘employer right of reasonable refusal’ determined by the AIRC Full Bench in the metal industry case.

300. In the SA Clerks Case, at first instance Stevens DP rejected the ASU’s claim to redefine a casual as one engaged to work ‘on a sporadic or irregular basis with no expectation of ongoing employment’, and its claim for all other employees to be deemed to be engaged on a full-time or part-time basis. Instead, Stevens DP decided to give employees covered by the SA Clerks Award a right to

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134 Print T4991.
access full-time or part-time employment after 12 months of ongoing and regular employment.

301. In his decision DP Stevens relevantly said:

“I also acknowledge that some, perhaps many, casual employees have a preference for casual employment and a 20 per cent casual loading.”\(^{135}\)

302. In deciding to include a casual conversion clause in the Metals Award 1998, the AIRC Full Bench in the *Metal Industry Casual Employment Case*\(^{136}\) was significantly influenced by the following matters:

- The evidence that ‘casual employment in the metals and manufacturing industry, in practice, is only infrequently by engagement that is a true hiring by the hour’ and that ‘(i)t seems casual employment is often a continuing employment, until the need arises to interrupt or terminate it’\(^{137}\)

- The AMWU’s survey evidence which showed that 75% of casual workers in the manufacturing industry were engaged for more than three months and 50% were engaged for 12 months or more\(^{138}\)

- ‘The not inconsiderable body of evidence indicating that for some employees the casual employment and loaded rate regime is not unsatisfactory to their needs’\(^{139}\)

- The inappropriateness of a maximum period of engagement for casuals\(^{140}\)

- The inappropriateness of a provision deeming a casual to be a permanent employee after a specified period\(^{141}\)

\(^{135}\) [2000] SAIRCOMM 41 at para 196(5).

\(^{136}\) Print T4991.

\(^{137}\) Print T4991 at para [58].

\(^{138}\) Print T4991 at para [104].

\(^{139}\) Print T4991 at para [102].

\(^{140}\) Print T4991 at paras [108] and [115].
• The need to ‘promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.’\textsuperscript{142}

• The need for an approach ‘which builds time and an opportunity to consider and discuss into the conversion process.’\textsuperscript{143}

• The decision of Stevens DP in the \textit{SA Clerks Case}.\textsuperscript{144}

303. A major difference between the clause devised by Stevens DP and the clause devised by the Full Bench in the \textit{Metal Industry Casual Employment Case} is the following wording in the Metals Award 1998 clause (emphasis added):

“4.2.3(b)(iv) Any employer may at any time after the period referred to in subparagraph (iii) give four weeks’ notice in writing to the employer that he or she seeks to elect to convert his or her ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer shall consent to or refuse the election but shall not unreasonably so refuse. Any dispute about a refusal of an election to convert an ongoing contract of employment shall be dealt with as far as practicable with expedition through the dispute settlement procedure.”

304. The absence of an employer right of reasonable refusal of a conversion request was a key reason why the decision of Stevens DP was overturned by a Full Bench of the SAIRC. The Full Bench held that to give an employee an absolute right to convert would be unjust (emphasis added):

“That granting a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without granting the employer any right to object, no matter what its circumstances are, \textit{is unjust}.\textsuperscript{145}

305. By the time that the Full Bench of the SAIRC had handed down its appeal decision in the \textit{SA Clerks Case}, the AIRC Full Bench had handed down its decision in the \textit{Metal Industry Casual Employment Case}.

\textsuperscript{141} \textit{Print T4991 at paras [108] and [109].}
\textsuperscript{142} \textit{Print T4991 at para [115].}
\textsuperscript{143} \textit{Print T4991 at para [116].}
\textsuperscript{144} \textit{Print T4991 at paras [108], [111] and [114].}
\textsuperscript{145} \textit{Clerks (SA) Award Casual Provisions Appeal Case [2001] SAIRComm 7 at p.2.}
306. In overturning Steven DP’s decision, the SAIRC made the following comments about the AIRC’s decision (emphasis added):

“105 Finally, we acknowledge that the Australian Industrial Relations Commission in the Metal, Engineering and Associated Industries Award opted to vary that Award by creating a right to elect to convert ongoing casual employment to full-time or part-time employment, albeit subject to a caveat that the learned Deputy President did not ultimately entertain, namely that the employer could refuse the request and the matter thereafter could be referred for resolution by the Commission. There are however a number of matters that need to be said in respect of this case. First, the case was decided on its own facts and upon the detailed and extensive evidence that was presented. Secondly, it dealt with a very different industry than the one under consideration here. Thirdly, the Federal Commission may not have thought it necessary to reflect at length upon the potential adverse consequences of its proposed change because, as it noted, there were a significant number of manufacturing and related award precedents for a maximum limit to casual employment and moreover, its variation was much less dramatic than that which was ordered here, because it did not involve granting an employee the unilateral right to change his or her status without any regard whatsoever to the views or the circumstances of the employer.

307. The final casual employment clause determined by the Full Bench of the SAIRC included the wording developed by the AIRC Full Bench in the Metal Industry Casual Employment Case regarding the employer right of reasonable refusal.

308. In February 2006, a Full Bench of the Industrial Relations Commission of New South Wales (NSWIRC) in the Secure Employment Test Case\(^{146}\) decided that most New South Wales state awards would be varied to give casuals who had worked on a regular and systematic basis for a specified period the right to elect to convert to full-time or part-time employment. The relevant award provisions included the following employer right of reasonable refusal:

“… Where an employer refuses an election to convert, the reasons for doing so shall be fully stated and discussed with the employee concerned and a genuine attempt made to reach agreement. Any dispute about a refusal of an election to convert to an ongoing contract of employment shall be dealt with as far as practicable and with expedition through the dispute settlement procedure.”

\(^{146}\) [2006] NSWIRComm 38, 28 February 2006.
309. The decision of the NSWIRC was reflected in some (but by no means all) state awards when the Work Choices legislation took effect in March 2006, i.e. the month after the decision was handed down.

310. Under the Work Choices legislation casual conversion provisions in federal awards were non-allowable award matters and deemed to have no effect.\footnote{Sections 515 and 525 of the Workplace Relations Act 1996}

311. In its \textit{Decision re making of priority modern awards},\footnote{[2008] AIRCFB 1000} the Award Modernisation Full Bench determined the following regarding casual conversion provisions in modern awards (emphasis added):

\begin{quote}
"[51] An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances. This provision has its genesis in the Full Bench decision already mentioned in connection with the fixation of the casual loading of 25 per cent in the Metal industry award. The Bench made it clear that it had formulated the casual conversion provision based on the circumstances of the industry covered by the award and that there had been no evidence concerning other industries. Section 515(1)(b) of the WR Act identifies casual conversion provisions as matters which cannot be included in awards. Section 525 provides that such terms have no effect. These sections were part of the Work Choices amendments. It appears, however, that casual conversion provisions in NAPSAs were not invalidated. Modern awards can contain a casual conversion provision. In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute an industry standard, but we shall only extend them in exceptional circumstances. The modern awards reflect this approach. We note in particular that we have decided to include a casual conversion provision in the \textit{Textile, Clothing, Footwear and Allied Industries Award 2010} (the Textile industry award) against the opposition of employers. We have done so taking into account the nature of the industry and the reduction in the casual loading from 33\% per cent to 25 per cent in part of the industry covered by the award."\end{quote}

312. The unions’ claims in the current proceedings directly conflict with central elements and principles in the various cases referred to above, including the importance of employers maintaining the right of reasonable refusal of a conversion request.
15.3 PRINCIPLES THAT THE COMMISSION SHOULD APPLY WHEN CONSIDERING THE UNIONS’ CASUAL CONVERSION CLAIMS

313. As discussed in section 15.2 above and in various other sections of this submission, the unions’ casual conversion claims directly conflict with the principles in the key authorities relating to casual conversion provisions and those in the Commission’s Preliminary Jurisdictional Issues Decision.\(^{149}\)

314. The Full Bench should apply the following principles where considering the unions’ casual conversion claims.

315. **Firstly,** casual employment (including casual conversion provisions) is an award-specific issue and model award provisions are not appropriate on this topic. There are major differences in the patterns of casual employment across different industries. (See section 5 of this submission).

316. **Secondly,** in addition to all other statutory requirements and merit considerations, any claims to extend casual conversion provisions to any other industry must be justified on the basis that ‘exceptional circumstances’ apply to that industry. In its Decision re making of priority modern awards,\(^{150}\) the Award Modernisation Full Bench decided that casual conversion provisions:

- Should generally only be included in an award if there is an ‘industry standard’ for such provisions in that industry,\(^{151}\) and
- Should only be extended to another industry if ‘exceptional circumstances’ apply to that industry.\(^{152}\)

The unions have failed to establish that exceptional circumstances apply to any industry. While the unions have provided some (inadequate) industry-specific evidence for a few industries, they have not provided industry-specific evidence in support of their claims in most industries.

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\(^{149}\) [2014] FWCFB 1788.

\(^{150}\) [2008] AIRCFB 1000.

\(^{151}\) [2008] AIRCFB 1000 at para [51].

\(^{152}\) [2008] AIRCFB 1000 at para [51].
317. **Thirdly**, for an award which already contains casual conversion provisions, the Commission should proceed on the assumption that the existing provisions meet the modern awards objective and that the Full Bench decision which led to the making of the award must not be departed from unless there are cogent reasons to do so.

318. **Fourthly**, under the FW Act each award must be reviewed ‘in its own right’ (s.156(5)). Therefore, the unions’ casual conversion claims need to be assessed in the specific context of each award and on the basis of any evidence filed justifying the variation sought to that award.

319. **Fifthly**, the Commission should not depart from the principles in the *Preliminary Jurisdictional Issues Decision* (See section 4 of this submission).

320. **Sixthly**, in all of the major casual conversion cases (as discussed in section 15.2 above) the relevant Full Bench has emphasised the importance of an employer having the right to refuse an employee’s election to convert if refusal is reasonable in the circumstances. It is vital that the Commission not depart from this central principle.

### 15.4 THE UNIONS’ CLAIM TO REMOVE AN EMPLOYER’S RIGHT TO REASONABLY REFUSE A CONVERSION REQUEST

321. The casual conversion clauses contained within modern awards give the employer the right to refuse an employee’s request to convert to permanent employment, typically with the proviso that the refusal must be reasonable in the circumstances.

322. For example, subclause 14.4(d) in the Manufacturing Award states:

> "(d) Any casual employee who has a right to elect under clause 14.4(a), on receiving notice under clause 14.4(b) or after the expiry of the time for giving such notice, may give four weeks notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse."
323. To depart from the longstanding and very sensible principle that an employer has the right to reasonably refuse a request from an employee to convert to permanent employment would be ‘unjust’, as held by the Full Bench of the SAIRC in the SA Clerks Case (see section 15.2 above).\textsuperscript{153}

324. Without doubt, the injustice would apply to employers and employees.

325. The injustice to employers would include increased costs, reduced efficiency, lower productivity, reduced flexibility, and reduced competitiveness.

326. The injustice to employees would be particularly harsh. If the right to reasonable refusal was removed by the Commission, the entirely predictable result would be the termination of employment of tens of thousands of casual employees who work regular hours. The date of termination of these thousands of employees would very likely fall between the date of the Commission’s decision and the date when the award variations become operative.

327. Employers typically engage casuals because they operate in an uncertain environment, with intense competitive pressures. Just because a casual has been engaged on a regular and systematic basis for six or 12 months does not mean that there is no uncertainty at the present time, or that the employer, if faced with being forced to convert, would not decide that the best course of action would be to engage a different casual rather than converting an existing one, or to downsize, or move offshore.

328. The Full Bench in the Metal Industry Casual Employment Case was very aware of the potential adverse consequences for thousands of casual employees if employers were forced to convert. The right of reasonable refusal was the subject of intense debate between Ai Group and the AMWU in the proceedings, particularly during the ‘settlement of orders’ process which followed the December 2000 decision. The Full Bench ultimately accepted Ai Group’s arguments and evidence about the likely consequences, and rejected the

AMWU’s. In the final orders issued in February 2001, the Full Bench included an employer right of reasonable refusal.

329. In its decision, the Full Bench provided the following sound rationale for giving employers the right of reasonable refusal:

“[115] … It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.”

330. The Full Bench of the SAIRC, in its decision overturning Stevens DP’s decision in the SA Clerks Case, described the absence of an employer right of reasonable refusal as ‘unjust’ and identified a series of adverse consequences that could flow from giving employees a unilateral right to convert (emphasis added):

“HELD: Appeal allowed.

…

3. THAT granting a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without granting the employer any right to object, no matter what its circumstances are, is unjust.

4. THAT the learned Deputy President’s apparent rejection of the notion that the existing dispute resolution process or something like it could deal with such disputes and disputes about the alleged wrongful categorisation of permanent clerks as casual clerks is not explained. His failure to deal with the evidence regarding the potential adverse affects of the proposed variation left the position where it does not know whether he rejected it, gave it little weight, or failed to take it into account. Some of the criteria upon which the right to elect is based are either unworkable or may lead to unnecessary disputation. All of these matters fall within the range of circumstances identified in Clerks (SA) Award-Trade Union Training Leave (Appeal Case) as warranting the Commissions’ interference.

…

102 Bearing this in mind, and given the evidence from Mr Eblen that the Award variation is likely to create some administrative difficulties for small business; the evidence from Mr McArthur that it might seriously compromise labour hire companies and force them to consider operating outside of the State; and the evidence from Prof Wooden indicating that the variation to the Award might discourage some small businesses from engaging casual labour, thereby increasing the unemployment rate; unless all of this evidence was rejected, any proposed variation directed towards changing employment practices in respect of the use of casual clerks had to be approached with caution and a detailed consideration of the evidence
of the potential adverse consequences of the variation had to be undertaken and disclosed. The learned Deputy President’s failure to do this was, with respect, an error.

103 The variation proposed by the learned Deputy President provides no opportunity for an employer to resist an election by an employee who has satisfied the qualifying criteria. There may be cases where it is simply unreasonable to require an employer to afford an employee permanent status no matter how long the employee has been performing work for the employer. In our opinion, even if the learned Deputy President was justified in concluding that the Award needed to be changed, to give a casual clerk the right to elect to become a permanent employee upon meeting certain criteria, there was, with respect, no justification for denying an employer the right to object and for the parties to thereafter access the grievance procedure that is already contained within the Award or something like it to resolve their differences.

... 

105 Finally we acknowledge that the Australian Industrial Relations Commission in the Metal, Engineering and Associated Industries Award opted to vary that Award by creating a right to elect to convert ongoing casual employment to full-time or part-time employment, albeit subject to a caveat that the learned Deputy President did not ultimately entertain, namely that the employer could refuse the request and the matter thereafter could be referred for resolution by the Commission. There are however a number of matters that need to be said in respect of this case. First, the case was decided on its own facts and upon the detailed and extensive evidence that was presented. Secondly, it dealt with a very different industry than the one under consideration here. Thirdly, the Federal Commission may not have thought it necessary to reflect at length upon the potential adverse consequences of its proposed change because, as it noted, there were a significant number of manufacturing and related award precedents for a maximum limit to casual employment and moreover, its variation was much less dramatic than that which was ordered here, because it did not involve granting an employee the unilateral right to change his or her status without any regard whatsoever to the views or the circumstances of the employer.

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

331. The NSWIRC Full Bench in the Secure Employment Test Case Decision made the following comments about the right of reasonable refusal (emphasis added):

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

...  

102 Since the Metal Industries Award decision, casual conversion provisions have been inserted in 44 awards of the AIRC, detailed by Unions NSW in exhibit 241, which was not challenged.

103 Mr Hatcher submitted that the Clerks (SA) Award and the Metal Industries Award decisions carefully balance the interest of employers and employees, and that the evidence in these proceedings justifies a similar conclusion.”

332. The inherent logic which underpins the employers’ right of reasonable refusal in casual conversion clauses is similar to the logic that underpins the right of an employer to refuse an employee’s request for flexible work arrangements on ‘reasonable business grounds’ under s.65(5) of the FW Act.

333. As stated in the Explanatory Memorandum for the Fair Work Bill 2008 relevantly states (emphasis added):

“258. Division 4 establishes a right to request flexible working arrangements in certain circumstances. The intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements.”

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334. Further clarity about the rationale for the right of reasonable refusal under s.65(5) of the FW Act was provided in the NES Discussion Paper released by the Labor Government during the development of the FW Act (emphasis added):

“Can Fair Work Australia impose a flexible working arrangement on an employer?  
No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are ‘reasonable business grounds’. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.”\(^{156}\)

335. When the FW Act was first implemented, it did not define ‘reasonable business grounds’ for the purposes of s.65(5) although the Explanatory Memorandum for the Fair Work Bill 2008 stated (emphasis added):

“266. Subclause 65(5) provides that the employer may only refuse the request on reasonable business grounds.

267. The Bill does not identify what may, or may not, comprise reasonable business grounds for the refusal of a request. Rather, the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:

• the effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;

• the inability to organise work among existing staff; and

• the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.”

336. The FW Act was amended, through the Fair Work Amendment Bill 2013, to add the following s.65(5A) to clarify the meaning of ‘reasonable business grounds’:

“(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service."

337. It appears that the employer’s right of reasonable refusal, as contained within the casual conversion provisions and s.65 of the FW Act, stemmed from the August 2005 decision of a Full Bench of the AIRC in the Family Provision’s Case. In its decision, the Full Bench (Giudice P, Ross VP, Cartwright SDP, Ives DP and Cribb C) rejected the ACTU’s claim for employees to have an absolute right to extended parental leave entitlements and access to part-time work and decided that employees would be granted the right to request with employers having the right of reasonable refusal. The test case clause was worded as follows (emphasis added):

“Right to Request

1. An employee entitled to parental leave pursuant to the provisions of clause X may request the employer to allow the employee:

   1.1 to extend the period of simultaneous unpaid parental leave provided for in clause X up to a maximum of eight weeks;

   1.2 to extend the period of unpaid parental leave provided for in clause X by a further continuous period of leave not exceeding 12 months;

   1.3 to return from a period of parental leave on a part-time basis until the child reaches school age;

   to assist the employee in reconciling work and parental responsibilities.

2. The employer shall consider the request having regard to the employee’s circumstances and, provided the request is genuinely based on the employee’s parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer’s business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact upon customer service.”

157 PR082005
338. The Full Bench gave the following reasons for deciding upon the above clause (emphasis added):

“[395] Our third conclusion concerns the manner in which flexibility should be introduced. Neither the ACTU model, nor the model supported by the employers should be wholly accepted. The ACTU claim that these conditions should constitute an employee entitlement is not one we are prepared to grant. We agree with the employers that an unconditional right to additional parental leave benefits is inappropriate. It would have the potential to increase costs, reduce efficiency and create disharmony in the workplace. The employers' proposal, one which is based purely on agreement, has some merit. To take an example, an award might provide that an employer and an employee may agree that an employee could return from parental leave on a part-time basis until the child commences school. Such a provision might have some value in that it would recognise and encourage agreement about that matter. On the other hand it is equally true that there is nothing to stop the employer and the employee reaching such an agreement now. Despite that fact, and consistent with our earlier conclusion that some positive step is required, we think it is necessary to go beyond simply providing for agreement between the parties. The provision we have decided to adopt is based to a large extent on the proposals of the States and Territories. Those proposals, as we have already noted, draw on the approach contained in ss.80F and 80G of the Employment Rights Act 1996 (UK). That approach creates an employee right to request a change in working conditions and imposes a duty upon the employer not to unreasonably refuse the employee's request. We have adopted the employee right to request in the form suggested by the States and Territories but modified the employer's obligation so that the employer may only refuse the request on reasonable grounds.”

339. Consistent with the above comments of the AIRC Full Bench, the absence of a right of reasonable refusal would lead to increased costs, reduced efficiency and increased disharmony in the workplace.

340. If the existing right of reasonable refusal in casual conversion clauses was not working, as the unions allege, there would surely be evidence of numerous disputes arising about the issue. Over the past 15 years, since the AIRC handed down its decision in the Metal Industry Casual Employment Case and casual conversion provisions were inserted into numerous awards, there have been virtually no disputes about the refusal of employee requests to convert, as the Commission’s own records would no doubt confirm.

341. The lack of disputation over the issue highlights that there is no case for removing the right to reasonable refusal.

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158 PR082005 at para [395]
342. In the *Metal Industry Casual Employment Case*, the Full Bench highlighted the fact that since at least 1937 the Metals Award had catered for employers’ interests and preferences for free access to casual employment, and that “It is far too late to reverse that acceptance”.\textsuperscript{159} Similarly, it is far too late to entertain the removal of an employer’s right to refuse a conversion request. Such a course of action would be very damaging for employers, employees and the community.

343. The unions claims to remove the right of reasonable refusal are clearly not ‘necessary’ and hence offend s.138 of the FW Act.

344. In addition, the unions’ claims are inconsistent with the modern awards objective in s.134 of the Act because the claims conflict with:

- The requirement for awards to provide a ‘fair’ safety net (s.134(1));
  
  The absence of a right of reasonable refusal would be unjust, as identified by the Full Bench of the SAIRC in the *SA Clerks Case*;

- The ‘need to encourage collective bargaining’ (s.134(1)(b)):
  
  As things now stand, the unions are free to pursue more generous conversion rights in enterprise agreements. The space for bargaining would be reduced if the claim was granted;

- The ‘need to promote social inclusion through increased workforce participation’ (s.134(1)(c)):
  
  If accepted, the unions’ claim would lead to the loss of thousands of casual jobs with a consequent substantial negative impact on workforce participation;

- The ‘need to promote flexible modern work practices and the efficient and productive performance of work’ (s.134(1)(d)), and the ‘likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’ (s.134(1)(e)):
  
  As identified in the various major Tribunal decisions relating to the employer right of reasonable refusal, the absence of this right would impose inefficiencies on employers and increase costs;

\textsuperscript{159} Print T4991 at para [10]
• The ‘likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’ (s.134(1)(h)):

Acceptance of the unions’ claims would most likely lead to the loss of thousands of jobs with a consequent decrease in employment and economic growth.

345. Accordingly, the unions’ claims to remove the right of reasonable refusal must be rejected.

15.5 THE AMWU AND AMWU – VEHICLE DIVISION ‘DEEMING’ PROPOSAL

346. The heart of the alternate deeming proposal advanced by the AMWU, AMWU – Vehicle Division and THE ACTU is that a casual employee will be deemed to convert to permanent employment after a specified period, unless he or she actively elects to opt out. That is, the conversion will occur without any need for it to be initiated by the employee. Instead the employee is required to take active steps to avoid conversion.

347. The absence of an employer right to refuse casual conversion is also a feature of the deeming proposal, but is primarily addressed in sections 15.2, 15.3 and 15.4 of these submissions.

348. Ai Group strongly opposes the deeming proposals advanced. We contend that the proposals lack merit and that a proper case for varying each of the awards the subject of the claims to insert such provisions has not been made out. Cogent reasons for departing from the existing standards in relevant awards have not been established.

349. In support of the deeming proposal, the ACTU merely submits that, ‘…although some awards already have casual conversion clauses allowing for an employee to elect to convert to permanent employment.’

350. The prosecution of a case in support of a deeming provision has been largely advanced by the AMWU and the AMWU – Vehicle Division.

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160 ACTU submissions of 19 October 2015 at paragraph 18.
351. In addressing the AMWU submissions we note, as a preliminary matter, that the AMWU suggest that the parties address the following questions:

- Firstly, whether the current conversion provisions operate to effectively fulfil the purpose for which they were established; and

- Secondly, if the answer to the question above is ‘no’ then what form should casual conversion to permanent engagement provisions take in order to provide an effective safety net?

352. The Full Bench should not be misdirected by this invitation. It represents an approach to the Review that is not consistent with that articulated in the Preliminary Jurisdictional Issues Decision.\(^{161}\)

353. Although the historical context in which the current award clauses were established is a relevant consideration, the claim must be assessed against the current statutory framework and, in particular, considered through the prism of the modern awards objective.\(^{162}\) Importantly, the Full Bench should remain conscious of the obligation on the relevant unions to establish that all of the terms of their proposed variations are necessary to meet the modern awards objective. As identified in the Preliminary Jurisdictional Issues Decision:

> “5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.”\(^{163}\)

354. A key AMWU argument in support of the deeming proposal appears to be, in effect, a contention that employees may be reluctant to request conversion because of fear of negative consequences flowing from the making of such a request.

\(^{161}\) [2014] FWCFB 1788

\(^{162}\) Section 134 of the Act

\(^{163}\) Preliminary Issues Decision
355. It should not be accepted on the material before the Commission that there is a widespread problem of employees being reluctant to access casual conversion under existing provisions.

356. In any event, and contrary to the union submissions, the Act provides strong protections and avenues to address any adverse action that an employee may face in response to accessing a right to request casual conversion. Casually employed employees are not excluded from such protections and the contention that the avenues are practically inaccessible should be disregarded. In many respects, casual employees have far greater protection from such outcomes than they did at the time that when the casual conversion provisions were first introduced.

357. To a large extent, the AMWU contends, in effect, that the deeming proposal is warranted because of deficiencies in the current dispute resolution powers of the Commission or other available mechanisms for enforcement of modern awards. The union laments the greater access to compulsory arbitration under previous workplace relations systems, although there is no evidence of the AMWU accessing compulsory arbitration for any disputes about casual conversion in the metal industry since the AIRC Full Bench handed down its decision in 2000. The reason for this is that virtually no disputes have arisen about casual conversion over the past 16 years.

358. It should not be accepted that the current system of dispute resolution administered by the Commission is ineffective or an inadequate mechanism for assisting employees to secure, in a practical sense, the benefit of casual conversion provisions within awards. All awards contain detailed dispute resolution procedures that enable the Commission to settle disputes. This includes settlement by way of consent arbitration. Members of the Commission are of course highly skilled and experienced in assisting to resolve disputes. Although the Commission’s dispute resolution powers may not precisely mirror those available under previous legislative regimes, they are underpinned by other avenues for employees to see enforcement of an individual’s rights or employer compliance with award obligations. Also, these days the Commission

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164 See AMWU submissions of 13 October 2015 at paragraphs 7 to 11
has a much greater focus on assisting individual employees with disputes and grievances than was the case in 2000 when the AIRC was primarily focussed on collective matters.

359. There are numerous mechanisms and safeguards in place which operate to provide employees with an adequate form of redress or remedy if they are the subject of adverse action as result of seeking to access workplace rights, such as the right to request casual conversion.

360. It should not be accepted, on the material before the Commission, that there is a widespread phenomenon of employees covered by awards the subject of the deeming proposal not making a request to convert because of concerns over negative consequences. We submit that this is not the case. Nonetheless, even if this was the case it is unclear why, if the deeming model was adopted, such perceptions would not similarly manifest themselves in such employees feeling compelled to ‘opt out’ of conversion. Put bluntly, if the root cause of employees not converting is employee concern over an employer’s response to them requesting to covert, simply changing the mechanism for delivering such conversion would not remedy the fundamental problem.

361. The AMWU also alleges, in effect, that many employers breach existing award provisions by unreasonably refusing employee requests for conversion.\(^\text{165}\) In support of their claim they infer that current award provisions are deficient because they require application to a court to be effective or to enable the ‘testing’ of the reasonableness of an employer refusal. It would of course be naïve to assume that every employer and every employee always complies with every award term. Nonetheless, there is, insufficient evidence before the Commission to establish that there is significant or widespread non-compliance with current award derived obligations requiring casual conversion.

362. In relation to AMWU submissions about the need to make a relevant application to test a decision to refuse conversion, we note that the same observations could be made about the application of almost any contested

\(^{165}\) AMWU submissions of 13 October at paragraph 7.
award term. Such submissions neglect to acknowledge less formal means of employees seeking enforcement of their award rights and the deterrent effect that potential exposure to significant financial penalties have on employers seeking to deliberately breach award terms. We note that there is evidence in the current proceedings to suggest that union officials are able to rely on current award provisions to resolve concerns over casual conversion before even getting to the stage of commencing formal proceedings.

363. The AMWU submissions also ignore the role of unions and the Fair Work Ombudsman (FWO) in enforcing modern awards. The AMWU has not advanced any evidence to suggest that it is incapable or generally unwilling to represent its members in proceedings regarding the enforcement of their rights under current casual conversion clauses.

364. Similarly, no union has established in an evidentiary sense that the FWO is unwilling or unable to prosecute employers that fail to comply with existing casual conversion clauses, or that the FWO is otherwise unable to assist employees to secure conversion where they are entitled to it.

365. Ultimately, neither perceived nor actual non-compliance is a proper basis for the Commission to accede to union calls for further or different regulation. Non-compliance with the safety net does not establish that the safety net is itself inadequate. The possible non-compliance of some should not be accepted as a valid basis for concluding that it is necessary to impose a less flexible regime on all employers and employees, as contemplated by s.138.

366. If it is established that employers are not properly complying with the current regime the solution lies in better education about, and enforcement of, existing award and legislative provisions, not the adoption of new award provisions.

367. The AMWU relies heavily upon both its own survey and that conducted by the ACTU in support of its claims.

368. The AMWU submissions also identify a range of statistics concerning the
prevalence of casual employment in the manufacturing industry.\textsuperscript{166} This does not substantiate a case for implementing a deeming provision rather than a mechanism that operates at an employee’s election. The factors contributing to such statistics are multifaceted as dealt with in the statement of Julie Toth and in other sections of this submission. They include the desire of many casual employees to remain casual. It cannot be accepted that they are a product of deficiencies in the current safety net.

369. Putting aside the factors associated with such statistical outcomes, we also reject any contention that discouraging casual employment is a valid consideration in the context of the exercise of modern award powers. It is not an objective that is consistent with the application of the modern awards objective. Far from s.134(1) stating that there is a need to discourage casual employment, s.134(1) emphasises the need for workplace flexibility and enhanced workforce participation, for which casual employment is a vital enabler.

370. At paragraph 56 of its submission, the AMWU points out that 88% of respondents to the AMWU survey indicated that they had completed an application to convert to permanent employment and were rejected.\textsuperscript{167} It asserts that this is ‘…evidence that the deeming clause has work to do.’\textsuperscript{168} Apart from the serious deficiencies in the methodology for the AMWU’s survey, contrary to the union’s submissions the results do not establish that a deeming provision would be more beneficial than a casual conversion mechanism. It at best demonstrates the operation of exiting provisions enabling an employer to not accept conversion if it would be unreasonable. Of course, the statistic could also demonstrate that there are common circumstances where accepting employee conversion would be unreasonable. Regardless, the validity of any inference drawn from the survey is of little weight given the serious deficiencies in the material.

\textsuperscript{166} See for example paragraph 7 of the AMWU submissions of 13 October 2015.
\textsuperscript{167} AMWU submission of 13 October 2015.
\textsuperscript{168} ibid at paragraph 30.
371. At paragraph 70, the AMWU submits that the difference between the deeming provision sought by the AMWU and the provision sought by the ACTU (we assume this is a reference to the ACTU’s election proposal) is supported by, amongst other things, the nature of work performed under the Manufacturing, Graphic Arts and the FBT Awards.\textsuperscript{169} However no real explanation for this submission is provided.

372. Ai Group does not preclude the possibility of a different approach to the treatment of casual conversion provisions being adopted in different awards. Indeed any determination of whether a casual conversion provision is at all warranted, and if so, what form it should take necessitates that a proper industry-specific case is mounted by the proponent of the proposal. However, differences in approach should not simply be a product of the desired approach of a union with an interest in a particular set of awards.

373. In the \textit{Preliminary Jurisdictional Issues Decision} the Full Bench held (emphasis added):

\begin{quote}
“6. There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.

7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.”\textsuperscript{170}
\end{quote}

374. The union bodies which are advocating deeming proposals have not mounted any serious case to establish contextual considerations associated with the characteristics or employers and employees covered by the awards the subject of the deeming proposal, to warrant a departure from the ‘election and reasonable refusal approach’ currently contained within these awards, and many other awards.

\textsuperscript{169} ibid.

375. The need to ensure a stable award system, as well as numerous other elements of the modern awards objective, weighs heavily against the granting of the union deeming proposals.

**Employee Election and an Employer Right of Reasonable Refusal – the Better Approach**

376. The deeming proposal is an overly paternalistic and retrograde approach that is not only unjustified, but would potentially give rise to serious negative consequences and practical difficulties for both employers and employees.

377. The deeming proposal is particularly unwarranted given, on any reasonable view of the material before the Commission, it can be accepted that a very significant proportion of employees have no desire to convert. As the AMWU frankly identifies in the opening comments of its submission (emphasis added):

“It is a truth universally acknowledged that for some employees, casual employment suits stage of life requirements. The AMWU’s case is not about these workers. Our case does not disturb the preferences of casuals electing to be casuals. Our case recognises there is a role for irregular and regular casual employment in meeting the needs of casual engagement in meeting the needs of both business and employee.”  

378. The proposal will impose a burden on employees who will need to actively elect, in writing, to remain a casual employee in order to prevent an unwanted change in the fundamental nature of their engagement and to their remuneration and other terms of employment.

379. The operation of the deeming proposal will risk imposing negative consequences on employees who may not appreciate the significance of not electing to remain casual. This could include both a loss of flexibility that may well suit such employee’s circumstances and a very significant reduction in their income through the forfeiture of the 25% casual loading. Employees should not have such outcomes unilaterally imposed upon them when they have not actively sought conversion.

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171 AMWU submissions of 13 October 2015 at paragraph 1.
380. The deeming proposal does not necessitate any level of discussion, consultation or agreement before a casual employee is converted to permanent employment. It does not necessitate any advanced ventilation of the possible practical problems or issues associated with an individual’s conversion. It is not in the interest of either party for a casual employee to covert to permanent employment in circumstances where the precise terms of such engagement are not mutually understood or where the outcome is plainly unworkable and will simply result in the termination of the individual’s employment.

381. The deeming proposal is inconsistent with the approach determined in the *Metal Industry Casual Employment Case*. In support of a clause based upon employee election, with the employer having the right of reasonable refusal, the Full Bench there held:

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

382. These comments were made in the context of an alternate proposal to set a maximum limit on casual engagements. However the logic would provide equal justification for the rejection of the deeming proposals now advanced.

383. The Full Bench in the *Metal Industry Casual Employment Case* discussed the award simplifications proceedings before Marsh SDP, that had taken place in 1997 and 1999 regarding a deeming provision that was in the *Graphic Arts – General – Interim Award 1995*. Ai Group played a leading role in representing graphic arts industry employers during the lengthy and hard-fought award simplification proceedings. The relevant clause in the 1995 Award was referred to in Marsh SDP’s decision (emphasis added):  

[98] The union seek the retention of the existing award clause [4.1.5]:

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172 Print T4991.
173 Ibid at 115.
174 Print R7898 at para [98], 5 August 1999.
"4.1.4(b) An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual. A casual employee, after two weeks continuous employment as a casual employee, must become a weekly employee."

384. The clause, in effect, deemed employees to be permanent after two weeks of employment, or at least this was the way that the AMWU interpreted the clause at the time given the inclusion of the phrase “become a weekly employee”.

385. Ai Group strongly opposed the retention of the Graphic Arts Award ‘deeming’ provision. In her decision, Marsh SDP rejected the AMWU’s claim to retain the deeming provision and relevantly stated:

“[102] I have formed the view that on all the material presented a case has been made out to delete the deeming provision. At present casuals must be made permanent after two weeks regardless of operational requirements. It is demonstrated in the material that this restricts or hinders productivity [Item 51(6)(c)] or that it is a restrictive work procedure [Item 51(6)(b)]. The restrictive nature of the current clause is demonstrated by the widespread attempts made to circumvent its intent.”

386. Marsh SDP decided to insert a 12 week limit on continuous casual employment, with the ability to extend this for a further 12 week period by agreement. The clause was not a deeming provision. No wording was inserted into the Award to suggest that at the expiry of the 12 week period, the employee was ‘deemed’ to be, or must ‘become’ a permanent employee.

387. While nowadays the 12 week limit looks extremely inappropriate and retrograde, it needs to be recognised that the decision was made nearly 20 years ago, in circumstances where the printing / graphic arts industry was very different and significant industrial disputes were not uncommon.

388. A deeming proposal is contrary to the elements of the object of the Act that speak to the provision of a balanced framework for cooperative workplace relations and to the provision of workplace laws that are flexible for business.176

389. From a practical perspective, there would likely be significant difficulties

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175 Print R7898 at para [98].
176 s.3 of the Act.
associated with determining precisely how the deeming provisions would interact with existing clauses regulating the various types of employment available under the award. For example, there is substantial scope for disagreement over what a deemed permanent-part-time employee’s hours of work, or more specifically ordinary hours of work, would be under the application of the proposed clause. The specific proposals advanced do not adequately deal with such matters. In the context of the current Manufacturing Award, these difficulties are moderated by a requirement that there ultimately be agreement in relation to such matters and that casual conversion is not actually enacted until this occurs.

390. Ai Group contends that it is not unreasonable to require that an employee play an active role in initiating casual conversion. The safety net, and the award system in particular, contains numerous employee entitlements that can only be accessed where actively sought by an employee. That is, at their election. For example, this is commonly adopted mechanism in the context of facilitative provisions in modern awards, e.g. those relating to time off in lieu of overtime.

391. A deeming provision would be ‘unjust’. (See the decision of the Full Bench of the SAIRC in the SA Clerks Case, as discussed in sections 15.2, 15.3 and 15.4 above).

392. For all of the abovementioned reasons the Full Bench should reject the proposed claims to insert deeming provision in modern awards.

15.6 A CASUAL EMPLOYEE’S ELIGIBILITY TO CONVERT

393. The circumstances in which an employee will qualify for conversion to permanent employment under both the ACTU and AMWU proposals would give rise to practical difficulties, uncertainty and likely disputation.

394. The relevant paragraphs dealing with the ability to convert under the proposals are as follows:

“XX.X Casual Conversion
(a) A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of six months, thereafter is deemed to have their contract of employment converted to full-time or part-time employment unless the employee elects to remain employed as a casual employee.

(b) For the purpose of this clause, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

(c) An employee who has worked on a full-time basis throughout the period of casual employment is deemed to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is deemed to convert to part-time employment. Both full and part-time employees are deemed to convert on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed to by the employee."

395. Although the proposals borrow heavily from regimes in place under certain modern awards, it is important to appreciate that the application of the provisions in the context of the unions’ new claims will serve a very different purpose.

396. In the context of the current awards the provisions typically trigger an entitlement to covert which can be reasonably refused. They are, in effect, a catalyst for the parties to engage in a process of consultation concerning an employee’s request to convert to permanent employment.

397. In contrast, the proposed provisions would operate as a mechanism for conversion with no capacity for employer refusal. In the context of the deeming proposals it potentially operates without involvement from the parties. As such, the proposals operate on the assumption that an employee who is not an ‘irregular casual’ will meet the definition of either a full-time or part-time employee under every award which is the subject of the claim.

398. Under the unions’ clause, an ‘irregular casual employee’ is defined as ‘…one who has been engaged to perform work on an occasional or non-systematic or irregular basis.’ The proposal is vague and ambiguous. At the very least it is open to subjective interpretation. The reference in the proposals to qualification through a ‘sequence of periods’ of engagement potentially amplifies these difficulties.
399. It is entirely feasible that an employee may be engaged on a systematic or regular basis but not in a pattern of work that will conform to the definition of either full-time or part-time work under the particular awards or with patterns of work in the industry, occupation or enterprise covered by the award. For example, there are some industries that necessarily adopt very flexible patterns of work. In some cases there is no certainty of the precise hours of work that employees will undertake. The Full Bench should consider, for example, employees covered by the *Road Transport (Long Distance Operations) Award 2010* (*Road Transport Long Distance Award*) or the *Stevedoring Industry Award 2010*. It is difficult to see how the proposed clause could be sensibly applied in the context of the industries.

400. Just because certain wording appears in a minority of awards, does not mean that it should be regarded as uncontentious or workable in other awards. Most awards do not contain casual conversion provisions.

401. If the unions contend that the proposed wording is workable in the context of each award that is the subject of their claim, they need to establish this by reference to relevant award provisions in each award and through evidence of actual patterns of work of employees who are the subject of each award. As held by the Commission in its *Preliminary Jurisdictional Issues Decision*, the onus rests with the unions in this respect. They have clearly failed to make out a case for the sweeping variations to awards they have proposed.

402. The interactions between the casual conversion clauses, the existing award terms, and industry-specific circumstances, reinforce the imperative for the Full Bench to resist adopting a ‘one size fits all approach’ to considering the unions’ claims.

15.7 **A CASUAL EMPLOYEE’S SERVICE PRIOR TO CONVERSION**

403. The union claims seek to require that service as a casual employee counts for the purposes of determining various specified entitlements under the Act or the award. The wording of the proposals advanced by the unions is identical.
404. More specifically, the proposals require that service as a casual for an employee who is converted to permanent employment is to be counted for the purposes of the following provisions of the Act:

- Unfair dismissal;
- Parental leave under the NES;
- The right to request flexible working arrangements under the NES;
- Notice of termination under the NES; and
- Redundancy under the NES and awards.

405. This obligation is subject to the caveat that it does not include periods of service as an ‘irregular casual’, as defined for the purposes of the claim.

406. By way of example, the inclusion of the following clause is proposed for insertion in the Manufacturing Award:

“(h) a casual employee who is deemed to be employed on a full or part-time bases shall have their service prior to conversion recognised and counted for the purpose of unfair dismissal, as well as parental leave, right to request flexible work arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual.”

407. Little is said by the unions in support of this element of the claim. The unions have not advanced a merits based case in support of the proposal. The AMWU merely suggest that the proposed variation, ‘...provides clarity regarding previous periods of services as regular period casual employees for the purposes of accessing NES and award entitlements based on periods of service.’ For this reason alone the clause should fail, particularly if the Full Bench determines that the proposal does not merely provide ‘clarity’ about how such prior service would currently be treated under the NES but, as Al Group submits, would instead either extend or create new employee entitlements.

408. The proposals should be rejected in light of both jurisdictional and merit based considerations.

409. The proposed clause significantly alters the current safety net. It reflects an approach that is inconsistent with the treatment of casual service for relevant
purposes, currently and historically, under relevant industrial legislation and awards. Service of a casual employee does not count for the purpose of determining their NES entitlements as a permanent employee relating to:

- The right to request flexible working arrangements
- Parental leave, or
- Notice of termination or redundancy pay

410. The proposed clause would also result in unfair ‘double dipping’ as it would entitle converted employees to have their casual service included in the calculation of entitlements that are inherently associated with permanent employment and, for the absence of which, they have already been compensated through the current casual loading.

**Does the Act Require Recognition of Prior Service as a Casual for the Purposes of Calculating NES Entitlements?**

411. An appropriate starting point for consideration of this element of the unions’ claims is the current legislative framework. This includes consideration of the extent to which prior service of a converted casual employee counts for the purpose of determining legislative entitlements in relation to:

- NES entitlements relating to notice of termination (s.117) and redundancy pay (s.119);
- The right to request flexible working arrangements (s.65); and
- Parental leave and related entitlements under the NES (as impacted by s.67).

**Notice of Termination and Redundancy Pay**

412. Division 11 of the NES deals with notice of termination and redundancy pay.

413. It is uncontroversial that casuals are excluded from receiving the benefits of NES provisions related to notice of termination and redundancy pay. The extent of any potential contest in these proceedings is whether service as a casual employee counts once they have converted to permanent
employment.

414. Section 117 prohibits an employer from terminating an employee unless they have either provided a specified period of notice or payment in lieu thereof. The period of notice is required to be calculated by reference to the employee’s period of ‘continuous service’ in accordance with a scale set out at s.117(3).

415. Section 119 sets out an employee’s entitlement to redundancy pay.

416. Relevant to the operation of both s.117 and s.119 is s.123(1)(c), which provides that division 11 does not apply to a casual employee:

"123 Limits on scope of this Division
Employees not covered by this Division
(1) This Division does not apply to any of the following employees:
...
(c) a casual employee; …"

417. Any reference to continuous service in ss.117 and 119 must be read in the context of the division of the Act in which such provision sits and be considered in light of the purpose of these provisions. This includes, in particular, the exemption of casual employees from the application of the entire division. Adopting this approach, it is difficult to reconcile an interpretation of the reference to ‘continuous service’ in these sections with an extension of these entitlements by reference to a period of casual employment.

The Right to Request Flexible Working Arrangements

418. In order to have a right to request flexible working arrangements pursuant to the NES or to have an entitlement to parental leave, a casual employee must, at the relevant time be a ‘long term casual employee.’

419. This term is defined in s.12 of the Act:

“long term casual employee: a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:
(a) the employee is a casual employee; and
(b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.”

420. Significantly, there is no requirement that an employee have a period of ‘continuous service’ in order to qualify as a long term casual employee.

421. Section 65 of the Act affords certain employee’s the right to request flexible working arrangements. Sub-section 65(2) states:

“(2) The employee is not entitled to make the request unless:
   (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
   (b) for a casual employee—the employee:
      (i) is a long term casual employee of the employer immediately before making the request; and
      (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.”

422. The above provision provides a different basis upon which an employee may qualify for the right to make a relevant request. One is applicable to permanent employees and the other is applicable to casual employees. They are drafted as alternate bases of qualification for the entitlement. Again, there is no requirement that the casual employee have a period of continuous service.

Parental Leave

423. Division 5 of the legislative provisions containing the NES governs employee entitlements related to parental leave. Sub-sections 67(1) and 67(2) establish the limited circumstances in which an employee would receive leave (other than unpaid pre-adoption leave or unpaid no safe leave) under the division:

Employees other than casual employees

67(1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).
Casual employees

67(2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave or unpaid no safe job leave) under this Division unless:

(a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and

(b) but for:

(i) the birth or expected birth of the child; or

(ii) the placement or the expected placement of the child; or

(iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)--the taking of the leave;

the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis."

424. Again, this section sets out different criteria governing when permanent employees and casual employees qualify for a parental leave related entitlement. The Act does not make any reference to a period of continuous service in setting out the criteria applicable to casuals.

425. An analysis of these provisions of the Act demonstrates that there has been no indication in the text of the Act to suggest that the notion of continuous service in any way captures a period of service as a casual employee. Instead, the term is only used in reference to employees other than casual employees. It appears that Parliament has not deemed the use of this term appropriate in the context of casual employment.

426. Clearly the Act provides different tests or prerequisites for determining when a casual employee receives protection from unfair dismissal and the benefit of NES entitlements in relation to the right to request parental leave and flexible working arrangements. However, the relevant issue for consideration in the current context is whether service as a casual employee, who is subsequently converted to permanent employment, should be counted in the determination of such rights or entitlements. It in effect requires interpretation of the provisions governing the entitlement of employees other than casuals, in order to determine whether they should properly be construed as encompassing prior casual employment. This involves a consideration of whether such periods of
service constitute ‘continuous service’ as referred to in each of the abovementioned sections.

427. Ai Group contends that prior service as a casual employee does not count for the purpose of determining whether an employee who is no longer a casual has a right to request flexible working arrangements or to access parental leave, and for the purposes of determining the quantum of any notice of termination or redundancy pay entitlements.

428. To form part of an employee’s ‘continuous service’ for the purposes of the Act a period must also constitute ‘service’.

429. Section 12 – the Dictionary, contains a reference to continuous service but does not define ‘continuous service’, other than to provide that the term has a meaning affected by s.22. Accordingly, the term must be construed, subject to the operation of section 22, in the context of the FW Act as a whole and with the purposive approach mandated by s.15AA of the Acts Interpretation Act 2001.

430. Section 22(4) deals with the meaning of service and continuous service for relevant purposes. It relevantly provides (emphasis added):

“(4) For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2:

(a) a period of service by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or
(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee’s continuous service with his or her national system employer, but does not count towards the length of the employee’s continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions
to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.”

431. As can be seen, the relevant definition of ‘service’ in the Act does not specifically include or exclude a period or periods of casual employment. Nor does the Act specify whether a period of service as a casual employee, or the inherent breaks or absence between engagements should be treated for the purpose of calculating a period of continuous service.

432. A reading of a reference to ‘continuous service’ in the NES as excluding casual service is consistent with an ordinary reading of s.22 and is supported by a consideration of the context of the provisions in which it used and the broader purpose of the Act.

433. It is consistent with the ordinary meaning of the term ‘continuous service’ as adopted in broader industrial parlance and the historical exclusion of casual employees from entitlements to redundancy pay and notice of termination entitlement. This issue is developed further below.

434. As observed by the Full Bench in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*:

> “[23] The FW Act did not commence in a vacuum. It replaced the WR Act and inherited a Federal award system and an award modernisation process that was undertaken in anticipation of the central place of modern awards in the FW Act system.”

435. The Act was implemented in the context of a long history of exclusion of casual employees from severance pay. Relevantly, Parliament’s consciousness of such matters is partly demonstrated by the fact that the scale of redundancy pay entitlements provided by s.119 reflects the federal award standard.

436. The Act was also established against a back drop of the historical inclusion of casual conversion provisions in many awards as a product of arbitrated proceedings and a widely adopted 25% casual loading which was a product of prominent arbitrated outcomes and expressly determined as including

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177 [2013] FWCFB 2434
appropriate compensation for the an absence of entitlements akin to those now provided under the NES to employees other than casuals.

437. If the legislature had intended that prior service as a casual employee who had converted to permanent employment should be counted for the purpose of the NES then surely this would have been expressly dealt with.

438. It would be a particularly unfair outcome if employees were to be able to take advantage of the NES for a period when they were in receipt of a casual loading that compensates them for the absence of entitlements equivalent to those provided under the NES, such as redundancy pay. It would mean that employees are ‘double dipping’. This would not be consistent with a fair and relevant safety net of minimum terms and conditions.178

Traditional Interpretation of ‘Continuous Service’, Exclusion of Casuals from Notice and Redundancy Entitlements, and the Need to Avoid Double Dipping

439. Any suggestion that awards should now be amended to provide that periods of service as a casual employee count for the purposes of severance pay would be at odds with the longstanding and often articulated reluctance of the AIRC and other relevant tribunals to afford severance pay entitlements to casual employees.

440. The unions’ proposal represents an unjustifiable exercise in ‘double dipping’ because the quantum of casual loading prescribed by modern awards is referable to the absence of entitlements attributable to permanent employment, including notice of termination and redundancy pay. It is also inconsistent with the longstanding exclusion of casual employees from benefits associated with termination and redundancy pay.

441. The Federal Commission’s 1984 TCR Decision excluded casuals from severance pay, stating that:

“Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also inconsistent with the

178 As contemplated by s.3(c) and s.134(1).
general severance pay prescription being granted where termination is as a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work.” 179

442. A key decision referred to by the Commission in arriving at this decision was the Milk Processing and Cheese Manufacturing Etc (Appeal) Case 20, (1978) 45 SAIR 902. 180 In that context a Full Bench of the SAIRC did not grant severance pay to seasonal or casual employees, stating that: 181

“We unreservedly agree with the Commissioner’s original conclusion that, insofar as the claim sought redundancy prescription for seasonal or casual employees, it was totally ill-founded. Having regard to the essential basis of the 20 per cent casual loading paid to such employees, it is a contradiction in terms, and would constitute double counting of the most flagrant nature, to confer additional benefits upon them. To suggest that a casual employee could reasonably have an expectation of lifelong employment with the one employer is, to say the least, incongruous.”

443. Relevantly, a detailed consideration of the casual loading prescribed by the Metals award 1998 was undertaken by the AIRC in the Metal Industry Casual Employment Case. 182 At paragraph 181 the Full Bench stated that it considered ‘that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgement of the adequacy of the casual rate loading”.

444. In the case, the unions had sought an increase in the level of the casual loading to compensate, in part, for foregone notice of termination and severance pay benefits. Indeed, the Full Bench decision records that the unions (in particular, the AMWU) argued that ‘compensation for distress and hardship associated with uncertainty of tenure and the consequent financial difficulties facing casual workers, both of which incorporate the TCR redundancy and notice requirements’ ought to be properly included as a

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179 Termination, Change and Redundancy Case – Decision, 8 IR 34, para 75. Print F6230.
180 Print F6230.
182 Print T4991.
component of the casual rate loading.\textsuperscript{183}

445. The Full Bench of the AIRC granted an increase in the casual loading from 20\% to 25\% under the Metals Award 1998. The Bench observed that, since the loading was last varied from 15\% to 20\% in 1974, full-time and part-time employees had gained additional benefits such as extended periods of notice, severance pay, carer’s leave and parental leave. Moreover, the Bench ruled that a contemporary casual loading rate should include the foregone benefits of severance pay and notice of termination (emphasis added):

“... the Commission’s decisions in the Termination, Change and Redundancy Case (the TCR Case), the Family Leave Case, the Parental Leave Case, and the Personal Carer’s Leave Case have significantly increased effective access by eligible full-time and part-time employees to accruing personal leave entitlements. Those entitlements are not available in any paid form to casual employees. We accept that they are appropriately to be evaluated as a component in the assessment of the appropriate level of the casual rate loading.” (emphasis added)\textsuperscript{184}

446. The Bench further stated:

“We consider that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgment of the adequacy of the casual rate loading. The differences, together with the employment by the hour distinction, are fundamental to the respective types of employment.”\textsuperscript{185}

447. The origins of the 25\% casual loading flowing from the \textit{Metal Industry Casual Employment Case} are particularly relevant in the current proceedings because of the influence it had on the setting of the almost standard 25\% casual loading now in place under modern awards. The reasoning of the Full Bench of the AIRC conducting the Part 10A Award Modernisation process was as follows:

“[47] In our statement of 12 September 2008 we indicated that we intended to adopt a standard loading of 25 per cent for casual employees. We received many representations in relation to that indication. For example, a number of employer representatives submitted that we should not adopt a standard casual loading or that if we did so 25 per cent was too high.

[48] There is great variation in the casual loadings in NAPSA\textsc{p}s and federal awards. In some cases the situation is complicated by the fact that casuals

\textsuperscript{183} Para [139]
\textsuperscript{184} Para [165]
\textsuperscript{185} Para [183]
receive an annual leave payment, usually through an additional loading of one twelfth, although in most cases casuals do not receive annual leave payments. To take some examples, a casual loading of 25 per cent is common throughout the manufacturing industry, casual loadings in the retail industry vary from 15 per cent to 25 per cent. A loading of 25 per cent is very common, although not universal, throughout the hospitality industry. A number of pre-reform awards currently provide for a 33⅓ per cent loading and higher when the annual leave payment is taken into account. It seems to us to be desirable to standardise provisions to apply to casuals where it is practicable to do so to avoid claims in the future based on unjustified differences in loadings. We appreciate that there are casual employees in some industries in some States receiving loadings less than 25 per cent and we understand that employers of those employees will experience an increase in labour costs if the loading is standardised to 25 per cent. Equally, there will be reductions in labour costs where the loading, including the annual leave loading where it applies, exceeds 25 per cent currently.

[49] In 2000 a Full Bench of this Commission considered the level of the casual loading in the Metal, Engineering and Associated Industries Award 1998 (the Metal industry award). 12 The Bench increased the casual loading in the award to 25 per cent.13 The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry.14 It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard.

[50] In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent …

448. In the 2004 Federal Redundancy Test Case, the Bench said:

“We have reached the conclusion that it would be inappropriate to award severance pay for casuals. Such an approach would, in the case of the metal industry at least, be “double dipping” and likely to be so in other industries. Although there are other cogent arguments for and against this part of the ACTU application, this issue is decisive. It follows that we reject this aspect of the application.”

449. In Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media - Newcastle Newspapers (Herald) it was the opinion of the Commission that when calculating the amount of redundancy pay to be paid to an employee who has periods of earlier casual employment and later periods of permanent employment, the periods of earlier casual employment do not count

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186 [2008] AIRCFB 1000.
187 Redundancy Case, Decision, PR032004, Giudice J, Ross VP, Smith C and Deegan C, para [316].
188 [2014] FWC 5631.
when the enterprise agreement only provides redundancy for permanent employees. At paragraph 4 the Commission noted (emphasis added):

“While I can well understand why the employees feel aggrieved that their long periods of unbroken casual service, are not included for the purposes of calculating redundancy, the fact is that throughout this time they had received a 20% casual loading on their base rates of pay. Casual loadings are intended to compensate a casual employee for the benefits and entitlements otherwise available to permanent part time and full time employees; such as annual leave, sick leave and redundancy payments. This has been a long-held and well known principle under workplace law. The fact that long service leave was payable to the employees according to State legislative provisions and that certain shift allowances, penalty rates and overtime may be paid, does not alter the strict legal position.”

450. In AMWU v Waycon Services & Ors189 Senior Deputy President Polites rejected a claim by the AMWU for certain long-term labour hire casuals to be awarded severance payments. The AMWU had made application to the Commission for an order requiring a number of labour hire companies engaged on the ADI Minehunter Project in Newcastle to pay a $50.00 per week severance allowance for their casual employees into the union’s Manusafe Trust Fund (or NEST).

451. In refusing the claim, Senior Deputy President Polites accepted Ai Group’s arguments that the labour hire employees were already receiving compensation for foregone severance pay benefits, via receipt of the 25% casual loading prescribed under the Metal Industry Award:

“I am fortified in this conclusion by the evidence in this case as to the payment of the casual loading. The evidence was to the effect that employees were receiving the casual loading prescribed in the Federal Metal Industry Award . . . The casual loading in the Metal Industry Award was considered in the Casuals case quite recently. In adjusting the casual loading in that case specific reference was made to the fact that casual employees were not entitled to the severance payment and the loading increased in part on this account.”190

452. The Commission also noted that, in these circumstances, the current exclusion of casual employees from severance pay entitlements under national law and

190 AMWU v Waycon Services, PR922384 at para [36].
practice was ‘perfectly understandable’.191

453. There are also a number of cases that support the proposition that the ordinary meaning of ‘continuous service’ in the FW Act would exclude periods of service as a casual. In *TWU v Q Catering Limited* a Commission Full Bench said:

“[48] In National Tertiary Education Industry Union v La Trobe University [2009] AIRC 576 Whelan C held that in the absence of an express intention to include periods of casual employment for the purposes of the redundancy pay provisions of the relevant agreement, the Commission was not satisfied that any periods of casual employment should be taken into account in calculating an employee’s entitlements to redundancy pay under the agreement. The Commission did so in the following manner:

“[62] Madgwick J in Kucks v CSR Limited stated that in interpreting an award “ordinary or well understood words are in general to be accorded their ordinary or usual meaning”. He also suggested that awards (and I would suggest that this is even more likely to be the case with agreements) may have been expressed in ways likely to have been understood in the industry. An expression such as continuous service is used frequently in industrial instruments. In the absence of any definition expressing a contrary intention, the context in which the Agreement was made would suggest that the terms should be given its ordinary meaning.

[63] In my view, the ordinary meaning of continuous service excludes periods of casual employment because such employment is characterised by a series of contracts or engagements which would not normally be considered as continuous employment or continuous service.

[64] In the absence of an expressed intention to include periods of casual employment as service for the purposes of clause 41, I am not satisfied that any periods of casual employment can be taken into account in calculating an employee’s entitlement under that section.”

[49] In Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media – Newcastle Newspapers (Herald) [2014] FWC 5631, Sams DP, was dealing with a dispute as to whether a particular redundancy provision applied only to “permanent” employees, and stated:

“...the fact is that throughout (the relevant) time (the casual employees) had received a 20% casual loading on their base rates of pay. Casual loadings are intended to compensate a casual employee for the benefits and entitlements otherwise available to permanent part time and full time employees such as annual leave, sick leave and redundancy payments. This has been a long held and well known principle under workplace law.”

[50] Some instruments do expressly provide that casual, or similar service, may be included for the purposes of redundancy payments. As relied upon by the TWU, in “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v Safries Pty Ltd [2014] FWC 2352, O’Callaghan SDP was dealing with an enterprise agreement which stated (in Appendix 1) that “periods of short term

191 ibid
employment will accumulate from year to year included for the purpose of calculating length of service under this agreement. Provided that the break between periods of short term or casual employment does not exceed six months." The issue to be resolved was whether the redundancy provision applied to casual employees.

[51] After reviewing the history of casual loadings and the nature of the relevant modern award referred to in the enterprise agreement, the SDP observed:

“[38] Consequently, in terms of the Agreement, unless Appendix 1 can be read as establishing an entitlement for redundancy pay, I do not consider that any such right can be inferred. ……

…

[40] I think that Appendix 1 must be read as establishing an entitlement to redundancy payments for weekly employees on the basis that these payments recognise periods of short-term or casual employment within the limitations established by clause 14. Those periods of short-term or casual employment entitle the weekly hire employee to receive redundancy payments calculated at a lesser rate of accrual for that period. There is no specific entitlement to redundancy pay for employees who, at the time of the redundancy, were not weekly hire employees.”

[52] It is evident in this analysis that in the absence of this specific provision, such casual service would not have figured in the calculation of the length of service for redundancy entitlement under that agreement.

[53] In a matter more on foot with the earlier cases, the Industrial Relations Court of South Australia in Schuman v Pace Trading Pty Ltd (2007) 169 IR 101, held that the employee’s prior casual service should not be recognised as continuous service for the purposes of calculating severance pay entitlements. Hardy IM found:

“[57] I am also of the view that if the applicant is to be considered to be a casual employee during the first period of her employment and I certainly consider that to be the case, there would have been no question that she would not have qualified for a redundancy payment had her employment been terminated during that period of casual employment. The applicant’s submissions depend in part upon the fact that she was terminated as a permanent employee so that the previous casual service can be included but I do not agree. If the casual service did not qualify her for a redundancy during the currency of that service it makes no sense to me that it would do so at a later juncture after some permanent service.”

[54] These cases demonstrate that the conventional approach is that in the absence of an express provision, prior service as a casual does not count for the purposes of redundancy entitlements. However, the particular terms of each instrument need to be considered.”192

454. The issue of whether or not prior service by a converted employee is counted for redundancy and notice of termination purposes was recently considered by the Commission in the context of a dispute concerning the interpretation of an

enterprise agreement. In his decision, Commissioner Riordan decided that prior service as a casual did not count. The Commissioner saliently observed:

“[35] The argument in relation to “double dipping” was not extensively argued at the hearing, however, the argument does have merit. It would not seem to be fair or logical for an employee who has been paid a loading, which I have found to contain compensation for notice and redundancy pay, to then be able to use that same period of service in the calculation of notice and redundancy pay as a permanent employee. As an example, if two employees had started with Forgacs on the same day – employee A as a permanent employee, employee B as a casual. For 6 months, employee B receives the same rate as A, plus a 25% casual loading. After 6 months, B becomes a permanent employee in accordance with section 14 of the Agreement. If 2 years and 9 months later both A and B get made redundant, the AMWU believe that both employees have 3 years and three months continuous service for the purposes of their notice and redundancy entitlements. This would mean that both A and B would receive the same notice and redundancy pay. I cannot see how such an outcome is possibly fair to employee A. Employee B received a 25% loading for 6 months, which contained compensation for the lack of notice and redundancy pay entitlement in B’s initial period of employment.

[36] I agree with the sentiments of Industrial Magistrate Hardy, Deputy President Sams and Commissioner Hampton that the legal principal against “double dipping” in this regard is a logical, well known and universally accepted industrial practice.

[37] I accept the argument that if the legislature had wanted prior casual service to count towards a permanent employees period of service then it would have been expressly stated in the Act in a manner similar to the way section 384 has provided for access for casual employees into the unfair dismissal provisions of the Act.  

The Right to Request and Parental Leave

455. Putting aside for a moment the obvious concerns over ‘double dipping’, what is clear is that Parliament did not intend for casual employees, within the meaning of the Act, to receive the benefits of NES entitlements relating to notice of termination or redundancy pay. Moreover, the legislature only intended that casuals would receive the benefit of either parental leave or the right to request flexible work, or the ability to bring an unfair dismissal claim, in specific and limited circumstances. There is legislative acceptance of the differential treatment of employees engaged on a casual basis.

456. It can be assumed that the Act itself represents a reflection of community expectations in relation to such matters. The relevant provisions in the Act

\[193\] AMWU v Forgacs, [2016] FWC 638
represent Parliament’s acknowledgement that the exclusion of such benefits in the context of casual employment represents a legitimate component of a fair and relevant minimum safety net of terms and conditions of employment, as contemplated by s.134(1).

139. The exclusion of casual employees from NES entitlements to redundancy pay and notice of termination is comprehensive. The Act does not establish a different regime of entitlements for award free or award covered employees, as occurs in the context of annual leave.

140. It is also significant that the NES does not expressly permit awards to include terms dealing with redundancy pay or notice of termination entitlements for casual employees. This can be contrasted with the NES’s treatment of matters such as the taking of annual leave. 194

457. The granting of this element of the unions’ claim would represent a major change in the general approach of the Commission to the treatment of such matters. To date, the Commission has typically not developed provisions in modern awards that establish or reflect the statutory right to request flexible work arrangements or access to parental leave. There has also been only very limited supplementation of employee rights in relation to redundancy pay, and in this regard the Commission has mainly confined its willingness to regulate such matters to transitional arrangements and a small number of industry-specific redundancy schemes. Such matters have been left to the NES. The union proposals would represent a significant and unjustified departure from this approach. No cogent reasons for such a course of action have been advanced.

458. To the extent that the proposal expands entitlements to notice of termination or redundancy pay, it would have inevitable cost implications for employers.

459. Increasing the circumstances where the right to request flexible work arrangements applies, would also have cost implications in some

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194 See s.95.
circumstances.

460. The proposed clause would plainly represent an increase in the regulatory burden on business. It would be contrary to considerations arising under s.134(1)(f) of the Act.

461. At the macro level, such outcomes could be expected to have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the Australian economy (s.134(1)(h)).

462. The unions have not advanced any evidence addressing the potential cost of this element of their claims. This is inconsistent with the approach said to be required in this Review by the Full Bench reviewing the Security Industry Award:

“[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change.”

463. Consequently the Full Bench is not in a position to properly take into account the abovementioned mandatory considerations in determining whether the proposed clause warrants inclusion in the safety net. For this reason alone the Commission should decline to grant the proposed variation.

464. The imposition of the proposed obligation, and its ‘double dipping’ nature, would create an incentive for employers to seek to ensure that casuals do not qualify for conversion, either through the selective management of the frequency or regularity of their engagement or by ensuring that casuals are not engaged outside of the relevant six monthly period.

465. The unions’ claim has no merit and should be rejected.

15.8 THE INTERACTION WITH PRE-EXISTING PART-TIME EMPLOYMENT CLAUSES

466. The unions’ claims, with one exception, encompass a requirement that a part-time casual employee be converted to part-time employment.

467. It cannot lightly be assumed, in the context of all the individual industries and awards the subject of the unions’ claims, that the engagement of employees on a part-time basis would be a workable substitute for the engagement of part-time casual employees.

468. Many awards contain highly restrictive part-time provisions. Such provisions have either evolved or at least operated against a backdrop of a largely unfettered employer capacity to engage casual employees.

469. Although there are common elements to many modern award clauses dealing with part-time employment, there are also significant deviations between awards. To properly appreciate the level of flexibility associated with the use of part-time employment often requires consideration of numerous award clauses. For example, where an award requires that specific hours for part-time employees be agreed, it is not always apparent whether additional hours of work are required to be paid at overtime rates, without reviewing the applicable overtime clause in the award. In some awards the entitlement to various allowances will also be impacted by the type of employment that an individual is engaged under.

470. Often award clauses dealing with part-time employment require that part-time employees work set ordinary hours, including sometimes requiring specification of the number of hours to be worked and the days and times at which ordinary hours will be performed. It is not uncommon for the clause regulating part-time employment under an award to provide, in effect, that hours worked outside of such arrangements are overtime and paid at overtime rates.

471. The differences in the manner in which awards which are the subject of the unions’ claims regulate part-time employment can be demonstrated through a cursory glance at the part-time provisions in such instruments. For example, the
Manufacturing Award contains the following provisions in relation to part-time employment:

13.1 An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 ordinary hours per week.

13.2 A part-time employee must be engaged for a minimum of three consecutive hours a shift. In order to meet their personal circumstances, a part-time employee may request and the employer may agree to an engagement for less than the minimum of three hours.

13.3 Before commencing part-time employment, the employee and employer must agree in writing:

(a) on the hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times for the work; and

(b) on the classification applying to the work to be performed in accordance with Schedule B.

13.4 The terms of the agreement in clause 13.3 may be varied by consent in writing.

13.5 The agreement under clause 13.3 or any variation to it under clause 13.4 must be retained by the employer and a copy of the agreement and any variation to it must be provided to the employee by the employer.

13.6 Except as otherwise provided in this award, a part-time employee must be paid for the hours agreed on in accordance with clauses 13.3 and 13.4.

13.7 The terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38.

13.8 A part-time employee who is required by the employer to work in excess of the hours agreed under clauses 13.3 and 13.4 must be paid overtime in accordance with clause 40—Overtime.”

472. In contrast, other awards provide for much greater flexibility in relation to the engagement of part-time employees. The Business Equipment Award 2010 provides as follows:

“12. Part-time employment
An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 hours per week. An employee so engaged will be paid, per hour, 1/38th of the weekly rate prescribed by clause 20 of this award for the work performed.”

473. The Telecommunications Industry Award 2010 (Telecommunications Award) provides:


“11.2 Part-time employment

(a) An employee may be engaged to work on a part-time basis involving a regular pattern of hours which will average less than 38 hours per week. An employee so engaged will be paid per hour 1/38th of the weekly rate prescribed by clause 14—Classifications and minimum wage rates, of this award for the work performed.

(b) Overtime will be payable to part-time employees for time worked in excess of the hours fixed in accordance with the pattern of hours applicable to the employee. However, a part-time employee is not entitled to be paid overtime penalties on a day until they have worked at least an equivalent number of hours that day to an equivalent full-time employee in the relevant section of the enterprise, provided that a part-time employee will not work more than 38 hours in any week at ordinary rates.

(c) The terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38 hours.

(d) Public holidays

Where the part-time employee’s normal paid hours fall on a public holiday prescribed in the NES and work is not performed by the employee, such employee will not lose pay for the day. Where the employee works on the holiday, such employee will be paid in accordance with clause 26—Public holidays of this award.”

474. The Journalists Published Media Award 2010 provides:

“10.2 Part-time employment

(a) A part-time employee is an employee who is employed on a continuing basis but is engaged to work an average of less than 38 ordinary hours per week.

(b) An employer is required to roster a part-time employee for a minimum of four consecutive hours on any day or shift.

(c) A part-time employee will receive pro rata rates of pay and pro rata conditions of employment.

(d) The weekly hours of employment, including starting and finishing times, will be as agreed between the employee and the employer. However, the employer may change the hours of work by providing seven days’ notice in writing, provided that there is no change to the total agreed number of ordinary hours of work.

(e) An employer may ask a part-time employee to work at times other than those agreed in case of an emergency or a shortage of staff through sickness or other causes which cannot reasonably be foreseen. In this case the employer must give the employee as much notice as possible and will, within the same or the succeeding week, grant to such an employee time off duty to compensate for the additional time worked.
(f) All time worked in excess of the agreed hours (except as provided for in clause 10.2(e) or as varied in accordance with clause 10.2(d)) will be overtime and must be paid at the rate of time and a half for the first three hours and double time thereafter.

475. The Higher Education General Staff Award includes the following clause:

"10.2 Part-time employment means employment for less than the normal weekly ordinary hours specified for a full-time employee, for which all award entitlements are paid on a pro rata basis calculated by reference to the time worked. Part-time employment may contain a reasonable probationary period that is directly related to the nature of the work to be carried out under the contract. As a condition incidental to employment on probation, an employee must be advised of, and given an opportunity to make response to, any adverse material about the employee which the employer intends to take into account in a decision to terminate the employment upon or before the expiry of the period of probation."

476. The Hydrocarbons Field Geologists Award 2010 (Hydrocarbons Field Geologists Award) regulates types of employment in the following way:

"10. Types of employment
10.1 Employment may be full-time, part-time or casual.
10.2 A casual employee will be paid a loading of 25% of the annual retainer and daily rig allowance for the classification in clause 14.2 that a full-time employee would receive if that employee was performing the duties.
10.3 Casual employees must be provided with a minimum period of three hours employment on each engagement or be paid for a minimum of three hours at the appropriate casual rate.
10.4 Notwithstanding anything to the contrary appearing elsewhere in this award, the services of a casual employee may be terminated by one hour’s notice by either party or by payment or forfeiture of one hour’s salary as the case may be.
10.5 Unless specifically provided for, a casual employee will not be entitled to any of the allowances provided by this award, other than those prescribed in this clause."

477. In contrast to the divergent regulation of part-time employment outlined above, the unions’ claims seek to provide a largely uniform mechanism for transitioning of ‘part-time casuals’ to permanent part-time work.

478. The unions’ claims will be extremely costly and disruptive. However, the effects will differ markedly from award to award depending on the level of
flexibility available under the awards. The effects will also differ depending upon the extent to which particular industries (or employers) rely on casual employees to overcome the inflexibilities associated with employing part-time employees under the provisions of the relevant award.

479. In the context of the current proceedings, the Full Bench should consider it incumbent upon the relevant unions to establish that the proposed casual conversion clause would operate appropriately in the context of each award. More specifically, such matters should be considered in the context of the differing treatment of the regulation of other types of employment beyond casual employment.

480. Relevantly, the granting of the unions’ claims necessitates a careful assessment by the Full Bench of the specific provisions in each modern award relating to part-time employment and the needs of employers and employees covered by such awards. Where an award provides for high level of regulation of the engagement of part-time employees, such as in the context of the Manufacturing Award, the Full Bench should be even more cautious about limiting access to the engagement of casuals.

481. There are a myriad of award-specific and industry-specific considerations that need to be taken into account in considering the interaction of the proposed conversion provisions and the existing regulation of part-time employment. This is a product of the industry-specific nature of award provisions regulating different types of employment.

482. It is essential that the Full Bench does not adopt a ‘one size fits all approach’ to assessing the unions’ claims. It should not entertain the ACTU’s blatant attempt to rectify the deficiencies in its case, constituted by its failure to lead evidence or make submissions relevant to each award the subject of its claim, by suggesting that, ‘...if there is a compelling case for a general right of conversion...it should only refrain from extending these rights to a particular modern award if there is a compelling evidence preventing it from doing so’. The blatant attempt by the unions to shift the onus to employers or the
Commission to address the numerous, major industry-specific issues that arise from their claims needs to be roundly rejected.

483. The differing levels of flexibility in current award provisions relating to part-time employment reinforces the need for an award-specific approach to be taken in the current proceedings.

484. Contrary to the ACTU's submissions, the Commission cannot simply proceed to vary an award absent a problem being raised. An absence of objection is not enough to ground a claim. Given the nature of the current proceedings, there is no onus on any party to respond to another's proposed claims. The Commission is required to undertake a review pursuant to a statutory obligation and it is statutorily required to take into account the matters identified in s.134(1) in the exercise of its powers regardless of the material that is put before it.

485. The subject matter of the unions' claims does not lend itself to the establishment of a general right being extended in the terms proposed. This is highlighted by the variable treatment of award clauses dealing with part-time employment.

486. Absent a compelling evidentiary case properly addressing each of the industries covered by the proposed clause the Full Bench should reject the unions' claims outright. Any such case would need to address whether the other ‘types of employment’ regulated by each award, and particularly the part-time employment provisions, would meet the needs of those covered by the instrument if the claims were granted, having regard to the matter identified in s.134(1)(a) and other relevant considerations.

487. Importantly, the Full Bench should not regard the interaction of the proposed casual conversion provisions and the existing regulation of part-time employment (or other types of employment) as a minor matter capable of being addressed through a mere drafting exercise that can be attended to at a later stage or through a settlement of orders process. The level of flexibility available to employers in the context of each modern award, absent the
current right to engage casual employees, must be a central consideration in weighing the merits of the unions’ claims.

488. If the unions have not, in the context of each particular award, satisfied the Commission that such provisions, absent the existing right to engage casual employees, would meet the needs of participants in the industry, the Commission cannot be satisfied that the award would constitute a fair and relevant minimum safety net.

489. The unions have made virtually no attempt to explain or indeed even acknowledge the interaction of a mandatory right of conversion with the award provisions regulating the use of part-time employment.

Superannuation Entitlements

490. The unions have pointed to a concern over retirement savings of casual employees. This issue, and in particular the flawed basis for their concerns, is addressed in Section 15.9 of these submissions.

491. Nonetheless, it is important to appreciate that under many awards any additional hours worked by a part-time employee beyond their ‘agreed ordinary hours’ of work will be overtime. Consequently any amounts such employees receive will not constitute ‘ordinary time earnings’ attracting superannuation contributions. Accordingly the operation of the proposed mandatory conversion clause could, in practical terms, significantly reduce the superannuation contributions that an employer is required to make to such employees.

492. Putting aside the potentially contentious and likely award-specific issue of whether additional hours worked by a part-time employee are strictly overtime hours or whether they are ordinary hours of work paid at overtime rates, the likelihood of employers being less willing to offer additional hours to employees that convert to part-time employment as a consequence of the application of overtime penalty rates would operate to restrict superannuation accruals for employees if the unions’ claims are granted.
493. Any reduction is superannuation entitlements of those employees that convert to permanent employment will be exacerbated by the removal of the relevant casual loading (typically 25%).

494. In assessing the claim the Commission must be mindful that the conversion of casual employees may result in significant and potentially unforeseen reductions in the likely earnings and retirement savings of relevant casual employees. Any argument that such risks are overcome by the proposed conversion only being triggered at an employee’s election (or in the context of the deeming proposals, the decision to elect not to convert) is tempered by the prospect that such employees may not fully consider or understand the consequences of conversion.

**Hours Afforded to Part-Time Casu**

495. The unions have, in effect, sought to argue that casual employees do not receive as many hours of work as they would like. At paragraph 32 of their submissions, the AMWU relies on a recent AWRS report in order to submit:

“Nearly half (46%) of casual employees want more hours, compared to 27% of permanent employees. Only 2% want fewer hours.”

496. As outlined above, many awards require that overtime rates be paid to part-time employees who work beyond their agreed hours of work. Often there is a requirement that the parties undertake the administratively arduous task of formally varying the individual’s agreed hours in writing and this typically results in an ongoing variation to the individual’s hours.

497. The application of common part-time award provisions would make it less likely that a converted employee would be offered any additional hours, given they would attract additional penalty rates. Accordingly the proposed conversion clause would likely only operate to intensify employee dissatisfaction with the number of hours they are given.

498. It cannot be assumed that casual employee will consider or even be able to foresee such potential consequences of their conversion.
15.9 OTHER ISSUES RELATING TO THE UNIONS’ CLAIMS

Casual Earnings

499. In support of its claims, the ACTU point to union analysis suggesting one of the disadvantages of casual employment is lower earnings compared to those of permanent workers. In support of its claim the ACTU sets out comparative examples of the overall mean, median and average weekly earnings of casual and permanent employees.

500. Similarly, at paragraphs 132 to 138 of their submissions the AMWU seeks to highlight the purported disparity between the earnings of casual and permanent employees. This analysis is not confined to an examination of award-reliant employees.

501. It is not clear whether the data relied upon by the AMWU in these sections has been derived from an assessment of employees working different hours. Nor does it appear that the analysis is confined to the incomes of employees performing comparable work or to employees with similar skills or qualifications. Accordingly it does not assist in demonstrating that the purported lower earnings are actually a product of the employee having been engaged as a casual employee. It does not establish a causal connection between lower wages and casual employment. Accordingly the AMWU’s assertion that a deeming provision will improve the living standards of the relevant casual employees or increase the likelihood of having their needs met should not be accepted.

502. Regardless, the union’s concern over comparative wage levels between permanent and casual employees should be disregarded to the extent that the earning include (or potentially include) over-award payments. Affording employees a greater capacity to obtain over-award payments is not an objective that would be consistent with the Commission’s task of ensuring that awards constitute a ‘fair and relevant minimum safety net’. As identified by the Full Bench in the context of the 4 Yearly Review proceedings relating to the proposed removal of the standard absorption clause in modern awards:
“[72]...As we have mentioned, the modern awards objective is to ensure that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’. The safety net nature of modern awards was emphasised in the July 2015 decision, as follows:

Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory...”

503. In the context of the abovementioned proceedings the Full Bench displayed a clear unwillingness to interfere with over-award arrangements. By logical extension, the Commission should be similarly unmoved by any argument that a variation to the safety net is warranted in order to assist casual employees to secure higher over-award rates of pay.

504. The AMWU’s submission seeking to establish that casual employees are overrepresented amongst award-reliant employees should similarly not move the Full Bench to grant their claim. It is not the role of the safety not to provide a pathway off the safety net.

505. The AMWU’s reference to casual employees purportedly being excluded from a profit share scheme operated by Blackmores under an enterprise agreement does nothing to advance its case. It is an irrelevant consideration.

Superannuation Entitlements

506. The ACTU and AMWU point to alleged lower levels of accrued superannuation entitlements amongst casual employees in support of the proposed claims. The ACTU does this, in part, by reference to an academic article from 2006 seeking to compare the policy benchmark of a male on average/median earnings, contributing for 40 years, against estimated accrued entitlements of certain categories of casual employees (i.e. male/female and full-time/part-time casuals). Such considerations are of limited, if any, relevance in the context of the current proceedings.

507. It could not be considered necessary to the establishment of a safety net of

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196 [2015] FWCFB 6656
197 AMWU submissions of 13 October at paragraphs 29 to 31
minimum terms and conditions to mandate a mechanism for compulsory conversion in order to enable such employees to obtain comparable retirement savings to that of an employee receiving average earnings.

508. Interestingly, the ACTU submission suggests that casual full-time males receive 98% of the entitlements of the selected benchmark, while the accrued entitlements for full-time females as well as both part-time males and females are comparatively lower. At least superficially, this suggests that any deviation in accrued superannuation is not necessarily discreetly attributable to the type of employment in which they are engaged, but may instead be associated with:

- Gender related matters; or

- The amount of work undertaken by the employee.

509. The content of award clauses addressing superannuation was the subject of consideration in the context of the Part 10A Award Modernisation process. The relevant reasoning of the Full Bench in relation to the development of the model superannuation clause was as follows:

“[89] The model superannuation provision included in the exposure drafts was the subject of a large number of submissions and comments. While some suggestions were made that there should be no superannuation provision in awards at all, we think that it is appropriate to deal with the subject in the limited terms proposed in the draft but with some modifications.

...”

[92] The superannuation provision in some of the exposure drafts included an additional paragraph dealing with superannuation contributions during periods of paid leave or while an employee was absent from work due to injury or work-related illness. It is not our intention that the additional paragraph should be part of the standard clause. It may be appropriate, however, where it is necessary to maintain the pre-existing safety net.

[93] We have included superannuation provisions in most awards. Where we have not the issue is dealt with below in relation to the award concerned.\footnote{Award Modernisation [2008] AIRCFB 1000.}

510. The ‘model’ clause included in most awards largely leaves the determination of the quantum of an employee’s entitlement to be determined by relevant superannuation legislation. Although the Full Bench did include slightly different
provisions in some modern awards, this typically reflected the pre-existing standard in the applicable predecessor instruments.

511. The Full Bench did not deem it necessary to include any differential superannuation obligations for casual employees.

512. The Commission should not deviate from the approach of primarily leaving the setting of appropriate superannuation obligations to superannuation legislation. The unions should raise any deficiencies that they allege exist in the ‘adequacy of the Superannuation Guarantee’ with the Government or other members of Parliament. This is issue is not appropriately dealt with through restricting an employer’s capacity to engage casuals.

513. Given the Commission has, appropriately, not sought to afford casual employees additional superannuation entitlements beyond those in the Superannuation Guarantee, it should similarly not accept that any alleged disparity in accrued superannuation warrants limiting the capacity of employers to engage employees in this type of employment.

514. Also, the Commission should not be moved to alter the safety net because of ACTU assertions about:

- Employees being purportedly less likely to make additional employee contributions; or

- Employees joining retail superannuation funds.

The Anti-Avoidance Provision

515. Each of the proposed union claims includes a paragraph in the following terms:

“An employer shall not reduce or vary an employee’s hours of work in order to avoid or affect the provisions of this clause.”

516. This clause is presumably intended to operate as an anti-avoidance provision. However, the provision is likely to be both problematic and ineffective.

517. As a threshold point, we note that the proposed provision inappropriately
operates on the assumption that a casual employee will have standard hours which an employer can ‘reduce’ or ‘vary’. Awards do not generally (if ever) require that casuals be engaged for set hours. Consequently, it will be difficult to identify precisely when an employer could be said to be in breach of this provision.

518. The clause appears to require identification of an employer’s motives in determining the hours of work to be afforded to a particular casual employee. In practical terms, it is difficult to see how it could be effectively enforced. Further, if unions (such as the AMWU) view enforcement of the current casual conversion provisions as inadequate, it is difficult to envisage how such an inherently difficult clause to enforce could be viewed as being likely to be effective.

519. The Joint Employer Survey reveals strong opposition to the proposed mandatory conversion of regular casual employees to permanent employment. This is unsurprising as there will undoubtedly be many circumstances where it is neither feasible nor reasonable for an employer to accommodate a conversion request. The right of reasonable refusal under current casual conversion clauses in modern awards reflects this.

520. This proposed clause is highly unlikely to overcome the possibility of some employers undertaking such action as is necessary in order to avoid the problematic or unreasonable operation of a mandatory casual conversion provision.

521. The imposition of onerous and inflexible award obligations mandating casual conversion in a manner that is out of step with the needs of employers and employees would increase the likelihood of employers and employees breaching awards. The imposition of a difficult to enforce anti-avoidance mechanism would not prevent this reality.

522. Even if employers complied with the provision in implementing rostering arrangements, they may simply seek to avoid the problematic operation of a mandatory conversion clause by ensuring that casual employees are not
engaged for more than six months. There is no capacity to include an award provision to address such a risk. Such a situation is not in the interests of the employer or employee.

523. The proposed clause also has the potential to give rise to unnecessary disputation in circumstances where an employee or his or her representative inaccurately perceives, or alleges, that an employer has made a decision regarding the rostering of a casual employee.

524. An employer that engages a casual employee should not lightly be put to the task of justifying decisions that it makes regarding the allocation of work or hours to a casual employee who may have been engaged for a relatively short period of time.

525. Rather than implementing the proposed clause, a better approach would be to ensure that awards do not operate in a restrictive and unreasonable manner.

526. A provision that affords an employer a limited right to refuse conversion in circumstances where it would be reasonable to do so is far more likely to operate in an effective and enforceable manner than the proposed anti-avoidance provision. It would remove much of the incentive or perceived necessity to actively prevent casual employees from qualifying in circumstances where the employer has formed a view that there is genuinely no capacity to accommodate conversion.

**Classification Issues**

527. There are particular difficulties associated with how the classification provisions in the particular award may apply to a casual employee converted to permanent employment in circumstances where they may have been working under different classifications during the sequence of periods in which they were regularly engaged. This is because a casual employee may, under some awards, potentially be separately engaged to perform work under different classifications on different days.

528. The difficulties with applying existing classification systems to casuals that may
work under more than one classification during the period under which they qualify for conversion are amplified in the context of a deeming proposal, as there is no necessity for such matters to be resolve prior to the deeming occurring. These are matters that, in the interest of all parties, should be worked through if a casual employee is to convert to permanent employment.

Union Representation

138. The ACTU and AMWU both point to lower levels of unionisation amongst casual workers as a justification for their proposed limitations on this type of employment.\textsuperscript{199} The AMWU identifies that only 6% of casual employees in the manufacturing industry are union members. It characterizes this as a further disadvantage associated with casual employment.\textsuperscript{200} Such submissions should not be accepted as justifying the claims.

139. While low levels of union membership amongst Australia’s casual workforce does call into question the extent to which the views of unions can validly be viewed as representative of casual employees, it does not justify amendments to the safety net.

140. The promotion of union membership is not a relevant consideration for the Full Bench in the context of this Review. Nor should it be assumed that an absence of union membership in anyway represents a disadvantage warranting amendment to the safety net. A union contention that it does is obviously self-servicing.

141. No element of the modern awards objective is directed towards the promotion of union membership. A cornerstone of the Act is its recognition of freedom of association. Section 3 provides that the object of the Act is, in part, to be achieved by:

\begin{quote} 
“(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and
\end{quote}

\textsuperscript{199} ACTU submissions, 19 October, paragraph 77(s)
\textsuperscript{200} AMWU submissions, 13 October, paragraph 19
discrimination, providing accessible and effective procedures to resolve grievances and dispute and providing effective compliance mechanisms…”

155. The concept of freedom of association encompasses not only the right to join a union but also the right to not join a union. Moreover, the Act’s reference to the right to be represented does not imply that the representation of an employee needs to be by a union; other representatives are recognised in the Act.

142. The identification of a statistical correlation between low levels of unionisation and casual employment does not establish a causal relationship. While it might reasonably be suggested that such a phenomenon partially explains the unions’ campaigns and claims to restrict such types of employment, it does not mean that casual employees choose not to join a union because of their casual employment status.

143. The reasons why casuals are less likely to join unions are likely to be multifaceted. An examination of such matters in the context of the current proceedings would be an unwarranted distraction.

144. The validity of union assertions that casual employees are inherently vulnerable so as to necessitate new casual conversion rights not historically present in awards is undermined by the reality that the Act includes a raft of significant protections for casual workers, particularly for ‘long term casual employees’. This includes the right to seek an unfair dismissal remedy, rights under the NES, rights under the general protections, and the capacity to bring a dispute before the Commission. Such protections are reinforced by the special rights afforded to unions under the workplace relations system, and through the FWO’s operations.

145. Casual employees are provided no less protection under the Act than permanent employees in terms of their right to either collectively bargain or obtain union representation or assistance.

146. In their submissions the unions make bold assertions in relation to purported discrimination and negative safety outcomes experienced by casual employees. Such matters are addressed in further detail elsewhere in these
submissions. Nonetheless, it should be noted that casual employees receive the same protection under anti-discrimination laws as permanent employees. They also receive the same level of protection under work health and safety laws.

147. Ultimately, it is beyond the proper role of an award safety net of minimum terms and conditions to address all such issues.

15.10 SECTION 138 AND THE MODERN AWARDS OBJECTIVE

529. The unions’ claims are inconsistent with the modern awards objective in s.134 and inconsistent with s.138 of the Act.

Relative living standards and the needs of the low paid (s.134(1)(a))

530. The Joint Employer Survey reveals that a significant number of employers signalled business decisions that would not be in the interests of casual employees if the unions’ casual conversion claims were granted. Such responses included a change in hiring and firing practices, including shorter periods of work for casual employees with no opportunity for further casual work periods let alone permanent work. Many businesses reported job losses or operating with fewer employees, or even, alarmingly, business closures.

531. To the extent that some casual employees are low paid, their living standards would undoubtedly be influenced by their overall job opportunities. The conversion claims would diminish such opportunities markedly.

532. The Joint Employer Survey shows that even where casual employees currently have the right to request permanent work, less than 10% actually do so. The survey suggests that when it comes to a casual worker’s assessment of their own living standards, a loaded casual rate is probably preferred than a lower permanent rate.

The need to encourage collective bargaining (s.134(1)(b))
533. In support of its claim, the AMWU has filed a sample of enterprise agreement clauses underpinned by the Manufacturing Award. It has also filed casual conversion clauses in various enterprise agreements in the printing industry.

534. The material advanced demonstrates that there is already capacity for unions and employees to secure casual conversion provisions through collective bargaining.

535. It is uncontroversial to suggest that casual conversion provisions are primarily pursued at the initiative of unions and/or employees. They reflect common union claims.

536. Granting the union claims will reduce the incentive for employees to engage in collective bargaining by delivering a commonly pursued bargaining claim through awards.

537. The AMWU asserts that casual employees are less likely to be covered by an enterprise agreement and that, ‘…by corollary’ assisting employees to move into permanent employment will encourage enterprise bargaining. Such submissions rest upon a general assumption that it is the type of employment that is the determinative factor in an employee’s capacity or desire to engage in collective bargaining. The submissions and material before the Commission does not substantiate such a sweeping factual assertion.

538. It is one thing to suggest that casual employees are statistically less likely to be engaged in collective bargaining but quite another to suggest that they do not engage in collective bargaining because they are engaged on a casual basis. A relevant causal connection between such matters has not been properly established by the unions.

539. In its consideration of the relevance of s.134(1)(b) the AMWU argues that the proposed deeming provisions will, ‘…provide casuals with increased bargaining power.’ The union then goes on to suggest that:

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201 AMWU submissions dated 13 October 2015 at paragraph 148.
"As there appears to be much opposition from employer groups to casuals being able to become permanent, members of the employer organisations objecting to the proposed variation if granted, may wish to buy out the provision, extend the period prior to conversion being triggered or revert to casual conversion by election with employer veto with appropriate compensation to casual employees agreeing to forgo the entitlement.\textsuperscript{202}

540. The submissions are not directed at a proper interpretation of s.134(1)(b). The mandatory consideration arising from this section is the need to ‘…encourage collective bargaining’. The provision is not directed at giving any particular party an advantage at the bargaining table.

541. The AMWU’s submission reveals a somewhat disingenuous element to its claim. A significant proportion of the AMWU material appears directed at establishing that there are various non-monetary related disadvantages associated with engagement as a casual. This reaches a high point when the union suggests at paragraph 46 of its submission that casual employees’ loss of access to award and NES entitlements, ‘…cannot be “equalised” or reduced solely to a monetary value.’ It is hard to reconcile such submissions with their subsequent suggestion that employers ‘buy out’ certain elements of the proposed clause or either ‘…extend the period prior to conversion being triggered or revert to casual conversion by election with employer veto with appropriate compensation to casual employees agreeing to forgo the entitlement.’\textsuperscript{203}

542. At the very least, the obvious tension in the AMWU’s submissions undermines the weight that can be attributed to the union’s expressed concern over long term casual employment.

543. At paragraph 156 of its submission, the AMWU argues that the deeming provision will encourage contractual arrangements between a labour hire company and a host company regarding the transfer of labour hire employees’ employment to a host employer. This is not an outcome that the Full Bench should view as either desirable or warranting amendment to the safety net. It

\textsuperscript{202} AMWU submissions dated 13 October at 155.

\textsuperscript{203} AMWU submissions dated 13 October at 155.
would potentially have significant negative consequences for the labour hire sector and, consequently, negative flow on effects for the many employers and employees that rely upon such organisations. The important and beneficial role of the labour hire sector is addressed in section 9 of these submissions.

544. Theoretically, it can be argued (as the AMWU has) that granting the claim could create an impetus for employers to bargain. The same submission could be made in relation to any impractical and unreasonable proposed award variation that the unions may advance. Regardless, any determination that granting the unions’ conversion claims would be consistent with s.134(1)(b) would be outweighed by other elements of the modern awards objective as discussed below.

545. The extent to which employers may agree to engage in bargaining in response to the proposed variation should not be overstated. The responses of employers who participated in the Joint Employer Survey suggest that a more common response to the unions’ claim, if it were granted, would be to either terminate or limit the engagement of casual employees or close the business.

**The need to promote social inclusion through increased workforce participation (s.134(1)(c))**

546. As referred to in section 8 of this submission, increased workforce participation is an extremely important policy objective. Societal demographics have changed. Permanent full-time employment models are not attractive to many people aspiring to enter the workforce who may have other commitments in their lives that necessitates a more flexible way of working.

547. The unions’ casual conversion claims would be catastrophic for current levels of workforce participation and would impose barriers upon employers offering more work to a greater number of people. The social inclusion benefits of being employed would be lessened.
548. The unions’ claims for conversion would impose disincentives for employers to employ by limiting the availability of flexible work options that are necessary to enable businesses to cope with uncertain markets.

549. The statement of Julie Toth, Chief Economist of Ai Group, refers to an IMF report which states that increases in labour market flexibility have a statistically negative impact on unemployment levels and outcomes. Ms Toth in her statement (para [25]) refers to the importance of labour market flexibility and productivity in improving labour force participation and reducing unemployment.

550. The unions’ casual conversion claims would impose major restrictions on an employer’s ability to determine the best staffing mix to operate its business efficiently and productively. The claims would seriously impede employers in providing and maintaining employment.

551. The Joint Employer Survey results described in section 11 overwhelmingly demonstrate that conversion claims would have negative effects upon businesses and employees. Some 130 responses reported job losses and 146 responses reported operating with fewer positions. 124 responses reported possible closure of their businesses.

552. A significant number of responses (245) reported that giving casuals an absolute right to convert would be an incentive to change hiring and firing practices. Such hiring and firing practices included:

- Early termination of employment for casual employees, or

- Rostering so that casuals would not be regular.

553. The witness evidence from Corporate Health Group and Data Response also demonstrates that the conversion claims would result in fewer jobs.

554. The Commission should place significant weight on the negative impacts upon employment when assessing the unions’ claims against the various elements of the modern awards objective.
The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

555. The unions’ casual conversion claims would be a hindrance to flexible modern work practices and the efficient and productive performance of work. Businesses need flexible modern work practices in order to be agile, efficient and responsive to changes in customer demand.

556. Flexible modern work practices are also appealing and necessary for employees. Many employees prefer casual work to full-time employment.

557. The statement of Julie Toth (para [45]) refers to the multiple ways in which flexibility within firms can be measure in contrast to the undue emphasis placed on functional flexibility by the ACTU’s Professor Markey. Importantly, casual employment is a form of engagement that enables greater flexibility in terms of:

- The number of employees employed:

  Employers can more readily align staffing levels with operational needs if casual employees are engaged;

- The number of hours worked:

  Employers can more easily and quickly adjust the number of hours required of casual employees to meet operational or customer needs, unlike the fixed hours of permanent employees;

- Temporal work hours;

- Location of work, (particularly for labour hire businesses); and

- Wage and cost flexibility:

  Casual employment does not carry with it the associated fixed costs and liabilities of permanent employment when revenue is variable or unpredictable.
558. These numeric forms of flexibility are critical for businesses to enable them to respond to consumer demand and intense global market competition. While other forms of flexibility are important, to focus on ‘functional’ forms of flexibility in isolation is not in any way consistent with productive or efficient performance of work.

The need to provide additional remuneration for hours that are overtime, irregular or unpredictable, unsocial, on weekends or public holidays and shifts (s.134(1)(da))

559. This is a neutral element, when the Commission is weighing up the unions’ claims against elements of the modern awards objective.

The principle of equal remuneration for work for equal or comparable value (s.134(1)(e))

560. This is a neutral element, when the Commission is weighing up the unions’ claims against elements of the modern awards objective.

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

561. The unions’ conversion claims would impact negatively on productivity as highlighted by Julie Toth’s witness statement.

562. Also, the Joint Employer Survey reveals the detrimental impact that the unions’ claims would have on business, including possible business closures, increased employment costs, and loss of flexibility. The regulatory burden for many businesses, particularly those who employ a large number of casual employees would also be detrimental (See witness statement of Krista Limbrey of McDonalds).

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))
563. As discussed above, the unions’ claims include various uncertain and problematic elements that are inconsistent with this objective.

The likely impact of any exercise in modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

564. If the Commission were to grant the unions’ conversion claims, there would be a substantial, detrimental impact on employment growth and the national economy. The claims would not only inhibit job growth, but result in lower employment.

565. Modern awards should foster employment growth and business sustainability. The conversion claims would severely inhibit this.

566. Julie Toth’s statement refers to established meanings of productivity and the views expressed by institutions such as the Productivity Commission and the IMF. The various types of ‘numeric’ flexibility referred above improve economic outcomes and reduce unemployment.

567. The statement of Ms Kerry Allday refers to the international competition that her business struggles to cope with given that the global market provides cheaper services than what can be offered domestically. The further labour restrictions that the unions are seeking would impose higher employment costs and reduced efficiencies, making it very difficult for businesses like hers to compete and survive.

Section 138

568. The unions have failed to adequately establish why their conversion claims are necessary to achieve the modern awards objective.

569. The conversion claims are inconsistent with, and detrimental to, many of the elements of s.134(1). A fair and relevant minimum safety net of terms and conditions does not come in a form which severely erodes an employer’s ability to operate efficiently and to employ people.
570. The unions’ assertions that their claims are in the interests of workers and the community are fanciful.
16. CLAIMS TO INCREASE MINIMUM ENGAGEMENT PERIODS

571. In this part of our submission, we deal with claims made by the ACTU and certain affiliate unions regarding minimum engagement and/or payment provisions applying to part-time and casual employees.

16.1 THE CLAIMS

572. Many modern awards presently contain provisions that require that each time a part-time or casual employee is required to work, that employee is entitled to a minimum *engagement* for a certain number of hours. Other awards stipulate that each time a part-time or casual employee is required to work, they are entitled to a minimum *payment* equivalent to a certain number of hours of work. The requisite number of hours varies from award to award. Indeed some awards contain different minimum engagements/payments for different categories of part-time or casual employees covered by that award, or that apply in different circumstances. Other awards contain facilitative provisions that enable an employer and an employee to reach agreement to vary the stipulated minimum engagement/payment. This divergence in current award provisions is reflected in the table at Attachment 16A, which summarises the specific provisions found in each of the 122 modern awards.

573. The ACTU, AMWU and AMWU – Vehicle Division are seeking to change minimum engagement/payment provisions applying to part-time employees in some 73 modern award. ²⁰⁴ Their claim regarding casual minimum engagement/payment provisions captures 69 modern awards. ²⁰⁵ In essence:

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²⁰⁴ Aged Care Award 2010; Airport Employees Award 2010; Alpine Resorts Award 2010; Aluminium Industry Award 2010; Amusement, Events and Recreation Award 2010; Animal Care and Veterinary Services Award 2010; Aquaculture Industry Award 2010; Architects Award 2010; Asphalt Industry Award 2010; Banking, Finance and Insurance Award 2010; Business Equipment Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Cemetery Industry Award 2010; Children’s Services Award 2010; Cleaning Services Award 2010; Clerks-Private Sector Award 2010; Concrete Products Award 2010; Contract Call Centres Award 2010; Corrections and Detention (Private Sector) Award 2010; Cotton Ginning Award 2010; Dry Cleaning and Laundry Industry Award 2010; Electrical Power Industry Award 2010; Electrical, Electronic and Communications Contracting Award 2010; Fast Food Industry Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Gardening and Landscaping Services Award 2010; General Retail Industry Award 2010; Hair and Beauty Industry
The ACTU is seeking a minimum engagement/payment of 4 hours in respect of each of the awards that are the subject of its claim. In some instances, the deletion of an existing facilitative provision is also proposed by the ACTU. In others, where an award presently prescribes a minimum engagement period, the variation proposed seeks to alter...
this to a minimum payment (or vice versa), or to require that the employee be entitled to a ‘minimum engagement or payment’ of four hours.\textsuperscript{207} The ACTU’s claim would also have the effect of removing specific minimum engagements/payments that apply to particular categories of part-time or casual employees covered by an award, or that apply in specific circumstances.\textsuperscript{208}

- The AMWU is seeking to increase the minimum engagement period applying to part-time employees in the FBT Award from three hours to four hours.

- The AMWU is also seeking to confine the operation of facilitative provisions that allow a reduction to the current minimum engagement/payment provisions applying to part-time and casual employees in the Manufacturing Award and the FBT Award.

- The AMWU – Vehicle Division is seeking the insertion of a minimum engagement period of four hours applying to all part-time employees covered by the Vehicle Award, with a facilitative provision that would, in some circumstances, enable an employer and employee to reach agreement for a three hour minimum engagement.

- The AMWU – Vehicle Division is also seeking the insertion of a minimum payment of four hours for casual employees.

574. A summary of the claims made can be found at Attachment 16A. The table there contained provides a snapshot of the unions’ claims alongside existing

\textsuperscript{207} Alpine Resorts Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Cemetery Industry Award 2010; Children’s Services Award 2010; Clerks-Private Sector Award 2010; Corrections and Detention (Private Sector) Award 2010; Labour Market Assistance Industry Award 2010; Nursery Award 2010; Passenger Vehicle Transportation Award 2010; Racing Clubs Events Award 2010; Registered and Licensed Clubs Award 2010; and Seafood Processing Award 2010.

\textsuperscript{208} Cleaning Services Award 2010; General Retail Industry Award 2010; Health Professionals and Support Services Award 2010; Higher Education Industry—General Staff—Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Racing Clubs Events Award 2010; Registered and Licensed Clubs Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010 and Sugar Industry Award 2010.
award provisions. As can be seen, the degree of change sought and therefore the potential impact of the claim varies from award to award. This is a product of the nuances present in current award clauses in this regard.

16.2 INDUSTRY SPECIFIC MINIMUM ENGAGEMENTS/PAYMENTS

575. There is great diversity in minimum engagement periods/payments presently contained in modern awards. As we have earlier set out, an examination of Attachment 16A reveals a broad spectrum of arrangements applying to part-time and casual employees across the 122 modern awards. Of those:

- 44 modern awards do not contain a minimum engagement/payment for any part-time employees covered by it;
- 30 modern awards do not contain a minimum engagement/payment for any casual employees covered by it;
- 1 modern award contains a one hour minimum engagement/payment for all part-time employees covered by it;
- 6 modern awards contain a two hour minimum engagement/payment for all part-time employees covered by it;
- 8 modern awards contain a two hour minimum engagement/payment for all casual employees covered by it;
- 39 modern awards contain a three hour minimum engagement/payment for all part-time employees covered by it;
- 29 modern awards contain a three hour minimum engagement/payment for all casual employees covered by it;
- 5 modern awards contain a minimum engagement/payment of less than four hours with a facilitative provision that enables agreement to be reached for a shorter minimum engagement/payment for all part-time employees covered by it;
• 7 modern awards contain a minimum engagement/payment of four hours or less with a facilitative provision that enables agreement to be reached for a shorter minimum engagement/payment for all casual employees covered by it;

• 7 modern awards contain more than one minimum engagement periods/payments that apply to some or all part-time employees covered by it;

• 19 modern awards contain more than one minimum engagement periods/payments that apply to some or all casual employees covered by it;

• Only 14 modern awards contain a four hour minimum engagement/payment for all part-time employees covered by it;

• Only 19 modern awards contain a four hour minimum engagement/payment for all casual employees covered by it; and

• 5 modern awards contain a minimum engagement/payment of more than four hours for all casual employees covered by it.

576. Minimum engagement periods have, over time, been the subject of consideration by the Commission and its predecessors. This has generally occurred in the context of a particular award where a party has sought a specific variation and in some instances, during the Part 10A Award Modernisation process. In such cases, consideration has been given to the circumstances of the industry, the demographic profile of employees engaged in it and the relevant pre-modern award terms.

577. The ACTU’s claim invites the Commission to undermine the industry specific factors reflected in these provisions; to undo the consideration that has previously been given by industrial parties, the Commission and its predecessors as to the appropriate balance to be struck in determining whether an award should prescribe a minimum engagement/payment and if so, what
that should be; and to take a broad-brushed approach in introducing a one-size-fits-all entitlement without regard for vital industry-specific considerations.

578. We refer to section 5 of our submissions, where we contend that the matters here before the Commission are award specific issues. The position we have there put is particularly pertinent to this element of the ACTU’s claim.

579. The current relevant award terms exhibit diversity that is both necessary and appropriate. It reflects the significant differences in the needs and characteristics of employers operating in each industry. It is also indicative of the provisions that applied in these industries prior to the modernisation of the awards system. The ACTU’s sweeping assertion that ‘a minimum 4 hours’ work per engagement is a necessary standard across all industries’209 ignores the unique characteristics of particular industries and the operational requirements of employers covered by those awards. As the evidence will establish, the adoption of the ACTU’s claim across the board would have serious operational and financial implications for thousands of employers. Unsurprisingly, those employers are covered by the very awards that presently do not require that employees be engaged/paid for a minimum number of hours or in the alternative, contain a minimum engagement/payment provision that is shorter in duration than that proposed by the ACTU.

580. A minimum engagement period has a clear bearing on how and when an employer requires part-time and casual employees to work. It effectively creates a limitation on the extent to which an employer has access to labour that it can direct to work for short periods of time in order to meet its operational needs. This is particularly pertinent in industries where, for instance, an employer requires an employee to undertake home visits to clients to perform work that necessarily only takes one hour to complete. Another example arises in agricultural industries where work is performed outdoors and is subject to inclement weather. Minimum engagement periods in such circumstances may prevent an employer from being able to direct its employees to cease performing work, without an obligation to remunerate them for the remaining

209 See ACTU’s submissions dated 19 October 2015 at paragraph 94.
period of the minimum engagement. Restaurants and fast food outlets also face fluctuations in demand for labour through the course of the day which is met by employing part-time or casual employees for limited periods of time. For instance, a fast food outlet experiences particularly high customer demand during meal times. Also, a high proportion of employees in the fast food industry are students and they are not available or do not wish to work for four hours (see Ai Group’s submission and evidence filed in October 2015 in support of a reduction in the existing minimum engagement period in the Fast Food Award).

581. To grant the ACTU’s claim would be to turn a blind eye to industry specific considerations such as those set out above. It would result in an outcome that undermines the premise of developing a tailored set of terms and conditions that are appropriate to employers and employees in each industry. It would be at odds with the Commission’s own observations that (emphasis added):

“[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.”

582. The grant of the ACTU’s claim in the absence of evidence that satisfies the relevant statutory provisions in respect of each individual modern award would also be contrary to the AIRC’s observations in the Metal Industry Casual Employment Case, in which it adopted a three hour minimum engagement for part-time employees and a four hour minimum engagement for casual employees: (emphasis added)

“[134] In determining an appropriate minimum engagement for this award we wish to make it plain we are not setting any general standard beyond the award. As noted above we have been influenced in determining the four hour minimum by the existing position in manufacturing industry awards. There should be no expectation that the four hour period is an appropriate minimum in other sectors

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of employment where the factual circumstances are different and the needs and aspirations of both employees and employers are different.\textsuperscript{211}

583. The adoption of a minimum engagement/payment of at least four hours across the modern awards system is certainly not necessary to meet the modern awards objective and is inconsistent with the modern awards objective.

584. In determining the ACTU’s claim, consideration must be given to each of the factors listed at s.134(1) and in light of them, an assessment must be made as to whether the provision proposed is necessary in order to ensure that the award provides a fair and relevant minimum safety net of terms and conditions.\textsuperscript{212} Section 156(5) dictates that in this Review, each award must be reviewed in its own right. Therefore, the requisite analysis must be undertaken on an award-by-award basis. That these claims have been referred to one Full Bench as part of ‘common issues’ proceedings does not alter the Commission’s task, nor does it circumvent the need to satisfy the legislative preconditions that must be overcome in order for the unions to establish that the proposed provisions are in fact \textit{necessary} in the context of each of the awards that form part of the ACTU’s claim.

16.3 ‘WORKING TIME INSECURITY’

585. The ACTU relies on the notion of ‘working time insecurity’ in support of its proposition that a minimum standard of four hours minimum engagement/payment should be rolled out across the modern awards system. It describes ‘working time insecurity’ as a ‘key component of insecure employment.’\textsuperscript{213}

586. The concept of ‘working time insecurity’ is borrowed from the Lives on Hold Report, which we have earlier dealt with in general terms. The report states that

\begin{footnotes}
\footnote{Re \textit{Metal, Engineering and Associated Industries Award, 1998 - Part I} (Print T4991 at [134]).}
\footnote{See s.138 of the Act.}
\footnote{See ACTU’s submissions dated 19 October 2015 at paragraph 94.}
\end{footnotes}
it can take the form of too few hours, irregular hours, fragmented hours and a lack of predictability.\textsuperscript{214}

**The Extent of ‘Working Time Insecurity’**

587. The ACTU relies on its survey in order to establish that casual and part-time employees are indeed subject to working time insecurity. Our attention is drawn by the ACTU to figure 10.2 contained in the supplementary report attached to Professor Markey’s statement. The chart there contained sets out ‘the proportion of workers who had worked a minimum shift of 3 hours or less in the past 3 months, by industry’ (emphasis added).

588. We assume that the data underpinning that chart has been taken from responses to question 15 of the ACTU’s survey: ‘In the past 3 months, what is the minimum number of hours you have worked in a single shift?’. We refer the Commission to chapter 12 of these submissions, where we have dealt with the survey conducted by the ACTU at length, including the manner in which the survey questions have been drafted. This includes question 15. We need not reiterate those concerns here.

589. We refer also to the submissions we made regarding an employee’s eligibility to complete the ACTU survey. The list of survey questions found at Appendix 1 to RM-2 does not conclusively establish whether the survey was open only to casual employees or whether permanent employees could also proceed through the entire survey. The drafting of the relevant questions contained in the survey does not suggest that it was confined to casual employees and we therefore proceed on the basis that it was not. Rather, it would appear to us that the question that is relevant for present purposes could have been answered by a full-time, part-time or casual employee.

590. Figure 2.10 is described as depicting the proportion of workers who had worked a minimum shift of 3 hours or less in the past 3 months, by industry. At paragraph 18 of the supplementary report, the authors state:

\textsuperscript{214} See Lives on Hold Report at page 16.
“18. … Figure 2.10 in this Supplementary Report indicates the proportions of workers, by industry, who worked a shift of 3 hours or less in the last 3 months. Operationally similar industry sectors were combined where the number of respondents in an industry was < 10. Figure 2.10 shows that between one third and one half of the sampled casuals had worked such a shift in a number of industries, and just under two thirds in ‘Other Services’. Overall, 37 per cent of the mainly part-time sample of casuals had worked short shifts of 3 hours or less.”

591. As can be seen, the above passage variously describes the data as relating to workers generally and then to the sampled casuals. At page 4 of the report found at Attachment RM-2 to the statement of Professor Markey, the authors refer to ‘data from a survey of 838 casuals and 43 labour hire workers conducted by the ACTU’.

At page 10 of the same report, the authors state that the ACTU’s survey included 215 permanent workers however they have ‘largely excluded comparison with permanent workers in [their] analysis of the data, due to the low relative proportion of workers surveyed, and have treated the survey as primarily one of casual workers’.

592. The short point is that it is unclear whether the data in figure 2.10 relates only to casual employees or whether it is also based on survey responses from full-time and part-time employees.

593. If the data relates only to casual employees, it cannot be relied upon in support of any proposition that is put by the ACTU in support of its claim regarding part-time minimum engagement/payment clauses. We also note the observations made in the report and supplementary report attached to the statement of Professor Markey that the sample of casuals was made up predominantly (98%) by part-time casual employees. There is a likely correlation between this over-representation of part-time casual employees and the survey responses, in the sense that part-time casual employees are more likely to have worked a

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215 See Attachment RM-3 to the statement of Professor Markey at page 18.
216 See Attachment RM-2 to the statement of Professor Markey at page 4.
217 See Attachment RM-2 to the statement of Professor Markey at page 10.
218 See Attachment RM-2 to the statement of Professor Markey at page 10.
219 See Attachment RM-3 to the statement of Professor Markey at page 20.
minimum shift of three hours or less in the past three months than those that work ‘full-time’ hours.

594. If the data is based on responses from casual and permanent employees, this necessarily includes full-time employees. The extent to which such employees have worked a minimum shift of three hours or less in the past three months is not relevant to the ACTU’s claims. Their inclusion distorts data that is here being relied upon in support of the ACTU’s arguments regarding ‘working time insecurity’ of casual and part-time employees.

595. The additional difficulty arising from figure 2.10 is the ‘industries’ by which the data has been sorted. It is not clear how various modern awards have been categorised. The aggregation of ‘industries’ rather than an award by award analysis results in data that is not sufficiently transparent as it does not allow for analysis of the extent to which employees covered by the awards that the ACTU seeks to vary have worked a minimum shift of three hours or less in the past three months.

596. For instance, having regard to the ANZSIC classification titles and codes, ‘transport, postal and warehousing’ potentially includes:

- road freight transport;
- road passenger transport;
- rail transport;
- water transport;
- air and space transport;
- services provided to any or all of the above forms of transport;
- storage services; and
- postal services.
597. These industries may be covered by a number of modern awards, some of which (for instance the Road Transport Award and the Road Transport Long Distance Award are not subject to the ACTU’s claim. Therefore, even if the Commission finds that the flaws we have identified in the conduct of the ACTU’s survey, the drafting of the relevant survey question and that the potential sample of respondents does not undermine the data found at figure 2.10, the manner in which it has been presented very significantly limits in utility.

598. The quantum identified at figure 2.10 in respect of each ‘industry’ should be disregarded for all the reasons we have here stated. The data is not reliable and does not establish the ACTU’s proposition that its casual and part-time constituents covered by the relevant modern awards are suffering from an epidemic of ‘short shifts’.

599. Observations are also made by the ACTU, with reference to the report and expert report attached to Professor Markey’s statement regarding the age groups within which ‘short shifts’ are most prevalent as well as the disparity between genders.220

600. To these issues we simply say this; without accepting the veracity of the data found at tables 2.1 and 2.2 of the supplementary report221 given the numerous flaws we have identified with the ACTU’s survey so far, the analysis presented goes no further than to establish the distribution of minimum shift lengths amongst the demographics of the sample of survey respondents (querying again whether it includes permanent employees or is limited to those engaged on a casual basis). It does not attempt to address whether there is a causal connection between the characteristics of a part-time or casual employee and the minimum shift length they have worked and if so, what that connection is.

601. For instance, a higher incidence of shorter shifts having been worked by younger workers (18 – 20 years; 21 – 24 years) may readily be explained by

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220 See ACTU's submissions dated 19 October 2015 at paragraphs 94 and 96
221 See Attachment RM-3 to statement of Professor Markey at page 22
the fact that a significant proportion of them have study commitments which limits their availability. The incidence of shorter shifts amongst the senior age groups may be attributable to such employees seeking to work such shifts, depending upon the nature of the work and their capacity. A higher incidence of shorter shifts performed by women could be explained, at least in part, by employee preference to work such hours due to caring responsibilities. The analysis of this data ignores the reason why employees might be working shorter shifts and erroneously assumes that it must be as a result of the employer’s prerogative.

The Effects of ‘Working Time Insecurity’ – Low Income Earners

602. The ACTU asserts that:

“As discussed above, those working on award minimum wages less than fulltime hours are more likely to be low income earners. Any reduction in the expected length of a daily engagement has a severe impact on an already disadvantaged employee, and most heavily on intermittent casual workers.”

603. This is a factual proposition; that already disadvantaged employees, being a reference to low income earners, are ‘severely impacted’ by a reduction in the expected length of a daily engagement. Further, that this impact is felt ‘most heavily’ by intermittent casual workers.

604. The ACTU has not produced probative evidence in support of this submission. It should be put to the task of pointing to the relevant elements of its evidentiary case (if any) that in fact demonstrate the facts that it here seeks to rely upon.

The Effects of ‘Working Time Insecurity’ – ‘Disruption’

605. The ACTU and its witnesses complain of the alleged inability to make ‘reliable plans’ for additional jobs or non-work related commitments. For instance, the ACTU cites\textsuperscript{223} the evidence of Ms Linda Rackstraw, where she identified the following as a consequence of her casual employment:

\textsuperscript{222} See ACTU’s submissions dated 19 October 2015 at paragraph 98(c).

\textsuperscript{223} See ACTU’s submissions dated 19 October 2015 at paragraph 98(g).
“14. Due to having little control over my shift times and days of work, I found it difficult to plan my life and to spend time with my family. For example, I couldn’t say to my daughter, ‘let’s go for a coffee (on a particular day) next week’ because I wouldn’t know my shifts until the roster came out and I’d often have to cancel if there was a clash. I was always cancelling things with family. So I made less plans and enjoyed less social engagements than when I was working permanent-part time.”

606. Such difficulties do not necessarily arise as a consequence of the absence of a minimum engagement period. In fact Ms Rackstraw has the benefit of a three hour minimum engagement by virtue of clause 15.4 of the McDonald’s Australia Enterprise Agreement 2013. This does not preclude her employer from rostering her to perform work on different days and at different times. Ms Rackstraw’s evidence establishes this very point; that a minimum engagement clause is not an appropriate or relevant remedy.

607. To the extent that the ACTU relies on this assertion in respect of part-time employees, it must be seen in the context of provisions that appear in the majority of modern awards requiring agreement at the time of engagement (subject to variation thereafter) as to when a part-time employee will perform the ordinary hours of work. This necessarily provides a part-time employee with greater predictability and regularity.

608. We also note that a casual employee cannot be compelled to attend work by their employer. If a casual employee is not available on a particular day or time due to other commitments, the nature of their employment provides that individual with the flexibility of advising of their unavailability, without needing to seek leave from their employer.

The Effects of ‘Working Time Insecurity’ – Employee Preferences

609. To the extent that the ACTU seeks to rely on its survey as evidence that casual employees agree that workers such as themselves should theoretically have a longer minimum shift length, it is telling that the largest proportion of respondents (47%) selected the ‘neutral’ response. This indicates that it is not an issue of priority for them. Another 43% ‘agreed’ or ‘strongly agreed’. A small

224 See witness statement if Linda Rackstraw at paragraph 14.
proportion disagreed with the proposition put in the question. As we have
earlier pointed out, the nature of the question and the way it is crafted
necessarily lends itself to agreement with it. It is therefore unsurprising that only
11% disagreed.

610. We again note that this data is not indicative of the preferences of part-time
employees. Further, as indicated in the report225 and supplementary report226
attached to the statement of Professor Markey, the sample of casuals was
made up predominantly (98%) by part-time casual employees. There is a likely
correlation between this over-representation of part-time casual employees and
the survey responses, in the sense that part-time casual employees are more
likely to have expressed a preference for a longer minimum shift length than
those who work ‘full-time’ hours. Therefore, the data is not representative of a
balanced sample of casual employees.

611. We make the same observations about table 5.3 in the supplementary expert
report227 as we have earlier regarding the industry breakdown that there
appears. The data is of limited utility as it does not allow the Commission to
determine the extent to which longer minimum shift lengths are sought by
employees covered by particular awards.

612. Further, the ACTU has not articulated a connection between the preferences
expressed by employees and the bearing that this should have on the
Commission’s discretion in this matter. The basis upon which they rely on the
AWRS data and the ACTU survey is unclear.

16.4 EMPLOYMENT-RELATED COSTS

613. The ACTU cites certain costs associated with attending work as a reason for
why minimum engagement provisions are necessary. This includes child care,
travel and other expenses.

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225 See Attachment RM-2 to the statement of Professor Markey at page 10.
226 See Attachment RM-3 to the statement of Professor Markey at page 20.
227 See Attachment RM-3 to statement of Professor Markey at page 58.
614. The supplementary expert report attached to Professor Markey’s statement states that approximately 10% of casual employees incur child care costs and just over 14% of part-time employees incur child care costs. We acknowledge that, in the case of some individual employees, there may be circumstances in which an engagement of less than four hours may not be ideal for reasons such as the cost of child care. However, the implementation of a minimum standard across the awards system in order to accommodate the needs of a small proportion of the workforce in certain circumstances cannot be justified.

615. Shift lengths of a casual and part-time employee can vary. Thus, even if they are engaged to work a ‘short shift’ of less than four hours on a particular occasion, this may not be the case each time. In this way, their average shift length may in fact be in excess of four hours.

616. Further, the ACTU has not dealt with the extent to which employees in particular industries are in fact faced with child care expenses. For example, we refer to the statement of Krista Limbrey, dated 19 October 2015. Ms Limbrey is employed by McDonald’s Ltd as HR Business Partner NSW/ACT. At paragraph 38 of her statement, she sets out the age profile of employees employed in McDonald’s restaurants on a casual, part-time and full-time basis as at 19 May 2015. Of the 15,953 casual employees, 14,876 are aged 20 and under. That equates to 93%. Of the 59,982 casual employees employed by McDonald’s franchisees, 86% are aged 20 and under.

617. We do not contend that McDonald’s workforce is representative of the entire fast food industry however as it is the largest employer in this industry, Ms Limbrey’s evidence is indicative of the demographic profile of employees engaged in the industry. We also not contend that of the casual employees aged less than 20, none would incur child care costs. Nonetheless, the age profile of casual employees engaged in the fast food industry rather suggests that only a very small proportion of them would incur such costs. Therefore the ACTU’s arguments have little significance to the fast food industry.

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228 Attached to Ai Group’s submissions of 14 October 2015.
618. The ACTU also cites travel costs. We note firstly that this makes up a relatively small proportion of an employee’s earnings. Secondly, this issue too must be considered on an award by award basis. For instance, casual employees under the age of 20 engaged by a fast food operator within the area in which they go to school or live, are less likely to incur transport costs (or will incur less transport costs) than an employee engaged in, for example, the mining industry. Table 5.7 in the supplementary expert report attached to Professor Markey’s statement demonstrates this, although again we note that it does not provide a breakdown of the data on an award by award basis.

619. At paragraph 59 of its written submissions, the ACTU sets out the ‘daily earnings v net gains’ of an employee, having regard to travel costs, child care costs and other costs. It relies on this model in support of its argument that a four hour minimum engagement is necessary for the purposes of making it viable for an employee to attend work.

620. This argument is not relevant for those employees who do not incur all three types of expenses, to the full monetary value nominated by the ACTU. There is no evidence before the Commission as to what proportion of the casual and part-time workforce this would in fact apply to or by what award they are covered.

621. The adoption of a new minimum standard that has serious cost implications for employers in many industries and that potentially creates a barrier to accessing shorter shifts for those employees who would in fact prefer to work them due to their personal circumstances, cannot be justified by the model proposed by the ACTU, which is relevant to only a small unidentified portion of the casual and part-time workforce.

16.5 PART-TIME EMPLOYEES

622. Having dealt with the thrust of the unions’ arguments in support of their claims, we here pause to observe that whilst it is our view that their contentions are unsustainable, this is particularly so when considered in the context of current award provisions applying to part-time employees.
623. Of the awards in which the ACTU seeks to introduce a four hour minimum engagement period, the majority\(^{229}\) presently require that agreement be reached between the employer and employee as to the hours of work. In many cases, this includes the days and times at which that work will be performed. Typically, work performed outside of that which had been agreed attracts overtime rates.

624. Certain awards also define a part-time employee as one whose hours are ‘reasonably predictable’ or who is engaged to work ‘a regular pattern’ of hours. Such award provisions contemplate an ability to forecast an employee’s hours of work and suggest that there will be some repetition or pattern as to how and when they are worked.

625. As a consequence of such award provisions, part-time employment necessarily affords an employee greater certainty; both financially and in respect of the times at which the employee will be engaged in the performance of work. In each of the awards we have identified, a part-time employee also has greater influence over the hours that they work, because they must agree to them. Indeed it was this very consideration that led the AIRC to adopt a three hour minimum engagement (rather than the four hour minimum proposed by the AMWU) in the Metals Award 1998 (emphasis added):

“[133] … For part-time employees we will adopt a minimum of three hours, we also allow a similar dispensation to that which was applied by the Full Bench of the New South Wales Industrial Relations Commission in the State Part-Time Work Case. … In short part-time employment provides greater financial certainty

\(^{229}\) Aboriginal Community Controlled Health Services Award 2010; Aged Care Award 2010; Airport Employees Award 2010; Alpine Resorts Award 2010; Aluminium Industry Award 2010; Ambulance and Patient Transport Industry Award 2010; Amusement, Events and Recreation Award 2010; Aquaculture Industry Award 2010; Architects Award 2010; Asphalt Industry Award 2010; Car Parking Award 2010; Cement and Lime Award 2010; Children’s Services Award 2010; Cleaning Services Award 2010; Clerks-Private Sector Award 2010; Concrete Products Award 2010; Corrections and Detention (Private Sector) Award 2010; Dry Cleaning and Laundry Industry Award 2010; Electrical Power Industry Award 2010; Fast Food Industry Award 2010; Gardening and Landscaping Services Award 2010; General Retail Industry Award 2010; Hair and Beauty Industry Award 2010; Health Professionals and Support Services Award 2010; Hospitality Industry (General) Award 2010; Legal Services Award 2010; Local Government Industry Award 2010; Miscellaneous Award 2010; Nursery Award 2010; Nurses Award 2010; Passenger Vehicle Transportation Award 2010; Pastoral Award 2010; Pharmaceutical Industry Award 2010; Pharmacy Industry Award 2010; Plumbing and Fire Sprinklers Award 2010; Premixed Concrete Award 2010; Quarrying Award 2010; Racing Clubs Events Award 2010; Racing Industry Ground Maintenance Award 2010; Rail Industry Award 2010; Registered and Licensed Clubs Award 2010; Restaurant Industry Award 2010; Seafood Processing Award 2010; Silviculture Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Storage Services and Wholesale Award 2010; Sugar Industry Award 2010; Supported Employment Services Award 2010; Telecommunications Services Award 2010; Timber Industry Award 2010; Transport (Cash in Transit) Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010; Water Industry Award 2010 and Wine Industry Award 2010.
and predictability of earnings. Accordingly there is less need for each engagement or attendance to meet a minimum level of payment. …

626. Arguments relating to the uncertainty associated with casual employment, the irregularity of hours, the lack of control as to how and when an employee is engaged and financial insecurity carry far less weight, if any at all, in the context of part-time employment.

627. The ACTU has not provided any reasons, let alone ones that are compelling, that deal specifically with why a part-time employee should be afforded a minimum of four hours of engagement or payment. The ACTU’s claim treats casual and part-time employment synonymously for the purposes of this claim and fails to address the distinction between these forms of engagement when advocating reasons why a minimum engagement/payment provision is necessary.

628. The material before the Commission does not establish that the circumstances of casual and part-time employees are identical and that therefore they warrant the same result. In the absence of cogent reasons and probative evidence that allows the Commission to determine that the minimum engagement/payment provision proposed regarding part-time employees in each award is necessary to ensure that it provides a fair and relevant minimum safety net, the claims should not be granted. The grant of a four hour minimum engagement/payment in respect of one type of employment does not in and of itself lead to a conclusion that the same is to be granted in respect of the other form of employment. Each must be considered in its own right in respect of each award.

16.6 THE UNIONS’ EVIDENCE

629. Whilst we do not propose to here deal comprehensively with the witness evidence filed by the ACTU in relation to these proceedings, we note that it has failed to call any witness evidence in respect of the following awards that are impacted by its claim:

230 Re Metal, Engineering and Associated Industries Award, 1998 - Part I (Print T4991 at [133])
• ACCHS Award;
• Aged Care Award;
• Airport Employees Award 2010;
• Alpine Resorts Award;
• Aluminium Industry Award 2010;
• Ambulance Award;
• Amusement, Events and Recreation Award 2010;
• Animal Care and Veterinary Services Award 2010;
• Aquaculture Industry Award 2010;
• Architects Award 2010;
• Asphalt Industry Award 2010;
• Banking Award;
• Car Parking Award 2010;
• Cement and Lime Award 2010;
• Cemetery Industry Award 2010;
• Cleaning Services Award 2010 (Cleaning Award);
• Clerks Award;
• Concrete Products Award 2010;
• Contract Call Centres Award 2010 (Contract Call Centre Award);
• Corrections and Detention (Private Sector) Award 2010;
• Cotton Ginning Award 2010;
• Dredging Industry Award 2010;
• Dry Cleaning and Laundry Industry Award 2010;
• Electrical Power Industry Award 2010 (Electrical Power Award);
• Electrical Contracting Award;
• Gardening and Landscaping Services Award 2010;
• Gas Industry Award 2010;
• Hair and Beauty Industry Award 2010 (Hair and Beauty Award 2010);
• Health Professionals Award;
• Horse and Greyhound Training Award 2010 (Horse and Greyhound Award);
• Horticulture Award 2010;
• Hospitality Award;
• Hydrocarbons Field Geologists Award;
• Labour Market Assistance Industry Award 2010;
• Legal Services Award 2010;
• Local Government Industry Award 2010;
• Medical Practitioners Award 2010;
• Mining Industry Award 2010 (Mining Award);
• Miscellaneous Award 2010;
• Nursery Award 2010;
- Oil Refining Award;
- Passenger Vehicle Transportation Award 2010;
- Pastoral Award 2010;
- Pharmaceutical Industry Award 2010;
- Pharmacy Industry Award 2010;
- Plumbing and Fire Sprinklers Award 2010;
- Poultry Processing Award 2010;
- Premixed Concrete Award 2010;
- Professional Employees Award;
- Quarrying Award 2010;
- Racing Clubs Events Award 2010;
- Racing Industry Ground Maintenance Award 2010;
- Rail Industry Award 2010;
- Registered and Licensed Clubs Award 2010;
- Restaurant Award;
- Salt Industry Award 2010;
- Seafood Processing Award 2010;
- Silviculture Award 2010;
- Storage Award;
- Sugar Industry Award 2010;
• Supported Employment Services Award 2010;
• Telecommunications Award;
• Timber Award;
• Transport (Cash in Transit) Award 2010;
• Water Industry Award 2010;
• Wine Award; and
• Wool Storage, Sampling and Testing Award 2010.

630. As can be seen, of the 73 modern awards that form part of the ACTU's claim, it has not called any evidence in respect of 68 of them. That is, in respect of all but five of the relevant awards, the ACTU has not even attempted to make good any of the factual assertions upon which it relies in respect of employees covered by the above awards. For reasons that we have earlier explained, the ACTU's survey does not achieve this purpose either.

16.7 FACILITATIVE PROVISIONS

631. As can be seen from Attachment 16A, several minimum engagement/payment provisions presently include a facilitative provision that enables an employer and employee to reach agreement to vary the length of the engagement/payment. In some awards, that ability in unqualified. In others, such agreement may be reached only in the circumstances prescribed by the clause.

632. For instance, some awards subject to the ACTU's claim contain a facilitative provision in the following terms in respect of part-time\(^{231}\) and casual\(^{232}\) employees:

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\(^{231}\) Aluminium Industry Award 2010 and Seafood Processing Award 2010
\(^{232}\) Alpine Resorts Award 2010; Aluminium Industry Award 2010 and Seafood Processing Award 2010
“In order to meet their personal circumstances, an employee may request and an employer may agree to a shorter minimum engagement.”

633. Such a facilitative provision was found in the Metals Award 1998 in respect of part-time employees at the time that the *Metal Industry Casual Employment Case* was heard. Having determined that the award would be varied to include a four hour minimum engagement for casual employees, the AIRC stated:

“[133] … We so (sic) no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances.”

634. This provision is clearly crafted to include multiple safeguards. It applies only to meet the personal circumstances of an employee and only at an employee’s request. The clause is not one that permits an employer, unilaterally or with an employee’s agreement, to reduce a minimum engagement period to suit the business’ needs. Rather, the clause is tailored to accommodate the personal circumstances of an employee and provide them with the relevant flexibility.

635. Other facilitative provisions are framed in general terms. For instance, the Ambulance Award states at clause 10.5(b): (emphasis added)

“On each occasion a casual employee is required to attend work the employee will be paid for a minimum of three hours’ work, except by agreement between the employer and the employee.”

636. The effect of the ACTU’s claim is to remove these important facilitative provisions. It seeks to do so absent any submissions or evidence in support of these proposals. There is no material before the Commission to suggest that such provisions have been the subject of abuse, or have been the cause of any adverse impact. Indeed there is no evidence before the Commission as to how minimum engagement/payment provisions in any of the industries here relevant are operating; those industries being:

- the aluminium industry;

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233 *Re Metal, Engineering and Associated Industries Award, 1998 – Part I* (Print T4991 at [133])
234 See also *Amusement, Events and Recreation Award 2010*
• the seafood processing industry;

• the operation of alpine resorts;

• the ambulance and patient transport industry; and

• the amusements, events and recreation industry.

637. The paternalistic approach taken by the ACTU in seeking the deletion of award provisions such as the first example we have provided, which have been drafted with the clear intent of accommodating the personal circumstances of their constituents, is baffling. It appears that their case has been mounted on the premise that the ACTU considers that employees should not be engaged for less than four hours each time they are required to work, even in circumstances where this does not meet the needs of the employees they represent.

638. The complete absence of any material before the Commission in respect of this element of the ACTU’s claim does not enable the Commission to make an assessment that the current clauses are failing to meet the legislative objective or that the provisions proposed in lieu are necessary in the sense contemplated by s.138. The ACTU’s desire to remove this flexibility from the relevant awards without so much as an explanation as to why it is sought should not be fulfilled. There is an absence of any clear basis upon which the Commission could do so.

16.8 INDIVIDUAL FLEXIBILITY ARRANGEMENTS

639. It is important to understand the extent to which the introduction of a four hour minimum engagement/payment would introduce a new inflexibility that cannot be circumvented, even in the event of agreement between the parties.

640. Each modern award includes a model ‘award flexibility’ term. It provides that notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of the award to meet the genuine needs of the employer and the individual employee.
The provision provides a mechanism by which an employer and employee can reach agreement to vary the application of award terms in order to accommodate their ‘genuine needs’. Such an agreement is referred to as an ‘individual flexibility agreement’.

641. The operation of the clause, however, is limited to award terms concerning matters that are identified in the model clause. Those matters are:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

642. It is self evident that provisions mandating minimum engagements/payments are not award terms concerning overtime rates, penalty rates, allowances or leave loading.

643. A Full Bench (Justice Ross, Senior Deputy President Watson, Commissioner Gregory) considered the contention that minimum engagements/payments are terms concerning arrangements for when work is performed, during the 2 year review of modern awards. An application was made by the ARA to reword the relevant subclause of the model flexibility term as follows (emphasis added):

“arrangements for when work is performed, including minimum shift engagements”

644. A similar variation was proposed by the NRA. In refusing to grant the claims, the Full Bench ruled that minimum engagement/payment terms do not fall within the meaning of the expression ‘arrangements for when work is performed’:

“[112] VECCI, and others, contended that minimum engagement provisions in modern awards fall under the head of power in s.139(1)(c) and accordingly fall within the expression ‘arrangements for when work is performed’ and hence
within the scope of the model flexibility term. Indeed, VECCI submitted that s.139(1)(c) was the only head of power which supported the inclusion of a minimum engagement term in a modern award and hence it must follow that such a term is within the scope of the model flexibility term.

[113] We do not accept VECCI’s analysis, for two reasons.

[114] First, contrary to VECCI’s submission, s.139(1)(c) is not the only source of power for minimum engagement periods in modern awards. Properly understood such provisions deal with minimum wages (s.139(1)(a)) or are incidental (within the meaning of s.142) to casual employment (s.139(1)(b)). This characterisation is apparent from a consideration of the minimum engagement term in the Clerks—Private Sector Award 2010, which is the award VECCI is seeking to vary. The relevant clause is clause 12.4 and appears under the heading, Casual Employment:

“12.4 Casual employees are entitled to a minimum payment of three hours’ work at the appropriate rate.” [emphasis added]

[115] This provision is clearly dealing with minimum wages for casual employees, it is not dealing with arrangements for when work is performed.

[116] The second reason for rejecting VECCI’s contention flows from a plain reading of the expression ‘arrangements for when work is performed’ [emphasis added]. A minimum engagement term says nothing about ‘when work is performed’, it simply prescribes the minimum payment to be made to casual employees for each engagement.”

645. In addition to the aforementioned claims of the ARA and NRA, VECCI sought to vary the model term by inserting a separate and distinct reference to minimum shift lengths. This application was also refused. The Full Bench was not persuaded that it was appropriate to include minimum engagement periods within the scope of the model flexibility term. It determined that its inclusion within the scope of the model flexibility term would not be consistent with the modern awards objective.

646. The Commission’s decision establishes that the model flexibility term does not permit an employer and an employee to reach agreement to vary the application of a minimum engagement/payment provision pursuant to it. As a result, absent a specific facilitative provision such as that found in the Manufacturing Award at clauses 13.2 and 14.2, the terms of an award do not provide a means by which an employer and employee can agree to apply a

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reduced minimum engagement/payment in any circumstances. That is, there
does not appear to be any ability under an award to circumvent the operation of
a minimum engagement/payment provision, irrespective of whether it is sought
in order to meet the needs of the employer, the employee, or both.

16.9 INTERACTION WITH OTHER AWARD PROVISIONS

647. To properly understand the implications of the ACTU’s claim, consideration
must be given to other award provisions that relate to minimum
engagement/payment clauses. The ACTU does not appear to have done so.

648. Take for instance provisions that enable an employee to work a broken shift.
The Cleaning Award and the Aged Care Award provide examples of awards
that contain such clauses. We do not here propose to deal comprehensively
with the proper construction of the relevant provisions in those awards (or any
other instruments that facilitate broken shifts). We note our concern however,
that the introduction of a minimum engagement/payment provision, subject to
the precise manner in which it has been crafted, may give rise to the contention
that the minima is applicable to each part of a broken shift. The issue is one
that may well turn on the construction of the relevant provisions of the awards
when read with the ACTU’s proposals, which are not uniform in their terms.
Needless to say, the application of a minimum engagement period to each
component of a broken shift is a significant cost burden and in certain
instances, virtually impossible to accommodate. It would effectively undermine
the very purpose of implementing a broken shift. It is not clear whether this is a
matter to which the ACTU has had any regard when developing its draft
clauses.

649. Similar considerations arise in respect of pre-existing minimum payment or
engagements that apply to work performed during overtime or ordinary hours
on a weekend. Take for instance the Electrical Power Award. Presently, the
award requires that a casual employee be ‘engaged for a minimum of three
hours’ (clause 13.2). The award does not prescribe a minimum
engagement/payment in respect of part-time employees.
650. The ACTU seeks to replace the current clause 13.2 with the following:

“A casual employee must be engaged for a minimum of four hours per day or shift.”

651. It also seeks the insertion of a new clause 12.8:

“A part-time employee must be engaged for a minimum of four hours per day or shift.”

652. Clause 26.1(a) prescribes the rate payable for the performance of overtime on Monday – Saturday, Sunday or on a public holiday. Subclause (b) goes on to state that day workers who work overtime on a Saturday, a Sunday or a public holiday ‘will receive a minimum payment of three hours on each occasion’.

653. Similarly, clause 24.3 of the award deals with circumstances in which an employee is recalled to work overtime after leaving the employer’s premises. In such cases, the employee ‘will be engaged to work for a minimum of three hours or will be paid for a minimum of three hours’ work in circumstances where the employee is engaged for a lesser period’.

654. If the ACTU’s claim were granted, it would not only impact upon the minimum engagement/payment to which a casual or part-time employee is entitled when performing work that attracts the minimum hourly rate of pay prescribed by the award, but it would also have implications for overtime performed on a weekend or public holiday, or where an employee is recalled to work overtime.

655. The proposed clauses require that the employee (be they a casual or part-time employee) be ‘engaged for a minimum of four hours per day or shift’ (emphasis added). If a casual or part-time day worker performs work on a Saturday, and all such time constitutes overtime (noting that pursuant to clause 24.1(a), ordinary hours are to be worked on Monday – Friday), the terms of the minimum engagement clause would require that a casual or part-time employee be engaged for a minimum of four hours. This is because the ACTU’s proposed clauses require that for each day, a casual or part-time employee must be engaged for a minimum of four hours.
656. It is curious that the protection presently afforded to all employees performing overtime in certain circumstances would automatically be more beneficial for casual and part-time employees than those engaged on a full-time basis. That is, casual and part-time employees would have the benefit of a longer minimum engagement provision absent any argument that might establish that the disability or inconvenience suffered by such employees is greater than those employed on a full-time basis. It is also apparent that to require a full-time employee to perform overtime would, in these circumstances, be more cost effective if the work to be performed is for three hours or less. This may result in preference being given to rostering full-time employees to work at such times.

657. The Electrical Power Award provides only one example of a consequence that is likely to arise in several others. The ACTU has made no attempt to grapple with the subtleties surrounding these issues, to explain how the provisions they have proposed would interact with other award clauses and whether the resulting consequences are intended or inadvertent.

658. If our interpretation of the aforementioned provisions is correct, considerations as to the cost implications of the ACTU’s claim are magnified. The cost of introducing a four hour minimum engagement or payment provision is not limited the payment of the minimum hourly rate prescribed by the award for the performance of overtime, absent other penalties or loadings.

659. Rather, if the introduction of a four hour minimum engagement or payment provision has the effect of extending any pre-existing minimum engagement/payment that applies to the performance of work for which a penalty or loading is prescribed by the award, or by introducing the requirement of a minimum engagement/payment to the performance of such work, this inflates the cost implications of the claim considerably. As previously stated, this may lead to employers avoiding the rostering of casual or part-time employees to work at such times.
16.10 THE AMWU'S CLAIMS

660. The AMWU seeks to vary the minimum engagement/payment provisions in the Manufacturing Award. We deal with each in turn.

661. Firstly, it proposes the following change to clause 13.2, which applies to part-time employees:

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

662. The effect of the change would be to:

- increase the minimum engagement period from three hours to four hours;
- place a limitation on the extent to which the employee and employer could agree to reduce the minimum engagement period; and
- introduce a requirement that the agreement reached be recorded as a time and wages record.

663. Clause 13.2, as presently drafted, was inserted pursuant to the AIRC's decision in the Metal Industry Casual Employment Case:

“[133] … For part-time employees we will adopt a minimum of three hours, we also allow a similar dispensation to that which was applied by the Full Bench of the New South Wales Industrial Relations Commission in the State Part-Time Work Case. … In short part-time employment provides greater financial certainty and predictability of earnings. Accordingly there is less need for each engagement or attendance to meet a minimum level of payment. We so (sic) no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances.”

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237 Re Metal, Engineering and Associated Industries Award, 1998 - Part I (Print T4991 at [133])
664. The AMWU has not established that there has been any change in circumstances that warrants a departure from the approach taken by the Full Bench in the above passage. To the extent that it relies on notions of ‘working time insecurity’ or employment related costs as identified by the ACTU, we refer to our submissions above in this regard. No explanation is provided by the union as to why the additional regulatory obligation is sought.

665. Secondly, it seeks the following variation to clause 14.2 in relation to casual employees:

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

666. The AMWU makes the following submission in this regard (emphasis added):

“There is no floor on the minimum daily hours to be requested. Given the limited bargaining power of casual employees, their level of award reliance and the ability of facilitative provisions to reduce the safety net without Commission oversight it is essential that a safety net be created for the “facilitative floor.” The Union proposes that the facilitative floor be 3 hours consistent with the definition of facilitative provisions requiring a floor or range within which facilitation can occur.”

667. We struggle to understand the AMWU’s concern. It appears to us that the provision is drafted to apply only at the employee’s election, in order to accommodate their personal circumstances. The provision does not permit an employer to seek to reduce the minimum engagement period with the employee’s consent or otherwise, in order to accommodate the business’ needs, leave aside permitting a unilateral reduction to an employee’s minimum engagement period. We cannot see the relevance of an employee’s ‘bargaining power’, their award reliance or the need for Commission oversight in these circumstances.

668. In addition, we refer to and rely upon the submissions we have earlier made regarding the ACTU’s proposal to delete facilitative provisions such as these from a number of awards.

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238 See the AMWU’s submission dated 19 October 2015 at paragraph 64
669. The AMWU has sought identical variations to clauses 12.2 and 13.2 of the FBT Award. We have not identified any submissions or evidence in support of its claim. There is clearly no material before the Commission that would enable it to determine that the provisions proposed are necessary in the sense contemplated by s.138 of the Act. The variations should not be granted.

16.11 THE AMWU – VEHICLE DIVISION’S CLAIMS

670. The AMWU – Vehicle Division seeks the introduction of a new four hour minimum payment clause in respect of casual employees in the Vehicle Award, which does not currently contain such a provision. It is also proposing a new four hour minimum engagement clause in respect of part-time employees, with an ability to reach agreement to reduce that minimum engagement period to three hours in order to accommodate the personal circumstances of the employee.

671. The AMWU – Vehicle Division seeks to rely upon the submissions of the ACTU and AMWU in respect of these claims. We have responded to each of those earlier in our submissions.

16.12 THE POTENTIAL IMPACT OF THE CLAIMS ON EMPLOYERS

672. The variations sought by the ACTU in certain cases seek the introduction of a four hour minimum engagement. That is, the proposed clause would require that the employee be engaged for or rostered to perform work for at least four hours. In other instances, the ACTU seeks a provision that requires a minimum payment of four hours. This is a different proposition. The clauses proposed would mandate payment for at least four hours of work, irrespective of the duration of time that was in fact spent working by the employee.

673. As we have earlier stated, the impact of the ACTU’s claim will vary from industry to industry. This is in part due to the differing pre-existing minimum engagement/payment provisions in awards and due to the varying nature of the work performed under each of the relevant awards. It is for this very reason that the ACTU’s claims must be considered on an award by award basis.
674. The Joint Employer Survey provides a useful insight into the implications of granting the ACTU’s claim. The survey asked the following relevant questions:

- What would be the effect on your organisation if all part-time employees were entitled to a four hour minimum engagement period per day/shift?
- What would be the effect on your organisation if all casual employees were entitled to a four hour minimum engagement period per day/shift?

675. At Attachments 16B – 16G to these submissions, we have extracted all responses provided to these questions by respondents that identified that they are covered by the following awards:

- **Attachment 16B**: Aged Care Award;
- **Attachment 16C**: Fast Food Award;
- **Attachment 16D**: Health Professionals Award;
- **Attachment 16E**: Horticulture Award;
- **Attachment 16F**: Hospitality Award;
- **Attachment 16G**: Nurses Award; and
- **Attachment 16H**: SACS Award.

676. We urge the Commission to review and have regard to these responses. They provide evidence of the serious consequences that will arise in each of the industries if the variations sought by the ACTU were made.

677. We here propose to provide examples of specific industries in which the variations proposed would be particularly problematic. The adverse effects of the proposals, however, are by no means limited to these industries.
Aged Care Award 2010

678. Clause 22.7(b) of the Aged Care Award presently requires that part-time and casual employees receive a minimum payment of two hours for each engagement. The ACTU seeks an increase of this minimum payment to four hours. Attachment 16B demonstrates the profound impact that the unions’ claim would have in this industry.

679. Many employers covered by this award provide in-home care. This involves an employee travelling to the clients’ residence to provide them with a service. Often the assistance that the employee renders to the client involves only the performance of a particular task (such as preparing a meal or assisting a client to bathe or take medication) that may take less than one hour. In such circumstances, a minimum payment of four hours is a serious new financial imposition. Respondent 3347 explains this as follows:

“This would make our current Home Care service potentially unviable in areas for which demand is low. These areas are generally areas of low unemployment also where our current employees very much value the work that we can provide. Our clients currently demand services that can be as little as 15 minutes and in some regions this minimum engagement may make it impossible to provide a full roster and cost effective service. In addition our business in being squeezed by sole traders who are coming in with the ability to provide services at a fraction of the costs of our staff.”

680. Multiple responses make reference to CDC; Consumer Directed Care. This service model gives clients greater control over the services they receive, when they receive them and by whom:

“Detrimental. We would no longer have the flexibility to provide some clients with their requests under CDC. For example, a two hour stint at night for assisting someone to bed. In our small rural community there is only one client we assist with this and we could not do it cost effectively if we had to engage someone for 4 hours instead of 2.”

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239 See for example response ID 2280.
240 Response ID 3347. See also response ID 3141.
241 Response ID 3143.
681. Numerous respondents have identified that the additional costs associated with the ACTU’s claim would have a serious impact on their viability. Some go so far as to say that the business could not survive the financial implications of the claim if it were granted. For instance:

“We would not be in existence. We could not survive. The only way this could be overcome would be to deny care because we do not have staff to send to the clients.”

682. The evidence establishes that the ultimate consequence of these increased costs would be felt by way of altered service delivery outcomes. Several references are made to the employer’s inability to continue providing the services they presently offer if the proposed changes were made as it would be cost prohibitive. Aged consumers who need care would either experience an increase in costs or a complete withdrawal of services, particularly in rural and regional areas. For example:

“Costs would increase due to the need to roster employees to attend outside appointments with residents. Sometimes these appointments may only take an hour or two. Employees are happy to accept these shifts, but if we are forced to give them a min. of 4 hours we would have to withdraw this service due to increased costs. This would than adversely affect the resident as a private nursing agency would charge considerably more for this service. A lot of residents do not have family who are able to accompany them to appointments.”

683. Response ID 3133 similarly states:

“This would add significant costs to consumers, especially those receiving community services. It would also reduce flexibility of services to clients in the community. It would increase costs overall to the organisation.”

684. Many respondents also state that they would need to reduce the number of casual and/or part-time employees. Others speak of funding constraints which would not cover the additional costs incurred.

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242 See for example response ID 1581, 2022, 2026, 2176, 2262, 3130, 3307, 3392.
243 Response ID 3095.
244 See for example response ID 2207, 5753 and 3133.
245 Response ID 2008.
246 Response ID 3133.
“This would have a huge negative financial impact on our Business as we are Government funded, all payments are regulated by Government Legislation, therefore we are unable to control income to our Organisation. We are a community based not for profit Organisation. Currently the minimum engagement for our Organisation as per our EBA is 2 hours.”

685. As can be seen, a requirement that part-time and casual employees be paid a minimum of four hours will give rise to a whole raft of consequences for businesses, their employees and their clients:

“Due to the introduction of the CDC and NDIS, we need flexibility for our clients and employees.

Introduction of the 4hr minimum may mean we employee less casuals or they get less hours as we cannot use them to fill a 3 hour shift (e.g. someone leaves work early and we get agency staff for last 3 hours).

It may also mean we have to pay employees to make up for the 4 hour minimum, meaning we are paying for unproductive hours. As a not-for-profit, that is funds that could be better spent on our clients.

Lastly, it would cause great difficulty organising staff meetings and training sessions for part-time and casual employees, as we could not ask staff to come in for a 2 hour meeting. Meaning they might miss out on valuable information and interactions with their colleagues.

686. The potential impact of the ACTU’s claim on the aged care industry should not be underestimated. The survey responses we have here set out are but a sample of those found at Attachment 16B. They consistently indicate that employers covered by the Aged Care Award foresee an inability to absorb the increased costs, often due to their funding arrangements, and serious implications for the structure of their labour force and service provision.

Banking, Finance and Insurance Industry Award 2010

687. The Banking Award does not presently contain any minimum engagement or payment requirements. The ACTU has sought the inclusion of a four hour minimum engagement in respect of part-time and casual employees. We note that the ACTU has not mounted any evidence that is specific to this industry.

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247 See for example response ID 2026, 2125, 2126, 2182, 3160, 3221, 3242, 3267.
248 See for example response ID 2280, 3219.
249 Response ID 3267.
250 Response ID 5089.
688. Multiple survey respondents in this industry have cited the difficulties that would arise regarding the personal circumstances of employees and their availability if a minimum engagement period were introduced.251 For instance, response ID 360 states:

“This would effect our organisation. We have a pool of casual staff we can choose from. This allows flexibility as staff can alternate, job share, work in small teams and choose the hours that suit them. We would most likely use less casual staff.”252

689. Some have identified that they may no longer be able to accommodate the hours that an employee seeks to work due to their caring responsibilities:

“major negative - some have limited availability due to other family commitments”253

690. Others state that they employ students who could no longer be engaged due to their study commitments:

“we wouldn’t be able to offer any of them employment. As time doesn't allow a four hour shift due to the time restraints between the hours they finish school and our office closes.”254

691. The evidence suggests that this is an industry that is presently able to accommodate the needs of employees by engaging them for shorter shifts. A prohibition on doing so would reduce the extent to which such employees are engaged by these operators.

Cleaning Services Award 2010

692. The Cleaning Award contains a unique set of minimum payment provisions in respect of part-time and casual employees. The minimum payment to be made is contingent upon the ‘total cleaning area’ where the employee is engaged. The cleaning area is defined as ‘the area that the employer is contracted to clean, including internal areas, offices, toilets, kitchens and all other common/public areas but excluding car parks’. That is, the minimum payment

251 See response ID 3590 and 5613.
252 Response ID 360.
253 Response ID 477. See also response ID 715.
254 Response ID 4246.
is effectively determined by the contractual obligations of the employer (being a business providing contract cleaning services to a client) with a third party.

693. Clause 24.2 states: (emphasis added)

"24.2 Part-time and casual employees"

(a) Subject to the clause 24.3, the ordinary hours of work will be worked in periods of not more than 7.6 hours per day, on not more than five days, Monday to Sunday inclusive.

(b) The employer will roster part-time and casual employees for the following minimum engagement periods, but in the event that the employer does not require employees to work for the full period of the minimum engagement, the employer must pay employees as if they had worked the minimum period.

(c) Where only one employee is engaged at a small stand alone location with a total cleaning area (as defined) of 300 square metres or less, and where it is not practicable for a longer shift to be worked across two or more locations, the minimum engagement will be for one hour.

(d) Where employees are engaged at a location with a total cleaning area (as defined) of up to 2000 square metres the minimum engagement will be for two hours.

(e) Where employees are engaged at a location with a total cleaning area (as defined) of between 2000 and 5000 square metres the minimum engagement will be for three hours.

(f) Where employees are engaged at a location with a total cleaning area (as defined) of more than 5000 square metres the minimum engagement will be for four hours.

(g) The minimum engagements of three and four hours provided for in clauses 24.2(e) and (f) will operate from the date when a contract changes at a site or building between 1 January 2010 and 31 December 2014.

(h) Transitional arrangements

The following will continue to apply to ongoing contracts after 1 January 2010 until there is a change of contract, or until 31 December 2014 whichever is the sooner:

(i) For all States and Territories (excluding New South Wales and the ACT) the minimum engagement for part-time and casual employees will be:

- three hours on a Sunday or Public holiday; and
- two hours on a Monday to Saturday.

Provided that where the employee is the sole person employed on the premises, on a Monday to Saturday, the minimum will be one hour.

(ii) For New South Wales and the ACT, the minimum engagement for part-time and casual employees will be:
• three hours at the appropriate hourly rate for each start.

Provided that where one employee is employed at a small location, the employee will work and be paid on a one shift basis of no less than two hours where the total cleaning area (as defined) is 500 square metres or more and no less than one hour when the total cleaning area (as defined) is less than 500 square metres."

694. The provision above is a clear example of a minimum payment provision that is tailored to the specific needs of an industry. Despite this, the ACTU seeks to delete subclauses (b) – (g) and replace them with a four hour minimum engagement for a part-time employee and a four hour minimum engagement or payment for a casual employee.

695. The nature of the work performed by employees engaged by contract cleaners must properly be understood. During the Part 10A Award Modernisation process, the AIRC made the following observations about the industry and the work performed: (emphasis added)

"[59] The contract cleaning industry is characterised by high levels of part-time employment. Almost 50% of employees are engaged on a part-time basis often working shifts which may be of very short duration. It is also an industry where there are frequent changes of contract and where commonly employees cease employment with the outgoing contractor and become employees of the incoming contractor. It is an industry in which employees are highly reliant on the award and competition for contracts is primarily based on price."255

696. We also note that the current minimum payment provisions found in the award were developed by consent between the industrial parties involved, which included the Liquor, Hospitality and Miscellaneous Union (as it then was).256 It appears that the transitional arrangements were inserted in recognition of the fact the modern award terms would impose more onerous obligations on employers than those preceding them in the relevant pre-modern instruments.

697. The location of the work, the volume of the work and the size of a particular job is determined by the client’s needs. The business is responsible for servicing the client, subject to the terms of the contractual agreement that exists between them. The employer may be party to contracts with several clients who each

255 Award Modernisation [2009] AIRCFB 50 at [59]
256 Award Modernisation [2009] AIRCFB 50 at [58]
require only small discrete cleaning tasks to be performed, which only necessitate one or two hours to complete. That an employer will be able to provide an employee with consecutive jobs at various locations in order to meet the four hour minimum cannot be assumed. This is a matter that does not sit entirely within the purview of the employer.

698. If a client requires the employer to clean a ‘small stand alone location with a total cleaning area (as defined) of 300 square metres or less’, the job is at a distant location where the employer does not have a contract with other clients in the area and therefore ‘it is not practicable for a longer shift to be worked across two or more locations’, the award presently requires a minimum payment for one hour. This arrangement reflects the nature of the industry and its operations.

699. Take for example response ID 3955. In respect of part-time employees, the relevant employer states that the change would result in a reduction of the number of part-time employees they engage:

“It would significantly reduce the number of staff we could employ.
Essentially several people would loss [sic] their job to afford those hours to others to meet this minimum shift requirement.
It would especially be a burden for sites we provide commercial cleaning services to, where the building is very small and there are limited other available sites nearby in order to group them together to meet this minimum shift requirement (particularly in regional locations)”

700. When answering the question regarding casual employees, the same respondent spoke of the cost increases that would be faced by their clients:

“It would overly inflate the cost of providing our services to our clients as we would have to charge for 4 hours, even if they only wished to purchase, and only required, one or two hours.”

701. The financial implications of the proposed claim have been described as ‘devastating’ in light of the fact that most cleaning jobs undertaken by a

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257 Response ID 3955.
258 Response ID 3955.
particular employer only require two hours of work to complete. Other employers share their experience of employees not seeking to work longer shifts:

“it would not work in this industry
the worker not want more work in most cases”

702. The ACTU has not made any attempt at addressing the industry-specific considerations that arise in respect of this award; considerations which its relevant affiliate recognised and acknowledged at the time when the award was made.

Fast Food Industry Award 2010

703. The Fast Food Award requires a three hour minimum engagement of part-time and casual employees. The ACTU seeks to increase this to four hour. Ai Group seeks to vary the minimum engagement period applying to casual employees, such that the clause would enable an employer and employee to agree to an engagement of less than the three hour minimum. We refer to our submissions of 14 October 2015 and the evidence of Ms Limbrey in this regard.

704. We refer the Commission to Attachment 16C to these submissions, which sets out all responses provided by employers covered by the Fast Food Award to the joint employer survey questions. As can be seen, the vast majority of respondents indicate that the changes would have an adverse impact upon their business.

705. It is important to appreciate the way in which respondents have described the magnitude of the effect that the ACTU's proposal would have on their business. Respondent 851 provides a comprehensive answer:

“Disastrous.
* We would have to reconsider hiring any junior staff (say, under 17) as some barely cope with 3 hour shifts as it is.

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259 Response ID 4969.
260 Response ID 976.
706. Respondent 862 states that they would have to ‘let [part-time employees] go’ and that the business would close. Respondent 867 states that they ‘would cease employing anyone on a permanent part-time business’. In respect of casual employees, respondent 867 states that ‘it would may (sic) my wages expense even more unpalatable and my rostering even more difficult’. Respondent 884 states:

"Massive repercussions. This would send us to the wall. My business has no need for a max 4 hour shift. We employ 99% school age. This would also have an effect on their schooling."  

707. Respondent 4932 states the following in respect of the ACTU’s part-time employment claim:

"I would have to let them go as we have no need for staff more that 2.5 to 3 hours over lunch. We already over roster due to the minimum being 3 hours. We only need 2 people from 12 to 2, but roster the extra hour, costing us 7 hours a week in wages we need not pay. 14 hours a week would send us broke, putting 10 people out of work."  

708. The same respondent answered the question regarding casual employment as follows:

"I would close down due to excessive wage bill. Again I need 2 staff on from 6 to 8pm, I have to roster 2 staff for 3 hours each night as the junior is required to do 3 hour shift. over all the regulation requiring me to roster a minimum 3 hour shift costs on average an extra $300 a week in wages that I do not need."  

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261 Response ID 851.  
262 Response ID 884.  
263 Response ID 4932.  
264 Response ID 4932.
709. The number of employers who have indicated that the financial viability of their business would be compromised if the ACTU’s claim were granted, is alarming.

710. The survey responses also make clear that the claim would make hiring junior employees who currently perform work after school very difficult, if not impossible. Many cite the difficulties that would arise in relation to the engagement of school-going junior employees. This is consistent with Ai Group’s contention that the award should in fact provide greater flexibility in order to better accommodate the school commitments of young employees. Despite the submissions made by the ACTU regarding ‘employee preference’ for longer shifts, we cannot help but query whether it has in fact consulted its younger constituents who, the evidence suggests, would likely no longer be employed in the fast food industry.

Food, Beverage and Tobacco Manufacturing Award 2010

711. The FBT Award presently contains a three hour minimum engagement for part-time employees, with a facilitative provision that enables an employer and employee to reach agreement to reduce it. The AMWU seeks to replace this with a four hour minimum engagement, and a limitation on the facilitative element of the clause, such that agreement can only be reached to reduce the minimum engagement to three hours.

712. The survey responses below establish that:

- respondents covered by the award consider that an increase to the minimum engagement period, albeit by one hour, would result in increased costs and a loss of flexibility; and

- the facilitative provision is presently being utilised by employees and employers to accommodate the employee’s personal circumstances.

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265 See for example response ID 187, 849, 851, 867, 872, 884, 894, 2227, 2244, 2470, 4470, 4590, and 5017
<table>
<thead>
<tr>
<th>Response ID</th>
<th>Responses – part-time employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1305</td>
<td>Would lead to reduction in head count as current shifts may not meet minimum 4hr requirement and therefore would need to streamline workforce so that the employee could meet 4hr requirement</td>
</tr>
<tr>
<td>1743</td>
<td>I would have to terminate the services of one, however it wouldn’t impact on the other two at this time.</td>
</tr>
<tr>
<td>1868</td>
<td>This would be a financial burden.</td>
</tr>
<tr>
<td>2746</td>
<td>May have some effect as some employees can only work 2 or 3 hours per day due to family commitments.</td>
</tr>
</tbody>
</table>
| 3626        | * increased labour cost,  
              * operational inefficiency  
              * possible return to greater casual employment (if casual minimum engagement less than 4 hours)  
              * less workforce flexibility would add to cost of labour  
              * reduction in skill levels as change to minimum would effect our ability to offer flexible work arrangements which would also negatively impact mostly women in the workplace |
| 3928        | Add to running costs |

713. We note again that the AMWU has not provided any reasoning or advanced any probative evidence in support of the changes it seeks.

714. The variation should not be granted.

**General Retail Industry Award 2010**

715. The Retail Award requires that part-time employees be engaged for a minimum of three hours. The ACTU’s proposal is to increase this to four hours. The responses below are a sample of those provided by employers covered by this award regarding this element of the ACTU’s claim.

716. Apart from issues pertaining to the cost increases that would necessarily result, two other themes emerge from the joint employer survey:

- the difficulties that the ACTU’s proposal would create for junior employees who seek to work after school; and
• the practice of engaging part-time employees to cover break times, which does not necessitate four hours of work.

717. As can be seen below, many of the responses indicate that the employer would make changes to the structure of their labour force by using fewer part-time employees. The responses are demonstrative of the fact that whilst the ACTU might suggest that the change it seeks is a small or incremental one, the potential impact upon businesses appears to be profound.

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Responses – part-time employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>545</td>
<td>Increased cost to business &amp; reduced flexibility to cover peak customer periods.</td>
</tr>
<tr>
<td>684</td>
<td>I might look at making them redundant.</td>
</tr>
<tr>
<td>876</td>
<td>There would be a large increase in the wages payable on the store, This could result in not recruiting part time employees instead increasing the casual workforce.</td>
</tr>
<tr>
<td>879</td>
<td>Less flexible so harder to work with</td>
</tr>
<tr>
<td>886</td>
<td>This would be very inflexible for our business, in particular for retailers, where it isn't always possible both on a person's availability, business requirements and cost requirements.</td>
</tr>
<tr>
<td>1318</td>
<td>IN WHITE GOODS WE WOULD MAKE A LOSE AS THE PROFIT LINE WOULD NOT COVER IT</td>
</tr>
<tr>
<td>1319</td>
<td>Staff would have less flexibility. We would have less staff.</td>
</tr>
<tr>
<td>1433</td>
<td>I would not employ any part time employees</td>
</tr>
<tr>
<td>1630</td>
<td>I would not employ anyone if that was the case, as it would become to expensive. Is to force businesses to go broke by having to employ for longer hours when not required.</td>
</tr>
<tr>
<td>1793</td>
<td>Significant - PT workers are generally rostered for lunch covers and breaks, and to cover extended trading hours outside of our FT colleagues core hours</td>
</tr>
<tr>
<td>1824</td>
<td>We utilise some 3 hour shifts for break coverage. If we had to increase minimum shift to 4 hours we would be having to spend some hours at times when it is not required. This would mean we would not be able to create the most efficient rosters and service the customers in the best way.</td>
</tr>
<tr>
<td>1847</td>
<td>Increased cost when only required to cover lunch breaks of full-time retail employees. Too much overlap of hours.</td>
</tr>
<tr>
<td>1873</td>
<td>Would have to transition employees to casual and they would loose entitlements We would also loose some employees as they work in with the hours that they are available.</td>
</tr>
</tbody>
</table>
We would also need to look at alternate business situations

Some of our disabled workers are not able to work 4 hours in a day. It is too much for them.

reduced employment numbers
increased costs
reduced flexibility

this would mean juniors who come in after school could NOT work as they can only work for a maximum of 3 hours

It would rule out school kids working after school

would exclude casual school staff leading to employing part time workers thus increased wages

* increased labour cost,
* operational inefficiency
* possible return to greater casual employment (if casual minimum engagement less than 4 hours)
* less workforce flexibility would add to cost of labour
* reduction in skill levels as change to minimum would effect our ability to offer flexible work arrangements which would also negatively impact mostly women in the workplace

A REDUCTION IN FLEXIBILITY

Problematic

Add to running costs

It would further limit our ability to carry out our business in an efficient and effective manner

I would not have any

it would be a disaster - the 2nd part of our business engages a larger number of part timers and an increase from 3 to 4 hours would make a number of our stores non-viable.

Difficult because part time hours are contracted hours and because of 7 day trade difficult to roster.

718. We turn then to casual employees. The award presently recognises the special circumstances of junior employees at clause 13.4, which states:

“13.4 The minimum daily engagement of a casual is three hours, provided that the minimum engagement period for an employee will be one hour and 30 minutes if all of the following circumstances apply:

(a) the employee is a full-time secondary school student; and

(b) the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and
(c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and

(d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee."

719. This clause was inserted after a series of decisions were handed down regarding multiple applications that were made to vary the Award to provide for a shorter minimum engagement provision for school students. The clause has been the subject of proceedings before Full Benches of the Commission’s predecessors and the Federal Court of Australia. The ACTU has not provided any cogent reasons establishing why the relevant decisions should be departed from. Indeed it has not made any attempt to deal with the history preceding the relevant clause or to establish why a clause that is intended to enable employment opportunities for younger members of the workforce should be disbanded.

720. As the Commission will see from the responses below, the employment of junior employees is one of the most frequently cited concerns in the joint employer survey. The responses also indicate the impact of the change from three hours to four hours for other employees:

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – casual employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>245</td>
<td>Would result in less casual staff. Would consider the opening hours of the business</td>
</tr>
<tr>
<td>252</td>
<td>This would impact our rostering and payroll budget</td>
</tr>
<tr>
<td>308</td>
<td>We would significantly cut back on head count and would negatively impact on customers service and therefore revenue</td>
</tr>
<tr>
<td>332</td>
<td>I would not be able to hire casuals</td>
</tr>
<tr>
<td>378</td>
<td>Staff would be cut and would have to work harder during the busy periods</td>
</tr>
<tr>
<td>440</td>
<td>Our store is only open until 5.30pm so we couldn’t accommodate our school aged casuals from the end of school until we close the store. unless there was a provision left in place for after school hours, we would have to let them go.</td>
</tr>
<tr>
<td>544</td>
<td>It would prevent us employing a school or TAFE student in the future, they couldn’t work from 3-5pm.</td>
</tr>
<tr>
<td>545</td>
<td>Reduced flexibility of staff roster.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Location</th>
<th>Observation</th>
</tr>
</thead>
<tbody>
<tr>
<td>588</td>
<td>THIS COULD COST US A GREAT DEAL IN QUIETER TIMES PAYING STAFF WHEN THERE IS LITTLE TO DO</td>
</tr>
<tr>
<td>593</td>
<td>We could not do this as most of our casual employees are juniors who still attend school so have limited availability. After school shifts would become impossible as they cannot get to work before 4pm but we close at 6pm and this cannot be changed due to shopping centre trading hours.</td>
</tr>
<tr>
<td>678</td>
<td>Probably would cut back on hours and staffing numbers, some days we don't need staff here for that long</td>
</tr>
<tr>
<td>720</td>
<td>It would mean we would not have any school aged employees working.</td>
</tr>
<tr>
<td>803</td>
<td>The casuals would not get the work, putting more pressure/stress on other staff!</td>
</tr>
<tr>
<td>819</td>
<td>Would increase our costs and would probably mean that we would do this a different way without the casual. When we open on Saturdays we only open for 3 hours.</td>
</tr>
<tr>
<td>840</td>
<td>If we would normally employ a casual for three hours and there was a four hour minimum we would simply not employ them at all for that day, we would work by ourselves instead. If there was to be a four hour minimum our employees would each lose, on average, 6 hours a week of work. We would just make do without them and do the extra work ourselves.</td>
</tr>
<tr>
<td>854</td>
<td>Would make rostering more difficult to accommodate 4 hour shifts. Younger staff tire easily so we try to keep their shifts to 3 hours. Also often have a 3 hour shift over the busy middle part of the day - 4 hours would be too long and we would be paying wages we don't need to.</td>
</tr>
<tr>
<td>879</td>
<td>Detrimental</td>
</tr>
<tr>
<td>886</td>
<td>Incredibly inflexible and in many occasions difficult to provide due to the nature of our business operating hours. It would severely limit the ability to hire young workers due to school and other commitments.</td>
</tr>
<tr>
<td>891</td>
<td>Economic unsustainable reduction in employee numbers</td>
</tr>
<tr>
<td>962</td>
<td>Average shifts are between 5-8 hours for casuals and we already employ casuals for a minimum of 3 hours as per award so a 4 hour shift would not have a huge impact on our business.</td>
</tr>
<tr>
<td>1101</td>
<td>Forced roster changes. Significant cost increase for no operational benefit.</td>
</tr>
<tr>
<td>1140</td>
<td>It would have a huge affect and become quite difficult on us with breaks etc. It would make me decide whether I should keep trading as it is hard enough now. Also some of my staff are at uni and this would not be convenient for them either as they need to fit in with study and lectures.</td>
</tr>
<tr>
<td>1208</td>
<td>Would not employ casuals</td>
</tr>
<tr>
<td>1216</td>
<td>We would no longer be able to employ young school age staff for after school and Saturday morning shifts</td>
</tr>
<tr>
<td>1235</td>
<td>Significant as more paid hours which could result in employing less staff and possible store closure(s) where profit is marginal.</td>
</tr>
<tr>
<td>1267</td>
<td>During peaks, we would need to significantly reduce the number of casuals we employed in some parts of the business.</td>
</tr>
<tr>
<td>1319</td>
<td>They would have less shifts allocated.</td>
</tr>
<tr>
<td>1433</td>
<td>I would seriously consider reducing the number of hours I employ casuals.</td>
</tr>
<tr>
<td>Page</td>
<td>Text</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>1500</td>
<td>it would change the roster for the 7 day period and also change the weekend and public holiday times and increase costs</td>
</tr>
<tr>
<td>1759</td>
<td>not good as most employees are unavailable for 4 hours minimum hours</td>
</tr>
<tr>
<td>1762</td>
<td>Probably would not employ them as four hours is too long</td>
</tr>
<tr>
<td>1819</td>
<td>We would have to do more work ourselves as four hours doesn't give us the flexibility we need. Our employees are happy to be flexible don't impose rules that aren't required.</td>
</tr>
</tbody>
</table>
| 1873 | Business would need to amend trading hours  
Review of structure and rosters  
No flexibility |
| 1881 | Only junior employees who are still studying that complete a shift after school ie 2 to 3 hours minimum required. |
| 1901 | they are already entitled to minimum of 3, however 4 in some stores would be too much for a cover shift. |
| 1905 | change of rostering habits less employees hired |
| 1906 | Increase to wages. |
| 1913 | LESS WORK FOR THEM |
| 1915 | We would not be able to employ after school casuals as we can only fit 3 hours after school. Most other shifts are 4-5 hours. |
| 1917 | NEGATIVE. 3 HOURS GIVES ME THE BREAK I NEED AT TIMES. I WOULD EMPLOY THEM LESS DAYS AS IT WOULD NOT BE Viable TO HAVE TO PAY THAT EXTRA HOUR. |
| 1955 | Close business  
reduce numbers to increase hours |
| 1963 | For the school kids after school - means that we would not be able to employ them.  
On weekends when our opening hours are only 3.5 hours means that we would probably lessen staff - not paying for time not worked. |
<p>| 1965 | We probably wouldn't employ as many |
| 2065 | THIS WOULD EFFECT OUR WAGES AS THE THREE HOUR MINIMUM ALLOWS STAFF TO BE UTILISED WITHOUT A GREAT EXPENSE |
| 2202 | we would employ less |
| 2203 | Increased costs, reduced numbers |
| 2246 | negative, may result in paying the employee to fulfill nebulous and unnecessary tasks to meet the minimum obligation when genuine work isn't available. lost revenue. |
| 2284 | we would go broke or not employ casuals - as we operate only till 6 pm and 14 out of 26 are school age employees who would have to be paid for hours not work, the other part time employees do not have enough work to do a four hour shift due to the nature of their job ( newspaper delivery) We have a contract with HWT to delivery papers by 7am. They arrive at 4 am we would pay staff to do nothing. It should be an arrangement between employer and employee the minimum hours worked. |
| 2286 | not good it will mean fewer people employed and small business owners forced to work longer hours to keep wage costs to a minimum |
| 2287 | This would have an effect on our base rosters, as lunch cover casual shifts are generally a 3 hour shift. |
| 2407 | It wouldn't be worth having casual workers on a sunday if that was the case. We only |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2426</td>
<td>Cost more wages for certain periods and would look to employ less people</td>
</tr>
<tr>
<td>2799</td>
<td>Would affect a few shifts eg Staurday and Sundays. Some shiftscould not extend eg after school shifts as students don’t finish school to 3.30pm and shop closes at 6 pm</td>
</tr>
<tr>
<td>2830</td>
<td>couldn’t employ a school kid</td>
</tr>
<tr>
<td>2861</td>
<td>This would have a huge effect on the payroll budget. We would have to cut back hours somewhere in order to not exceed the payroll budget. It would greatly effect lunch cover shifts.</td>
</tr>
<tr>
<td>2903</td>
<td>Devastating! Sometimes a person is only needed for three hours. Why pay for more when you need less?</td>
</tr>
<tr>
<td>3398</td>
<td>This would only affect our junior employees (under the age of 18). We employ some local teenagers to work as assistants after school and these shifts are generally 2-3 hours. It would affect us negatively as we would have to employ older employees who can work a 2-6pm shift rather than a 4-6pm shift - costing more for an easy job easily fulfilled by juniors. Again we also see it as important that we can offer work to local teenagers while still at school to give them experience etc.</td>
</tr>
<tr>
<td>3414</td>
<td>A major effect, they probably wouldn’t have a job. We need the flexibility for a casuals to work less than 4 hrs per shift sometimes.</td>
</tr>
<tr>
<td>3608</td>
<td>It would affect the school kids as we shut at 7pm so only time for a 3 hour shift. Would not affect day staff but if also takes away the flexibility</td>
</tr>
</tbody>
</table>
| 3626 | * increased labour cost  
* employ fewer casuals  
* increased workload on existing permanent staff as cost of additional resources too great  
* operational inefficiency (people engaged when work is not required or same work is completed over greater time frame)  
* compromised customer service  
* customer dissatisfaction and potentially less sales (walk out if service not prompt) |
| 3785 | We would be required to close 13 outlets that service schools as we would not be able to operate, as a business |
| 3828 | Severe. I would have to reassess weekend work and decrease the amount of staff required daily, therefore staff would have to work more hours under more pressure during the bust periods |
| 3946 | This would not work for our school age workers who come after school. They would not get any work as we close at 5:30pm and I would not pay for 4 hours. |
| 3957 | Would have to restructure |
| 3983 | it would diminish flexibility when using school age casuals |
| 3996 | They can’t work these hrs for us necessarily in one shift so they determine how long they work. For example, a secondary student starting work immediately after school (4pm) is not going to work until 8pm. |
| 4143 | I would not employ any |
| 4218 | We would have to re-arrange our staffing requirements, probably employ fewer persons for longer hours |
| 4497 | We would close the doors on Sunday Trade (only open 3 hours) After school Jnr would not get employed (only works 2 hrs after work) Job losses are 100% guaranteed |
| 4687 | It would be detrimental to some staff |
We use junior casuals to fill in the gaps between the full timers and the hours that shopping centre run and the 3 hour minimum is just right. 4 hours wouldn't allow for school students to work during the week at all.

a financial burden would result

Big cost increase

difficult to employ students eg 5pm - 9 pm - they would not finish uni in time to get to work. We roster from 6pm to 9pm.

This may put a strain on our funding should this occur, but at present our only casual employee works more than 3 hourly shifts

REduced number of employees
greater difficulty in rostering staff to effectively serve customers

less staff would be given hours, requirement covered by owners

Not good for our younger kids that can only work 3 hours per shift due to school commitments and our opening hours. We couldn't be able to employ them at all during the week. Only on weekends.

This could prove disadvantageous as we often use a casual 3 hour shift over the lunch cover period.

It would cost me money. One position in particular already requires less than three hours but we have to pay for three!

defeat the need for flexibility in off season. Staff required to work minimum 4 hours would probably lose their jobs, and aim to reinstate next summer season. Especially impacting on regional locations.

Four juniors would lose there jobs. We are only open for 2.5 hours after school. A 4 hour minimum would mean that juniors would cost more than senior staff for that period.

Health Professionals and Support Services Award 2010

721. The Health Professionals Award covers, as the title suggests, health professionals as well as those in administrative and support roles. The award is an industry and occupational award. It does not presently prescribe a minimum engagement period for part-time employees but requires that casual employees be engaged for a minimum of three hours. An exception is provided for cleaners employed in private medical practices, who must be engaged for at least two hours. The ACTU has proposed a four hour minimum engagement in respect of all casual and part-time employees.

722. Responses to the joint employer survey by employers covered by this award are set out at Attachment 16D. We once again observe that the majority of respondents have indicated that the claim would have an adverse impact on
their business. Some make reference to their funding arrangements in circumstances where the service sought by the client is for a shorter period:

“The Community services program could not operate if it was required to engage a casual on 4 hourly limit, when the client on requires someone for 1-2 hours. The funding received would not cover the shift.”

723. Respondent 3854 speaks of the business’ efforts to accommodate the caring responsibilities of their employees, which would be undermined by the proposal:

“Honestly? There would be shifts we’d drop the casuals & make the part-timers work under increased pressure, vs having a casual alongside them sharing the load. We wanted to employ Yr 11/12 students after school, to let the mothers go home & be with their kids after 3.30/4pm, but as the HP&SS Award isn’t in line with the Retail Award (i.e. still insists on 3hr minimum shifts) then too bad, the Mums must stay on until late. If this is changed to 4hrs for casuals, it will only worsen the situation. Beggars me why on one hand, as employers, we’re continually told to “be flexible” with our employees (which we try to be!) but on the other hand, FWA are constantly reducing our avenues to offer such flexibility???”

724. Respondent 4461 similarly makes reference to the engagement of employees who suffer from a disability, whose needs it seeks to accommodate:

“Waste of money. For recreation workers, once they've done the client drop off to school or sports lessons etc (they do a lot of taxiing), we don't have anything else for them to do - they're not qualified for office or social work. The three hour minimum already has this problem. For admin casuals, it's not so bad, but it means we're looking to either make work for them or find ways of not using them at all - e.g. to cover lunch breaks we would increasingly use other employees to do their work from the reception desk. The three hour minimum period is already problematic - we only really need coverage for 2 hours. We are an EEO employer and some of our casuals don’t get work anywhere else (e.g. disabled employees). They are happy with any work we can give them - the more the better of course. This sort of thing actually works against them rather than for them as it is probably intended to do.”

725. The 24 hours a day/7 days a week nature of some employer’s operations would result in significant cost increases, as stated by respondent 4147:

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268 Response ID 3854.
269 Response ID 4461.
“Costs would increase by approximately 30% as we already pay a 3 hour minimum when often an employee is engaged on a job for under 2 hours. It would make offering the 24/7 on-call service unsustainable without a significant price for clients.”

726. The provision of services such as counselling is necessarily limited in duration.

As respondent 4457 points out, to require the engagement of such an employee for four hours would ‘substantially affect the profitability of the business’.

727. We also note that the repercussions for employers in rural and regional areas is particularly acute:

“It would result in financial hardship for our not for profit organisation, restrict the no of younger staff members that could work for us, increase casual staff numbers and result in us having staff having nothing to do when the peak load time is finished. We are situated in a small rural town and getting staff is hard enough without more restrictions being placed on us. We need flexibility.”

728. These responses provide only a glimpse of the consequences that would be faced by employers if the ACTU’s claim were granted. Again the nature of the industry and the work performed by employees engaged in it is such that the imposition of four hour minimums cannot be accommodated by these employers.

Horticulture Award 2010

729. The Horticulture Award covers work that is, to a very large extent, seasonal. It is trite to observe that various types of produce can only be grown and harvested during specific months in a year. Further, much of the work is performed outdoors and therefore is subject to inclement weather.

730. Attachment 16E to these submissions set out responses to the survey by employers covered by the Horticulture Award. Even a cursory glance reveals the very significant impact that the ACTU’s claim would have. The Award does not currently have a minimum engagement or payment provision.

270 Response ID 4147.
271 Response ID 5741.
731. Many employers state that the variation sought would have significant financial implications for their business. 272 One states that they would ‘close the doors.’ 273 Others state that they would employ less part-time or casual employees, or cease to employ them altogether. 274 For instance, the employer represented by response ID 577 states:

“I would close my business and stop employing 10 staff in the area.” 275

732. Multiple survey respondents cite the impact of changing weather conditions. The absence of a minimum engagement means that an employer can direct an employee to cease performing work and go home in the event of inclement weather. For instance, at response ID 4566 states:

“we would have to lay off a casual worker, if it rains for half an hour and they cannot work, then we cannot afford to pay them for 4 hours. currently we pay them for 2 hours if this happens.” 276

733. The ACTU’s proposal is for a four hour minimum engagement for both full-time and part-time employees. In circumstances such as poor weather conditions or a breakdown in machinery (see response ID 213), it may in fact not be possible to engage a part-time or casual employee for four hours if there is no work that can be performed.

734. The survey responses show that the ACTU’s claim would have a severe impact on the horticulture industry. We note that in this context, the ACTU has not presented any evidence that is specific to employees covered by the Award.

**Hospitality Industry Award 2010**

735. The Hospitality Award presently requires that part-time employees be engaged for a minimum of three hours and that casual employees receive a minimum payment for two hours. Whilst we oppose the ACTU’s proposal to increase this

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272 See response ID 14, 510, 1160, 2665, 2732, 3405, 3417 and 4961.
273 Response ID 3372.
274 See response ID 456, 577, 3137, 3417, and 4566.
275 Response ID 577.
276 Response ID 4566. See also response ID 2732 and 4961.
to four hours in respect of both forms of employment, for present purposes, we focus on the Joint Employer Survey responses in respect of the casual minimum payment clause.

736. We refer the Commission to Attachment 16F, a collation of all responses by employers covered by this award to the relevant survey question. The red shading indicates those responses that foreshadow a negative impact upon the employer’s enterprise, with regard to the services it provides or employment opportunities in the industry. The proportion of such responses speaks for itself.

Manufacturing and Associated Industries and Occupations Award 2010

737. We have earlier set out the AMWU’s proposal to increase the minimum engagement of part-time employees in the Manufacturing Award to four hours and to limit the facilitative provision such that the minimum engagement period could be reduced no further than three hours in order to accommodate the personal circumstances of the employee.

738. Below are a sample of responses to the Joint Employer Survey by those employers covered by the Manufacturing Award. They are indicative of the impact that a four hour minimum engagement would have on certain businesses in the manufacturing industry:

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – part-time employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>82</td>
<td>Difficulty in managing available work to align with fixed hours of employment. Incoming work is random at best.</td>
</tr>
<tr>
<td>104</td>
<td>I would be paying them sometimes to do nothing - that wouldn’t be too smart economically.</td>
</tr>
<tr>
<td>120</td>
<td>Currently none, but in the future with flexible workplace arrangements especially associated with an aging workforce and parental requirements it will impact our ability to provide flexibility</td>
</tr>
<tr>
<td>188</td>
<td>The part-timer is already being paid for 3 hours minimum shift when the work is often finished after 2.5 hours. We would reduce employment to one day a week instead of two days a week.</td>
</tr>
</tbody>
</table>
| 515         | The company would need to pay for time not worked. For example one of our part-time employees has elected to work two hours a day, five days a week because it suits her personal circumstances. If the company had to pay for minimum of 4 hours a day, we would expect four hours work in
which case it would be highly likely the employee would resign. We have other part-time employees in similar situations.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>516</td>
<td>This will increase our cost and probably forced us to retrenching people</td>
</tr>
<tr>
<td>564</td>
<td>Would reduce the reliance of local labour and use overseas contracted labour</td>
</tr>
<tr>
<td>947</td>
<td>may decrease flexibility during peaks and troughs in demand, we may not be able to accommodate what the part-time employee wants (ie they don't all want 4 hours)</td>
</tr>
</tbody>
</table>

739. The survey responses speak of the nature of the potential impact that would be felt by employers who presently engage part-time employees for less than four hours. It also demonstrates that the facilitative provision in the award is being utilised to accommodate the needs of employees who seek to work shifts of less than 3 hours in length (see response ID 515).

740. It is important to appreciate that whilst the AMWU may characterise the variation sought as a modest one, it will nonetheless adversely impact upon operations in the manufacturing sector that engage part-time employees for a shorter period of time as well as those employees who seek to access a shorter minimum engagement period. It cannot be assumed that the change is one that can necessarily be accommodated or that the increased costs incurred can be absorbed. The AMWU has not led any evidence or attempted to deal with these considerations in their material.

**Nurses Award 2010**

741. The Nurses Award is an occupational award. It covers employers in the health industry and their employees covered by the classification structure as well as employers who employ a nurse/midwife, principally engaged in nursing/midwifery duties comprehended by the classifications listed in the classification structure. The Award’s coverage is not limited to traditional notion of nurses employed in a hospital. It would also apply to, for instance, nurses engaged in aged care facilities, in-home care, private medical practices, community health care facilities, and so on. In this away, the coverage of the award is very broad.
742. As the Commission will see in Attachment 16G, the very vast majority of respondents have identified that the changes sought would have an adverse impact upon their operations. In some cases, the impact is described as severe. The nature and extent of the impact relates to funding arrangements, increased costs to an extent that would undermine the financial viability of the business, an inability to accommodate employees’ desires to work short shifts, a reduction in the number of staff, increased costs and lesser flexibility for clients accessing the employers’ services, and so on. The types of difficulties identified are similar to those raised by employers covered by the Aged Care Award.

743. The Joint Employer Survey responses reveal the extent to which the ACTU’s claim would result in operational impossibilities and cost increases that would not be able to be absorbed by the employer. The very nature of the work requires the flexibility that is currently afforded by the Award, which does not prescribe a minimum engagement period in respect of part-time employees and contains a two hour minimum payment provision in respect of casual employees. The current arrangements should not be disturbed.

Restaurant Industry Award 2010

744. The Joint Employer Survey responses in respect of the Restaurant Award largely speak for themselves. At present, part-time employees must be engaged for a minimum of three hours and casual employees must be paid for a minimum of four hours. 

745. Restaurants and cafes experience peak periods of demand for food service which often last less than four hours. Given that this is the busiest part of the day for businesses, additional casual and part-time employees are rostered to perform work at this time. To the extent that the work required to be performed

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277 See for example response ID 682
278 See for example response ID 1581
279 See for example response ID 497
280 See for example response ID 2126
281 See for example response ID 3133
is less than four hours in duration, the employer would be obligated under the proposed clauses to engage part-time employees or pay casual employees for a minimum of four hours.

746. In response to the question regarding part-time employees, the sample of responses below demonstrates the assessment made by employers of the impact that would be felt by their business. This includes a significant new financial burden, reduced rostering flexibility and increasing the number of casual positions in lieu of part-time employees.

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – part-time employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>311</td>
<td>Would reduce my rostering flexibility and blow up costs when business is unexpectedly quiet. Customers are fickle, so I must be able to respond to demand in an immediate and flexible manner.</td>
</tr>
<tr>
<td>1126</td>
<td>would have a high impact as our venues mostly need flexible hours should employees need sending home and to save labor.</td>
</tr>
<tr>
<td>1856</td>
<td>I would need to change them to casual. I need more flexibility than this</td>
</tr>
<tr>
<td>2754</td>
<td>They already are and it's a heavy financial burden and fostering issue</td>
</tr>
<tr>
<td>3054</td>
<td>Our costs would go up, our staffing flexibility would go down...our gross profit would be compromised...and this is what is used to hire other people. Do the math.</td>
</tr>
<tr>
<td>3058</td>
<td>WOULD HAVE TO REDUCE THE NUMBER OF EMPLOYEES</td>
</tr>
<tr>
<td>3137</td>
<td>employ less people</td>
</tr>
<tr>
<td>3288</td>
<td>I would have to make them casual. Most shifts are 3 hours and we need that flexibility</td>
</tr>
<tr>
<td>3305</td>
<td>We would suffer</td>
</tr>
<tr>
<td>3604</td>
<td>Horrendous financial burden</td>
</tr>
<tr>
<td>3896</td>
<td>Payroll would increase significantly as we would have to pay for non-productive work and we would reconsider employing on a Part-Time basis</td>
</tr>
<tr>
<td>4087</td>
<td>They would go to Casual Staff</td>
</tr>
<tr>
<td>4622</td>
<td>We would probably not hire part-time staff but only use casuals.</td>
</tr>
</tbody>
</table>

747. The response to the question regarding casual employees generated a number of responses that highlight the significant impact of the ACTU’s claim. Such employees are presently entitled to a minimum two hour payment. We highlight
those responses where the employer assesses that the impact of the claim would be particularly detrimental.

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – casual employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>311</td>
<td>Again, similar as previous answer. Casual employees are hired for flexibility. 4 hours is half of our working day...and customers generally generate demand for 2hr periods. If we had to engage for 4 hrs, they would be idle for 2hrs and would significantly erode our ability to make any profit, which is already difficult as we have to pay exorbitant rates for untrained/non-career staff.</td>
</tr>
<tr>
<td>406</td>
<td>It wouldn’t work for us due to our business requirements. It would penalise us.</td>
</tr>
<tr>
<td>462</td>
<td>We can’t afford to guarantee hours</td>
</tr>
<tr>
<td>504</td>
<td>It would make harder to manage costs.</td>
</tr>
<tr>
<td>1126</td>
<td>higher labour costs as many are only needed for short periods during peak times.</td>
</tr>
<tr>
<td>1183</td>
<td>Much harder to sustain casual employees.</td>
</tr>
<tr>
<td>1322</td>
<td>There would be times where we would be paying more for an employee to do a shift where we don’t require the labour.</td>
</tr>
<tr>
<td>1424</td>
<td>This would make it difficult especially during our quieter periods when we might only need someone in for a few hours to cover a busy lunch or to assist with a group checkout</td>
</tr>
<tr>
<td>1765</td>
<td>We would restructure our working day and employ less staff</td>
</tr>
<tr>
<td>1856</td>
<td>Catastrophic, in quite times I don’t make enough money to employ someone for this amount of time. We may only have a need for 2 hours over a lunch period. We just don’t make enough money to cover this.</td>
</tr>
<tr>
<td>2390</td>
<td>significant impact on labour costs; 3 hour shifts cover main food service periods.</td>
</tr>
<tr>
<td>2543</td>
<td>it would fail to run appropriately</td>
</tr>
<tr>
<td>2783</td>
<td>our usual minimum shift is 4 hours but this could have a negative effect for events for which we need to employ people for less than that</td>
</tr>
<tr>
<td>3054</td>
<td>Same answer as for part-time</td>
</tr>
<tr>
<td>3058</td>
<td>WOULD HAVE TO REDUCE NUMBER OF EMPLOYEES</td>
</tr>
<tr>
<td>3288</td>
<td>I would close the doors most probably. It would mean that I would not be able to run my very small business without flexibility. Also, a lot of my staff do not want four hour shifts as they are studying or have other jobs.</td>
</tr>
<tr>
<td>3305</td>
<td>It would make it very hard for us as business owners</td>
</tr>
<tr>
<td>3415</td>
<td>Would place enormous burden and lack of flexibility on the business</td>
</tr>
<tr>
<td>3431</td>
<td>would not work for us because shop most things are do by us to save money, and most of staff could not work those amounts</td>
</tr>
<tr>
<td>3443</td>
<td>cut employees</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>3454</td>
<td>We would have to close our restaurant Mon-Thur as we couldn't afford to staff each meal service. We only need our casuals for 2-3 hour shifts. We couldn't afford to pay them anymore. We could afford to employ them Fri-Sat.</td>
</tr>
<tr>
<td>3457</td>
<td>This would NOT work - on some occasions when it is quiet the business isn't even open for a total of 4 hours. Other occasions there just aren't enough jobs for the employees to complete a 4 hour shift. If we had to employee for a minimum 4 hour engagement it would send our business broke very quickly as we would be paying employees especially in the quieter months to do NOTHING but stand around or send them home.</td>
</tr>
<tr>
<td>3498</td>
<td>Minimal effect. Only juniors are engaged for less than 4 hours at any one time Impact would be less work for juniors (16yrs) and less experience provided to these team members</td>
</tr>
<tr>
<td>3604</td>
<td>horrendous financial burden</td>
</tr>
<tr>
<td>3702</td>
<td>Would reduce number of employees &amp; close earlier</td>
</tr>
<tr>
<td>3896</td>
<td>Payroll would be higher than normal as we would be paying for non-productivity. A quiet night would mean an earlier close and knock off but would seriously affect our cash flow and sustainability as a business.</td>
</tr>
<tr>
<td>4087</td>
<td>My Business could not be sustained and would be forced to close, I require the flexibility to have staff between 2 and 6 hours to ensure our business is profitable.</td>
</tr>
<tr>
<td>4362</td>
<td>disastrous</td>
</tr>
<tr>
<td>4622</td>
<td>We would not be able to have extra staff on because if we don't need them for 4 hours we have to pay them anyway. We would have to do more work with less people.</td>
</tr>
<tr>
<td>4648</td>
<td>Fewer personnel would be employed.</td>
</tr>
<tr>
<td>4764</td>
<td>Closeure couldn't afford to trade under those circumstances</td>
</tr>
<tr>
<td>5602</td>
<td>It would impact on my staff as fewer people would get roistered hours. There are only so many hours of work to offer staff. Some would miss shifts while others get longer shifts.</td>
</tr>
</tbody>
</table>

### Storage Services and Wholesale Award 2010

748. Clause 11.4(a) of the Storage Award guarantees a casual employee a four hour engagement for every start. Therefore, casual employees covered by the award are not relevant to the ACTU’s claim. Part-time employees, however, must presently be rostered for a minimum of three consecutive hours on any
shift, pursuant to clause 11.3(e). The ACTU seeks to increase this requirement to four hours.

749. Whilst the variation here sought is of a smaller increment, the numerous Joint Employer Survey respondents below indicate that it would nonetheless introduce additional employment costs and would have implications on the business’s decision as to whether such employees are in fact retained or recruited. Response IDs 1127 and 1264 speak specifically of a part-time employees who presently works less than four hours so as to accommodate their personal circumstances.

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – part-time employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>543</td>
<td>would have considered converting casuals to part-time but if it had to be 4 hours then would definitely reconsider</td>
</tr>
<tr>
<td>662</td>
<td>impact on our ability to employ some of them</td>
</tr>
<tr>
<td>690</td>
<td>some would leave and would add cost</td>
</tr>
<tr>
<td>830</td>
<td>Increased Wage Budgets Store Closures due to profitability Loss of jobs for casual employees</td>
</tr>
<tr>
<td>1095</td>
<td>Will reduce staff number Give give remaining staff more hours</td>
</tr>
<tr>
<td>1127</td>
<td>For the most part there would be no affect as we don’t have split shifts &amp; most shifts are 5 hour minimum. However, one part-timer also studies &amp; fits in her work around her study. Sometimes she only works 3.5 hours - but that’s her choice.</td>
</tr>
<tr>
<td>1264</td>
<td>Most of our part time employees work a minimum of 4 hours per shift at present. We have one employee who chooses to work 3 hour shifts as it suits her family requirements - we would need to review her employment if the Award changed.</td>
</tr>
<tr>
<td>3621</td>
<td>Would have to reduce opening hours, or use full-time employees on overtime and dismiss the part-timers.</td>
</tr>
<tr>
<td>5373</td>
<td>EXTRA COSTS</td>
</tr>
</tbody>
</table>

750. The evidence demonstrates more generally that the Commission cannot assume that where the increase sought to a minimum engagement or payment provision is by a relatively smaller amount, that:

- the cost implications would be limited; and
any increased costs would be able to be absorbed by businesses or increased inflexibilities accommodated.

Social, Community, Home Care and Disability Services Award 2010

751. The SACS Award does not prescribe a minimum engagement period for part-time employees covered by it. Clause 10.4(c) of the award deals with minimum payments for casual employees in the following manner:

“(c) Casual employees will be paid the following minimum number of hours, at the appropriate rate, for each engagement:

(i) social and community services employees except when undertaking disability services work—3 hours;
(ii) home care employees—1 hour; or
(iii) all other employees—2 hours.”

752. The tailored approach taken to these minimum payment periods recognises the types of work engaged in by employees covered by this award. We have earlier referred to the performance of home care in the context of the aged care industry. The minimum payment of one hour for home care employees reflects precisely what we have earlier put; that such employees visit a client at their home to provide a certain service which will very often require no more than one hour to complete. The imposition of a four hour minimum payment in respect of such employees, as well as other casual and part-time employees, would be particularly damaging to this industry, and to the clients who the industry provides services to.

753. We direct the Commission’s attention to Attachment 16H where we have set out all responses provided by employers covered by the SACS Award. As the Commission will recognise, a very significant proportion of employers indicate the severity of the impact that the ACTU’s claim would have on their operations and the services they provide. Numerous respondents also cite their funding arrangements, which would not accommodate a four hour minimum engagement.
Vehicle Manufacturing, Repair, Services and Retail Award 2010

754. The Vehicle Award does not presently contain a minimum engagement or payment period in respect of casual or part-time employees. We have earlier set out the variations sought by the AMWU – Vehicle Division in this regard.

755. It is important to note the very broad range of enterprises covered by this award. The Award covers employers whose establishment, plant or undertaking is principally connected or concerned with:

- the selling, distributing, dismantling/wrecking/restoring, recycling, preparing for sale, storage, repairing, maintaining, towing, servicing, and/or parking of motor vehicles of all kinds, including caravans, trailers or the like and equipment or parts or components or accessories thereof including the establishments concerned for such vehicles and the like;

- operations or allied businesses concerned with selling, distributing or supplying running requirements for vehicles (including motor fuels, gas and oils);

- the selling and/or handling and/or retreading and/or storing/distribution and/or fitting and/or repairing of tyres or the like made of any material;

- the repair and servicing of motor vehicles in the establishment of an employer engaged in the motor vehicle rental business;

- the manufacturing, assembling or repairing of carriages, carts, wagons, trucks, motor cars, bodies, motorcycles, railway cars, tram cars, side-cars or other vehicles or parts or components or accessories in wood, metal and/or other materials;

- any operation concerned with roadside/mobile service; or

- driving school instruction.

756. In circumstances where an award applies to such a broad range of businesses that have varying operational requirements, the Commission should not hasten
to introduce minimum engagement periods absent close consideration as to the impact that the change might have on each of the various sectors that fall within the scope of the award. The AMWU – Vehicle Division has made no attempt at dealing with this.

757. The Joint Employer Survey responses below are indicative of the types of concerns that employers covered by the Award have about the unions; claim for a minimum four hour engagement being introduced in respect of part-time employees:

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – part-time employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>175</td>
<td>make it less likely to employ</td>
</tr>
<tr>
<td>547</td>
<td>This would not work for our organization.</td>
</tr>
<tr>
<td>922</td>
<td>Significant impact on operation</td>
</tr>
<tr>
<td>1374</td>
<td>3HOURS MIN IS HARD ENOUGH. WOULD EMPLOY LESS ON A PARTIME BASIS</td>
</tr>
<tr>
<td>1408</td>
<td>Would provide less flexibility for Associate and the organisation if min. 4 hours was required to be worked. Some requests may need to be declined or altered to suit business needs and comply with entitlement.</td>
</tr>
<tr>
<td>1873</td>
<td>Would have to transition employees to casual and they would loose entitlements We would also loose some employees as they work in with the hours that they are available. We would also need to look at alternate business situations</td>
</tr>
<tr>
<td>2814</td>
<td>We would be likely to stop using them as they remove our flexibility to work with the employee to achieve a mutually beneficial result.</td>
</tr>
</tbody>
</table>

758. Similarly, the following responses regarding a minimum engagement period for casual employees indicate the adverse impact that it would have:

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response – casual employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>657</td>
<td>Staff work more than a four hour shifts but may done less if only one job to do does not happen very often</td>
</tr>
<tr>
<td>922</td>
<td>Major impact on the operation. We would most likely lose a large proportion of our current driver list as they are semi retired and do not wish to work full time. Business would be tipped upside down.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>1374</td>
<td>NO WORK AVAILABLE RETAIL TOO FICKLE NEVER SURE WHEN YOU WILL BE BUSY100</td>
</tr>
</tbody>
</table>
| 1873 | Business would need to amend trading hours  
Review of structure and rosters  
No flexibility |
| 2190 | I would reduce the staff level |
| 2697 | We employ juniors for cleaning and stacking shelves each afternoon, if they had to be paid 4 hours on each occasion then we would have to look at alternatives. |
| 2814 | There are many examples where we would simply get out of certain types of work. We cannot compete on a cost basis if we have to pay this as a minimum engagement period. |
| 4818 | Most would loose their casual job |
| 4905 | We would consider alternatives to employing them. |
| 5772 | As a business we prefer to offer our employees a minimum hours per shift, but we still require the flexibility. We have casuals who by choice come in after school and work less than 4 hours. We would be unable to offer them shifts because of store opening hours and their availability if the min was 4 hours. Some stores in trade areas are only open for minimal hours on Sundays ie 3-4 this would have a cost impact. |

### 16.13 SECTION 138 AND THE MODERN AWARDS OBJECTIVE

759. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

760. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

761. We also note that each award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an
award-by-award analysis. An overarching determination as to whether four hour minimum engagements/payments should form part of the minimum safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

762. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision:

“[33] There is a degree of tension between some of the s.134(1) considerations. The Commission’s task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.”

763. The ‘necessary’ test must be considered with respect to each element of every proposal put by the ACTU and its affiliates. By way of example, the unions must establish that in respect of part-time employees covered by the Mining Award:

- a minimum engagement/payment period is necessary, and if so;
- a minimum engagement of four hours is necessary.

764. The same must then be established in respect of casual employees covered by the Mining Award. Similarly, the AMWU must demonstrate that in respect of part-time employees covered by the Manufacturing Award:

- a minimum engagement period of four hours is necessary; and
- it is necessary to amend the existing longstanding facilitative provision
that allows the minimum engagement period to be reduced by agreement, to be confined to three hours.

765. The ACTU and its affiliates have failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the awards that are the subject of the claims before the Commission meet the modern awards objective.

766. We make one additional observation in relation to the potential impact of the claim. The witness evidence and the Joint Employer Survey demonstrate that employers in those industries relevant to the claims will be adversely impacted by the changes proposed. The nature of that impact varies. In some cases, the respondents have indicated that they would alter the structure of their enterprise such that they would employ fewer part-time or casual employees; or that they would make changes to their rostering patterns. In other cases, the changes would result in increased costs, so much so that numerous employers have suggested that it would undermine the viability of their business. Some employers have also indicated that changes would need to be made to the way in which their services are provided to customers or clients, and to the cost and availability of those services.

767. We acknowledge that the severity of the consequences felt by a business from the introduction of, or increases to, minimum engagement/payment provisions will vary. There may admittedly be some enterprises that do not experience any change. This could be because the very nature of the work performed or the manner in which the business chooses to operate is such that part-time and casual employees are not rostered to perform work for less than four hours. Alternatively, an enterprise agreement may apply to an employer which already imposes a minimum engagement/payment of four hours or more.

768. In other instances however, the impact may be catastrophic. The responses to the Joint Employer Survey that we have attached to this submission are indicative of this.

769. It should also be noted that in some cases, respondents to the survey have
indicated that at the time of responding to the relevant question, the claim would not result in any material difference or change. They go on to state that nonetheless, should there later be an alteration to their operations or hiring practices, the clause proposed would have a specified impact. These responses are by no means irrelevant and should not be disregarded. They are indicative of the types of decisions that employers would make with respect to engaging casual and part-time employees as well as the circumstances in which they would roster these employees to work if the relevant award were varied as proposed.

770. That the variations proposed by the ACTU and its affiliates will not adversely affect all employers in an industry is not the test to be applied in determining whether the variation should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

771. The employer parties in these proceedings do not bear any onus to demonstrate that the claims will result in increased employment costs or undermine productivity in a certain industry or for employers covered by an award. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

772. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to
material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of individual businesses as well as industry at large.

773. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision, ‘the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations’282 (emphasis added). It is therefore for the proponent, or in this case, the various proponents, to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon individual businesses and industry at large.

A fair and relevant minimum safety net

Fairness

774. The notion of ‘fairness’ in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. The imposition of additional costs and inflexibilities upon all employers in all industries is both unfair and unjustifiable.

775. It cannot be assumed that the introduction of a minimum engagement/payment or an increase to the duration of a pre-existing minimum can be accommodated by an employer. The nature of an employer’s operations may be such that the flexibility currently afforded by the relevant award is essential. The work performed by an employee in those industries may be such that there is no ‘workaround’ that can be implemented by an employer in order to ensure that a

part-time or casual employee can be engaged for at least four hours at a time. Numerous examples of this arise in aged care, health, and the social and community care industries, to name just a few.

776. It cannot be assumed that a consequent increase in costs can be absorbed by an employer. As can be seen from responses to the Joint Employer Survey, many employers have indicated that the financial impact of the claims would seriously undermine the financial viability of their business. Others suggest that the increased costs would be passed on to their customers or clients, although an employer’s capacity to do this will necessarily be limited by market forces and competition.

777. Many of the Joint Employer Survey responses indicate that employees work shifts that are less than four hours in length because they so choose. This is either due to their caring responsibilities, their educational commitments or otherwise. Certain responses refer to the employment of older workers or those with a disability, who cannot work for four hours at a time. The imposition of a minimum four hour engagement is unfair for such employees.

778. With respect to those awards that the ACTU seeks to vary by deleting a facilitative provision, as well as the AMWU’s claims to limit the scope of pre-existing facilitative provisions in certain awards, a similar observation can be made.

779. In addition to the unfairness to employers and employees, it will obviously be patently unfair to aged, ill and disabled clients to lose access to in-home care services, or be forced to pay prohibitive prices, or be forced to move into a nursing home earlier than would otherwise be the case, as a result of the unions’ ill-considered claims.

**Relevance**

780. Reference is made in s.134(1) to the provision of a relevant safety net by an award. Whilst this is often taken to mean that the safety net must be relevant in a temporal sense, in our view it also requires that the safety net is relevant to
the needs of the industry in which that safety net applies. This warrants consideration of factors pertaining to the nature of the work performed, the consequential needs of employers in the industry, economic factors facing the industry and so on. This is precisely why the adoption of a one-size-fits-all approach as proposed by the unions, without due consideration being given to the specific industry or sector in which the proposed clause would apply, is inappropriate.

**Relative living standards and the needs of the low paid (s.134(1)(a))**

781. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

“[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.

[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life, assessed in the context of contemporary norms.283

782. The term “low paid” has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

“[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.”284

783. It is sufficient to note for present purposes that the ACTU has not undertaken the analysis required by s.134(1)(a).

784. The ACTU submits that the proposed variation will ensure that ‘low paid

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workers' earnings per engagement are more viable after the costs of attending work are accounted for.\textsuperscript{285} We have dealt with the invalidity of this assertion earlier in our submission and need not repeat our contentions here.

785. The ACTU also submits that the variations will 'help reduce the instance of poor quality work traps for low paid workers, both in terms of work that provides unviable short shifts or long-term insecurity that inhibits progression to secure and higher quality employment'.\textsuperscript{286} The ACTU has neither established that 'short shifts' cause 'poor quality work traps' nor has it explained how the imposition of a four hour minimum would remedy the issues that it complains of.

**The need to encourage collective bargaining (s.134(1)(b))**

786. We submit that the absence of a four hour minimum engagement/payment will leave greater room for bargaining and may incentivise employers and employees to negotiate terms and conditions that are specific to their conditions of employment. We note that the ACTU does not seek to rely on s.134(1)(b).

787. The significance of this element of the modern awards objective is reinforced by s.3(f) of the FW Act, which emphasises the importance of enterprise bargaining.

**The need to promote social inclusion through increased workforce participation (s.134(1)(c))**

788. Neither the ACTU nor its affiliates have called evidence in support of the proposition that longer minimum engagements/payments will increase workforce participation. They assert that the participation of women and those with caring responsibilities will increase however this is certainly not borne out in the evidence from the Joint Employer Survey.

789. The survey responses rather suggest that a four hour minimum would lead to

\textsuperscript{285} See ACTU submission dated 19 October 2015 at paragraph 116
\textsuperscript{286} See ACTU submission dated 19 October 2015 at paragraph 117
situations in which an employer is unable to accommodate an employee’s desire to work a shorter shift. An obvious example arises in respect of school aged children covered by the Fast Food Award and the Retail Award, as we have earlier set out. The responses there suggest that the ACTU’s claim would result in a significant number of school students being excluded from employment opportunities in those industries. It is important to appreciate such openings are often a pathway for young people into the workforce and enable them to develop essential transferrable skills. The ACTU’s claims are entirely at odds with promoting the participation of young persons in the workforce.

790. Examples can also be found in the survey responses we have extracted of women who seek to work shorter shifts to accommodate their caring responsibilities (see Section 12 of this submission). It cannot be assumed that, as per the ACTU’s assertions, all female employees seek longer minimum shifts and that this would best serve the goal of encouraging their participation in the workforce. The introduction of such inflexibility would be against the interests of employees, employees and the broader community.

791. It should also be noted that many of the survey responses we have extracted indicate that employers would restructure their workforce such that they no longer engage part-time or casual employees, or would engage less of them. This further demonstrates that the ACTU’s claim undermines this element of the modern awards objective.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

792. As the responses to the Joint Employer Survey establish, the variations sought by the ACTU, AMWU and AMWU – Vehicle Division quite clearly undermine the need to promote flexible work practices and the efficient and effective performance of work. They remove the ability of an employer to tailor the working hours of their employees to the work that needs to be performed.

793. In certain cases, the employer may attempt to re-arrange how and when work is performed to the extent that this is possible, however it may eventuate in a
less than optimal result that is inefficient and ineffective. For example, the Commission will identify that certain survey responses indicate that the relevant employer would choose not to roster a part-time or casual employee to work a particular shift and would instead require another employee to undertake the tasks. This could be in circumstances where the employee who would be required to perform the tasks is not as skilled as the casual or part-time employee who would have performed the task, thereby leading to an inefficient outcome.

794. The notion of flexibility connotes an ability to readily modify work practices in response to the various factors that influence the manner in which a business operates. These factors include clients’ requirements, fluctuations in demand, seasonal fluctuations, climatic conditions, market forces, regulatory changes, increased competition, changes to an employer’s workforce caused by employee absences, and so on. An ability to engage part-time and casual employees is an important means through which a business is able to facilitate or respond to each of these matters. It simultaneously allows employers to accommodate the personal circumstances of employees.

The need to provide additional remuneration (s.134(1)(da))

795. In response to the ACTU’s contentions in respect of s.134(1)(da), we refer to Section 15.9 of our submissions where we have dealt with the interaction between the proposed minimum engagement/payment provisions and pre-existing award clauses that apply to work performed on a weekend or public holiday.

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e))

796. The ACTU submits that:

“Short shift workers receive significantly less net gain in pay than longer shift workers. The claim will help ensure such employee’s net gain for equal or
comparable work is more equal.”

797. In our view, s.134(1)(e) cannot be relied upon in support of the ACTU’s contention.

798. The notion of “equal remuneration for work of equal or comparable value” is defined by the Act. The phrase appears in s.12 of the Act (the dictionary), with a reference to s.302(2). Section 302 falls within Division 2 of Part 2-7 (Equal Remuneration) of the Act. Section 302(2) states:

“Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value”.

799. Consideration given to whether an award provides equal remuneration for work of equal or comparable value requires an assessment of whether men and women workers receive equal remuneration for work of equal or comparable value. The comparison to be made under s.134(1)(e) is by reference to gender, not, for example, types of employment or shift length.

The likely impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

800. The claims, if granted, will self-evidently impose additional employment costs on employers. In many cases, it would result in an employer remunerating an employee in circumstances even though the employee is not in fact required to perform work. This is not a matter than can be trivialised. As can be seen from the Joint Employer Survey results, the impact in certain industries would be devastating.

801. It must also be remembered that this may not be an expense that arises with respect to just one or two employees. The entire operations of a business may be structured around the ability to engage part-time and casual employees for shorter periods at a time. The significant financial impacts upon employers,

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287 See ACTU’s submission dated 19 October 2015 at paragraph 130
small and medium sized business,\textsuperscript{288} cannot be ignored.

802. We have earlier dealt with the inflexibility that would result from the proposed clauses. This inflexibility would undermine the productivity of a business.

803. The adverse impacts of the proposed provisions on businesses mandate that the claims of the ACTU, AMWU and AMWU – Vehicle Division be rejected.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

804. The need to maintain a stable modern award system runs contrary to the unions’ claim. This element of s.134(1) must be seen in light of the absence of a probative evidentiary case before the Commission in these proceedings.

805. The unions have failed to mount a case that can or should move the Commission to adopt its proposals. The need to maintain a stable award system tells against granting the unions’ claims in the complete absence of a proper and convincing evidentiary case.

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

806. To the extent that the insertion of the provisions proposed is inconsistent with ss.134(1)(b), (c), (d), (f) and (g), the unions’ claims will adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy. This would arise, for instance, as a result of reduced workforce participation levels, and through the termination of a large number of casual employees, as has been foreshadowed by respondents to the Joint Employer Survey.

\textsuperscript{288} See s.3(g) of the Act.
16.14 CONCLUSION

807. For all of the reasons stated above, the unions’ claims should not be granted.
17. THE PROHIBITION ON ENGAGING AND RE-ENGAGING AN EMPLOYEE TO AVOID ANY AWARD OBLIGATIONS

The Claim

808. The ACTU, AMWU and AMWU – Vehicle Division are seeking the insertion of the following new term in 109 modern awards.\(^\text{289}\)

An employee must not be engaged and re-engaged, including as a casual employee, fixed term or task employee, an independent contractor, or outsourced, to avoid any obligation under this award.

809. The proposed clause purports to deal with circumstances in which an employee is engaged, that engagement is brought to an end, and the employee is subsequently re-engaged. The clause requires that an employee must not be engaged and then re-engaged for the purposes of avoiding any obligations under the award that applies to the employee. In so doing, the clause specifically states that an employee must not be so re-engaged as:

- A casual employee;
- A fixed term or task employee; or
- An independent contractor.

810. We note that this list is not intended to be exhaustive.

811. The clause also makes reference to outsourcing, although its intended meaning is somewhat unclear. It states that ‘an employee must not be engaged and re-engaged … or outsourced, to avoid any obligation under this award’. We assume that the purpose of the clause is to mandate against the outsourcing of \textit{work performed} by a particular employee, or the responsibilities of an employee, for the purposes of avoiding an award obligation. The clause does not, however, make this clear.

\(^{289}\) See Attachment B to the ACTU’s submissions dated 19 October 2015.
Award Clauses on which the Proposed Clause Appears to be Based

812. It appears that the clause which the unions are proposing may have had its genesis in the 1999 award simplification decision of Senior Deputy President Marsh in relation to the Graphic Arts – General – Interim Award 1995 (Graphic Arts Award 1995). The relevant clause in the Graphic Arts Award 1995 is reproduced in Attachment A to the Metal Industry Casual Employment Decision. The clause stated:

"4.1.4(c)(iv) An employee must not be engaged and re-engaged as a casual under 4.1.4(c) to avoid any obligation under this award."

813. The Full Bench inserted the following similar provision into the Metals Award 1998 as part of the casual conversion clause inserted as a result of the Metal Industry Casual Employment Case:

"4.2.3(e) An employee must not be engaged and re-engaged to avoid any obligation under this Award."

814. During the Award Modernisation Process, the following provision was inserted into the Manufacturing Award and Graphic Arts Award at clause 14.5 and 12.6 respectively.

815. It appears that there has been no detailed consideration given since modern awards were made, as to whether or not these clauses meet the requirements of s.136 and 139 of the FW Act.

Jurisdictional Considerations

816. Before turning to the unions’ justification for the proposed clause (to the extent that they have in fact provided any), we first set out our primary contention; that the Commission does not have power to include the proposed clause in a modern award and hence the provisions in the Manufacturing Award and Graphic Arts Award are of no effect as a result of s.137 of the FW Act.

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290 Print R7898 and Print S1785
291 Print T4991
817. The ACTU and unions have made no attempt at addressing the threshold issue of whether the proposed provision is one that may be included in an award pursuant to s.136(1). Nonetheless, we propose to briefly set out the reasons for our contention that it does not permit the inclusion of the clause sought.

818. A modern award must only include terms that are permitted or required by those parts of the Act that have been identified at s.136(1). We need not deal with ss.136(1)(b) – (d) in any detail. The proposed clause is self-evidently not one that:

- Must be included in a modern award by virtue of ss.143 – 149D;
- Deals with the interaction between the NES and a modern award pursuant to s.55; or
- Is permitted or required by the NES.

819. For completeness, we acknowledge that the provision is not one that cannot be included by virtue of s.136(2).

820. Section 136(1)(a) permits the inclusion of a term that is permitted by Subdivision B of Division 3, Part 2-3 of the Act. Section 139(1) forms part of Subdivision B. It states that a modern award may include terms that are ‘about’ any of the matters listed thereunder. It is our submission that the proposed clause is not ‘about’ any of the matters listed at s.139(1) and therefore, cannot be included in a modern award. In so doing, we refer to the relevant authorities we have earlier cited, which are instructive as to the proper construction of s.139(1). Importantly, they establish that each of the matters referred to at s.139(1) should be given their ordinary meaning in accordance with their general usage in the field of industrial relations.

821. It is important to first consider and characterise the proposed clause, for the purposes of determining what it is ‘about’. This requires an assessment of the subject matter of the term sought; a matter that the ACTU and unions have not attended to.
822. The proposed clause is preventative by its design. It creates an award derived prohibition on the engagement and re-engagement of an employee for the purposes of avoiding any award obligations. In this way, it purports to protect employees from an employment practice that might be adopted by an employer in order to subvert an obligation imposed upon it by the award. In essence, it is a clause about the potential re-engagement of an employee, whether they be so re-engaged as an employee or independent contractor, and it is a clause about the outsourcing of work.

823. It is therefore readily apparent that the provision is not one that is ‘about’ any of the matters listed s.139(1):

- Section 139(1)(a) – minimum wages;
- Section 139(1)(b) – type of employment;
- Section 139(1)(c) – arrangements for when work is performed;
- Section 139(1)(d) – overtime rates;
- Section 139(1)(e) – penalty rates;
- Section 139(1)(f) – annualised wage arrangements;
- Section 139(1)(g) – allowances;
- Section 139(1)(h) – leave, leave loadings and arrangements for taking leave;
- Section 139(1)(i) – superannuation; or
- Section 139(1)(j) – procedures for consultation, representation and dispute settlement.

824. An award may also include a term pursuant to s.142(1) of the Act, if it is:

- Incidental to a term that is permitted or required to be in the modern award; and
• Essential for the purpose of making a particular term operate in a practical way.

825. Earlier in this submission, we have set out authority for the proposition that s.142(1) imposes a significant hurdle. Even if it were determined that the proposed clause is ‘incidental’ to a term that is permitted or required to be in an award (a matter that we do not concede), there is neither any suggestion from the unions, nor any evidence that might establish that the proposed term is essential for the purpose of ensuring that another permitted award term operate in a practical way. There is a complete absence of material before the Commission that would enable it to conclude that, as a factual proposition, a permitted award term is not operating in a practical way and that the proposed clause is “absolutely indispensable or necessary” in order to remedy this. As a result, s.142(1) does not provide a basis upon which the clause sought can be included in a modern award.

826. For the aforementioned reasons, the claim made by the ACTU, AMWU and AMWU – Vehicle Division should be dismissed on the basis that the Commission does not have power to include the clause sought.

827. Should the Commission conclude that it does not have jurisdiction to insert the proposed clause, consideration of whether a merit case has been made out for its inclusion is not warranted. In the event that the Full Bench does not, however, make such a ruling, we contend that the clause is not one that is ‘necessary’ as required by s.138. We here proceed to develop this contention further.

The Unions’ Justification for the Proposed Clause

828. Neither the ACTU AMWU nor the AMWU – Vehicle Division have provided any justification for why the proposed clause is necessary to achieve the modern awards objective. Indeed neither have made any arguments in support of the proposal. There is a clear absence of any submissions from the proponents of

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the variation as to the basis (or bases) upon which the proposed provision is sought. Further, no reference has been made to the modern awards objective or s.138 of the Act.

829. In order to establish that the proposed clause is necessary, it is incumbent upon the unions to establish that employers covered by the relevant modern awards engage and re-engage employees to avoid award obligations. This is a factual proposition that must be established by way of evidence.

830. We have not identified any evidence that has been filed by the unions that supports such a contention. Indeed it is not clear to us whether the unions seek to make that assertion.

831. In the absence of any evidence that the actions to which the proposed clause is directed is in fact taken by employers, the Commission cannot conclude that the provision is necessary.

Other Protections

832. We turn briefly to consider whether under the current legislative regime, an employee would have access to any recourse should they be engaged and re-engaged to avoid an award obligation. That is, whether in the absence of the proposed clause, an employee is otherwise protected against the mischief that the award provision is directed.

833. Section 340(1) of the Act requires that a person must not take adverse action against another person because the other person has a workplace right or to prevent the exercise of a workplace right by the other person. This is a civil remedy provision.

834. A person has a workplace right if, relevantly, the person ‘is entitled to the benefit of … a workplace instrument’.\(^\text{293}\) Section 12 defines a ‘workplace instrument’ as an instrument that is ‘made under, or recognised by, a workplace law’ and ‘concerns the relationships between employers and employees’. A

\(^{293}\) See s.341(1)(a)
‘workplace law’ includes the Act. Accordingly, a modern award is a ‘workplace instrument’.

835. Section 342(1) sets out the circumstances in which an employer takes ‘adverse action’ against an employee:

- If the employer dismisses the employee;
- If the employer injures the employee in his or her employment;
- If the employer alters the position of the employee to the employee’s prejudice; or
- If the employer discriminates between the employee and other employees of the employer.

836. It should be noted that the proposed clause applies where an employer engages an employee and re-engages that employee. The re-engagement of an employee necessarily requires a termination of the first engagement or employment relationship. We also note that the proposed clause is directed towards circumstances in which such a re-engagement occurs ‘to avoid any obligation’ under the relevant award. The corollary of an award obligation imposed on an employer is an employee’s entitlement to the benefit of a modern award.

837. If an employer terminates an employee to avoid an award obligation, irrespective of whether that employee is re-engaged, the employee is protected by s.340(1). This is because, the termination of an employee in such circumstances amounts to adverse action by an employer against an employee because the employee is entitled to the benefit of a modern award, being a workplace instrument as defined by the Act. Such an employee is eligible to make an application to the Commission to deal with a dispute pursuant to s.365(1) of the Act.

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294 See s.12
838. In the alternative, should an argument arise that the re-engagement of an employee does not necessarily follow the dismissal of an employee, the employee may nonetheless be protected if the employer has:

- Injured the employee in his or her employment;

- Altered the position of the employee to the employee’s prejudice; or

- Discriminated between the employee and other employees of the employer.

839. In such circumstances, the employee may file an application to deal with a dispute pursuant to s.372 of the Act.

840. In circumstances where an employee’s employment is terminated, and their dismissal was ‘harsh, unjust or unreasonable’²⁹⁵, they employee may also be protected from unfair dismissal and accordingly file an application for an unfair dismissal remedy pursuant to s.394.

841. It would appear to us that the legislative regime already protects an employee from being engaged and re-engaged to avoid an award obligation. The provisions cited above provide such employees with an ability to file an application to deal with a dispute and/or to seek a remedy should this occur.

842. Section 138 only permits the inclusion of an award term where such a term is necessary to achieve the modern awards objective; that being to ensure that the award provides a fair and relevant minimum safety net of terms and conditions. The insertion of an award provision that provides for a protection that is already provided for in the Act along with a mechanism by which an employee may take action, cannot be considered necessary. Such duplication is unwarranted and does not overcome the threshold set by s.138.

²⁹⁵ See s.385(b)
Conclusion

843. The proposed clause is not one that can properly be included in a modern award. The Act does not grant the Commission with power to include it for the reasons we have earlier set out. Further, the unions have not sought to advance any arguments or evidence that might establish that the provision is necessary in the sense contemplated by s.138. The claim should therefore be dismissed.
18. THE PROHIBITION ON INCREASING THE NUMBER OF CASUAL OR PART-TIME EMPLOYEES

The Claim

844. The ACTU seeks the insertion of the following provision in some 109 modern awards:\footnote{See Attachment B to the ACTU submission dated 19 October 2015.}:

“An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours.”

845. The AMWU and the AMWU – Vehicle Division seek the insertion of similar clauses in the Manufacturing Award, Graphic Arts Award, FBT Award and the Vehicle Award.

846. The clause effectively places a limitation on an employer’s ability to engage new casual or part-time employees. The proposed clause would require that the employer first allow existing casual or part-time employees ‘engaged on similar work’, whose ‘normal working hours’ are less than 38 per week, an opportunity to increase their ‘normal working hours’. It is only after this exercise has been undertaken by the employer, that additional casual or part-time employees can be engaged.

The Unions’ Justification for the Proposed Clause

847. Neither the ACTU, the AMWU nor the AMWU – Vehicle Division have provided any justification for why the proposed clause is necessary to achieve the modern awards objective. Indeed they have not made any arguments in support of the proposal. There is a clear absence of any submissions from the proponents of the variation as to the basis (or bases) upon which the proposed provision is sought. Further, no reference has been made to the modern awards objective or s.138 of the Act.
848. The unions’ case appears to have been brought solely on the basis that some of its constituents who are engaged on a part-time or casual basis seek to work additional hours.

**Casual or Part-Time Employees**

849. Whilst the proposed clause is not clear in its terms, it appears that if an employer seeks to engage a new casual employee, it must first allow pre-existing casual and part-time employees on similar work an opportunity to increase their hours. That is, the obligation in these circumstances is not confined to offering additional hours to pre-existing casual employees. Similarly, if an employer seeks to employ an additional part-time employee, additional hours must be offered to pre-existing part-time and casual employees.

850. Casual and part-time employees are not appropriate substitutes for one another. That is to say, the purpose for which an employer may seek to engage a new casual employee cannot necessarily be fulfilled by allowing a part-time employee to work additional hours, and vice versa.

851. Many employers require access to a pool of casual employees who are mobilised primarily in circumstances where an unexpected need arises such as a sudden increase in production or due to the absence of permanent staff (e.g. personal/carers’ leave). In order to ensure that an employer is able to meet these needs, the business may have made an assessment that at any given time, they require a certain number of casual employees ‘on their books’.

852. In the event that an employer needs to replenish its pool of casual employees by engaging an additional such employee, the proposed clause would require that it first offer additional hours to existing casual employees and part-time employees engaged on similar work. In the circumstances that we have described above, the operational needs of the business cannot necessarily be fulfilled by an existing part-time employee. Indeed the very purpose of engaging a new casual employee might be to work alongside the existing part-time employee or to temporarily replace the part-time employee should the need
arise.

853. Part-time employment does not necessarily afford the employer with the same flexibility as casual employment as part-time employees typically work a set number of hours in accordance with the relevant award clauses. Hours of work performed in addition to those that are pre-determined may constitute overtime and therefore, a part-time employee cannot be compelled to work them.

854. Similar issues arise when considering whether additional hours of work performed by a casual employee can provide a business with an appropriate substitute to engaging a new part-time employee. Self-evidently, this is not the case. If an employer requires that an employee perform work for it on a regular basis at certain fixed times, a pre-existing casual employee cannot be relied upon for this purpose.

Similar Work

855. The obligation to offer additional hours applies to those pre-existing employees who are engaged on ‘similar work’. The term ‘similar work’ has not been defined or described by the ACTU or its affiliates. The application of the clause is therefore entirely unclear. For instance:

- Is the application of the clause limited to part-time and casual employees who perform work under the same classification as that which will be performed by the new employee that the employer intends to engage?

- Does the notion of ‘similar work’ require an assessment of the overall skills and training required to perform a particular role? Or does it relate more broadly to the type of work performed in a specific part of the business?

- Does the notion of ‘similar work’ also encompass consideration as to the level of responsibility or performance requirements?

- Does the clause take into account the location at which the work is
performed? If an employer engaged employees who perform ‘similar work’ at a factory in Victoria and New South Wales, is the employer required to offer additional hours to its employees in Victoria before engaging a new employee in New South Wales? Is the answer to this question any different if the two factories are located closer to one another? If so, how close?

- How is an assessment of ‘similar work’ made where an employer requires a new part-time or casual employee to perform a range of different tasks on an as-needed basis?
- In the content of labour hire, does the ‘similar work’ apply only to the work of one client or all current clients?

856. The proposed clause does not give consideration to any of the above complexities and self-evidently is not ‘simple and easy to understand’. The nature of the obligation imposed on an employer is ambiguous and on this basis alone, the claim should not be granted.

**Normal Working Hours**

857. The proposed provision twice makes reference to the ‘normal working hours’ of an existing part-time or casual employee. This element of the clause is also confusing. The very nature of casual employment is such that the hours of work may vary from week to week. In the context of casual employees, a reference to ‘normal working hours’ is therefore unclear and in fact contrary to the basis upon which casual employees are engaged. An assessment as to a casual employee’s ‘normal working hours’ where there is little if any regularity to the number of hours worked, cannot be made.

858. It is also relevant to note that the proposed clause does not draw a distinction between ordinary hours and overtime. That is to say, if a part-time employee’s ordinary hours of work are less than 38 hours per week, however the employee also works overtime, for instance, outside the spread of hours stipulated by the relevant award, the obligation to offer additional hours to that employee
nonetheless arises. Overtime hours however, may necessarily only be worked as and when the need arises; they may not be worked regularly. If they are nonetheless to be taken into account in assessing an employee’s ‘normal working hours’, this only serves to further complicate the task.

Selecting Existing Employees

859. The proposed clause must be considered in the circumstances of businesses which engage large numbers of casual and part-time employees (for example, a large labour hire company may have more than 10,000 casuals engaged at any point in time). We observe firstly that the terms in which the obligation proposed is cast do not make clear whether the opportunity to increase their ‘normal working hours’ need only be offered to a particular pre-existing employee of the employer’s choosing or whether the employer is required to consult generally with all such employees engaged on ‘similar work’.

860. If an employer is required to offer additional hours to all pre-existing part-time and casual employees engaged on ‘similar work’, and several of those employees indicate that they seek to increase their hours, the basis upon which an employer is to determine which employee or employees will have their hours increased is not clear. It is trite to observe that this is likely to give rise to disputation between an employer and its employees.

The Dispute Settlement Procedure

861. The insertion of the proposed clause has implications for the scope of the dispute settlement procedure that is present in every award. It is triggered ‘in the event of a dispute about a matter under [the relevant] award’. Where such a dispute arises, the dispute resolution clause states that:

- In the first instance, the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor.

- If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner between the employee or
employees concerned and more senior levels of management as appropriate.

- If the dispute cannot be resolved at the workplace and the above steps have been taken, a party to the dispute may refer it to the Commission. The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

- Where the matter remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

862. The dispute settlement procedure would apply to a dispute about a matter arising from the model clause. For instance, if an employer did not provide pre-existing employees an opportunity to increase their ‘normal working hours’ prior to engaging a new casual or part-time employee, the dispute settlement procedure would apply. Moreover, if an employer did engage in the process required by the clause but subsequently declined to increase the employee’s hours on the basis that the clause does not expressly require that it do so, the dispute settlement procedure would also apply to these circumstances.

863. We are concerned that in this way, an employee may be given a formal avenue through which they can seek an increase to their ‘normal working hours’. That is, an employee may argue that the proposed clause creates an obligation on the employer to grant the employee additional hours of work if requested, without any caveat. Similarly, where multiple employees seek to increase their ‘normal working hours’, but the employer is only able to increase the ‘normal working hours’ of one of those employees, the dispute settlement procedure would also apply to a contest in this regard.

864. The agitation of disputes by employees and their union representatives would appear a likely consequence of inserting the proposed clause across the award system.
Employer Discretion

865. The clause does not expressly grant an employer any discretion. It compels an employer to offer additional hours to existing part-time or casual employees in the circumstances prescribed. If an employee or multiple employees indicate that they seek to increase their hours, it is not clear whether the employer must acquiesce or whether the employer is able to refuse.

866. Whilst the obligation created by the proposed clause appears to extend only to the employer offering its employees an opportunity to increase their hours, its terms cast some doubt over the extent to which an employer may, once having engaged in that process, nonetheless decline to increase the ‘normal working hours’ of any such employees due to the operational needs of the business or otherwise.

867. To the extent that the proposed provision is intended to compel the employer to increase the ‘normal working hours’ of an employee and thereby, prohibit an employer from increasing the number of casual or part-time employees it engages, this is a serious encroachment upon an employer’s prerogative without any regard being given to the needs of the business or the purpose for which the employer seeks to increase its headcount. The model clause removes an employer’s ability to structure its workforce in a very significant way. The ACTU and its affiliates have not offered any justification for why this might be appropriate or necessary.

Operational Requirements

868. At its core, the proposed clause fails to recognise that there are legitimate reasons why an employer needs to add employees to its overall headcount. We point to following examples:

- As we have earlier stated, an employer may need access to a pool of casual employees who can be required to work on an ad hoc basis from time to time, as and when the need arises, often at short notice.

- An employer may seek to retain a pool of casuals who ensure that the
business is able to meet the ebbs and flows in demand that cannot otherwise be satisfied by its existing employees, even if they were to work additional hours.

- An employer may require additional employees to enable it to service more than one client at a time in circumstances where the employer has little if any control over when those services are to be provided.

- There may be circumstances in which an employer requires that a certain amount of work be performed within a set timeframe. This can only be achieved by additional personnel working alongside existing employees. The performance of additional hours of work by existing employees will not achieve the outcome required, as the work will necessarily span over a greater number of hours.

- A particular casual or part-time employee that the business wishes to recruit may have skills or other attributes that are needed by the business, even though the work to be carried out is broadly similar to that carried out by one or more existing casual or part-time employees.

869. The proposed clause stymies the extent to which an employer is able to satisfy the operational requirements of the business. It removes an employer’s prerogative to manage and structure its workforce as is necessary to meet the needs of the business. The effect of the clause would be to stifle an employer’s ability to increase the number of part-time and casual employee it engages at the whim of existing employees who seek to work additional hours, irrespective of whether the performance of those additional hours would in fact fulfil the very purpose for which the employer requires additional employees.

The Regulatory Burden

870. The proposed clause creates an obligation that is both time consuming and costly for an employer, particularly in circumstances in which it engages a large number of casual and part-time employees, which is by no means uncommon.

871. The imposition of a requirement that the employer:
• identify each of its casual and part-time employees who are engaged on 'similar work' and whose 'normal working hours' are less than 38 per week;

• inform each of those employees that there is an opportunity to increase their 'normal working hours';

• allow time for the relevant employees to respond to the employer;

• consider the responses received and, to the extent that it is permitted by the proposed clause, assess which if any of those employees requests can be accommodated;

• advise the relevant employees of the outcome;

• deal with employee queries or concerns regarding the outcome;

• implement changes as necessary to rosters; and

• make an assessment as to whether the need for an additional part-time or casual employee has been alleviated and if not, undertake the entire process once again.

872. We urge the Commission to turn its mind to the time and cost that will be incurred by an employer in undertaking the process above. In circumstances where an employer needs an additional casual or part-time employee as a matter of urgency the requirement is obviously completely unworkable. The above process would significantly delay the recruitment of a new employee.

873. The ACTU and its affiliates have not sought to grapple with whether the proposed clause would also trigger the obligation to consult under the model consultation clause about changes to rosters or hours of work (see for instance clause 9.2 of the Manufacturing Award). To the extent that this provision may also apply, it adds yet another layer of regulation that is entirely unjustified.

874. The proposed clause would also apply to labour hire agencies. The application of the proposed clause on such employers will result in absurd outcomes.
Labour hire agencies may have tens of thousands of casual employees engaged at a time. Should one of their clients seek a new casual employee, the proposed clause would require the labour hire agency to first undertake the process we have set out above in respect of a very large number of employees. This may be in circumstances where the client indicates that, for instance, they simply require a new casual employee to perform some work for them on the following day due to the sudden illness of an existing employee. It would be impossible for a labour hire agency to comply with the proposed clause in this situation.

**Employment Costs**

875. The regulatory burden and inefficiencies that will result from the clause will obviously be costly for employers.

876. Also, the performance of additional hours of work by an existing part-time or casual employee may, in some circumstances, result in the employee performing overtime. This might arise where, for instance:

- The employee works in excess of the maximum number of weekly ordinary hours, which in most awards is set at 38; and

- As a result of the employee working additional hours, he or she performs work outside the spread of hours stipulated by the award.

877. Moreover, it is unclear how the clause is intended to operate in the context of award clauses that mandate agreement about the actual hours of work for part-time employment (for example clause 13 of the Manufacturing Award) and require, in effect, that any additional hours worked are paid at overtime rates, unless a written agreement to vary an individual’s ordinary hours is entered into. The proposal does not appear to contemplate any amendment to such provisions in order to reflect the operation of the new clauses.

878. The proposed claim appears to provide an employer with no option but to permit an existing part-time employee to work beyond their ordinary hours of work, regardless of whether the employee has formally agreed to vary their
‘agreed working hours’ as contemplated by the current part-time clause. Nothing in the proposed clause requires that a part-time employee reach an agreement to vary their ‘agreed hours of work’ in the manner contemplated by clause 13.4 of the Manufacturing Award. Consequently, the effect of the proposed clauses would be that an employer is left with no option but to allow part-time employees to work additional hours at overtime rates. This could result in very significant cost increases for employers.

879. Alternatively, the proposed clause could be argued to effectively require an employer to agree to alter the employee’s ‘agreed hours’ if the employer wants to avoid paying overtime rates for the additional hours. This would be completely unreasonable, for example if the employer had only intended to employ additional casuals due to a temporary increase in demand.

880. To the extent that the model term requires that an employer increase the ‘normal working hours’ of existing employees as a result of which that employee then works overtime, this will result in increased employment costs for an employer which might otherwise not be incurred. The clause sought therefore imposes a new unjustifiable expense.

Fatigue Management

881. The proposed clause does not specify how many additional hours an existing casual or part-time employee needs to be offered.

882. The proposed clause does not have any regard for an employer’s fatigue management obligations. Many employers have fatigue management policies or protocols in place that influence how and when an employee can be required to work. In other industries, such as the road transport industry, there are specific regulations in place that require operators to actively take responsibility for the management of fatigue and have a significant bearing on an employer’s ability to require an employee to work. Work health and safety laws are also relevant.

883. Assuming the proposed clause does not grant an employer the discretion to
decline an employee who seeks to increase their ‘normal working hours’, the clause is at odds with an employer’s responsibility to manage their employees’ fatigue. It can lead to circumstances in which an employee seeks to work for lengthy periods of time which may be unsafe, having regard to the nature of the work. In certain circumstances, it may also conflict with those award clauses that require that employers, ‘wherever reasonably practicable’ arrange overtime such that “an employee has at least 10 consecutive hours off duty between the work of successive working days”. Where this does not occur, an employer is required to pay a penalty rate.\footnote{See for instance clause 40.4 of the \textit{Manufacturing and Associated Industries and Occupations Award 2010}. We note that the AMWU is seeking to vary this clause by removing the casual exclusion in clause 404.(b).}

884. In this way, the proposed clause undermines the need to ensure that employees are not subjected to unsafe work practices.

\textbf{Workforce Participation}

885. The effect of the proposed clause is to limit employment opportunities that would arise. The circumstances in which a new position would become available would be restricted. The proposed clause would deny those that are unemployed an opportunity to participate in the workforce. It would also limit the circumstances in which an employee seeking to explore new possibilities and develop additional skills could undertake a different role.

\textbf{The Joint Employer Survey}

886. In the Joint Employer Survey, employer respondents were asked an open-ended question:

“Before you increase the number of casual and part-time employees in your business, do you currently offer the hours to be performed by that casual or part-time employee to existing casual and part-time employees performing similar work?”

887. 33.87\% of respondents reported that they always do. 23.23\% reported that they often did and 27.10\% that they sometimes did, 11.61\% reported that they did
not. While the responses show that a large number of employers already offer additional hours to existing part-time and casual staff prior to increasing the number of part-time and casual employees in the business, this can be explained by the fact that there is already a financial incentive on many business to do so. Increasing employee head count can still increase the cost base for many businesses. Minimising those costs where existing employees are able to work more ordinary hours is an outcome that many employers would consider attractive.

888. There are also those employers who operate businesses where this obligation would be highly problematic or unworkable. This is because:

- The business operates with a large casual workforce and the regulatory burden of this obligation would be very high (e.g. labour hire firms);
- The business operates on the available hours of a large pool of casual or part-time employees;
- The business operates is an industry where this obligation would be problematic for the type of services provided;
- Of specific operational exceptions due to the need for adequate staff coverage and servicing of clients.

889. Some of the survey responses are set out below:

- “With a restaurant in a seasonal location I need lots of employees for short shifts at the busy times. This would be disaster for my business.”

- “Given the nature of our industry and our contractual arrangements with insurance companies, this would have a significant adverse effect on our business. We are restricted in the amount of travel time and kms we can charge our clients - with numerous cost centres specified across the country. We need to have casual investigators spread geographically

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across the country in order to service those cost centres. If we were forced to offer additional hours to existing casual employees rather than employee casuals in the geographical areas they were required, we would incur significant costs in paying casuals to travel, which we would be unable to recover from clients. The business would quickly become unviable. 299

- “It reduces the ability to run the business the way the managers want to run it. Too much red tape makes it difficult and the flexibility is removed. A business should be able to offer particular hours to particular workers and not have to increase their employee numbers.” 300

- “Additional hours would mean penalty rates to be paid to employees i.e. more costs involved to complete the job. Usually contracts are quoted & penalty rates are not usually included in quoted works, therefore profit & viability of the contract is compromised” 301

- “We would strongly oppose this. We operate on a 24/7 basis and need flexibility to cover all rostered hours. We want to make the decision to employ the best workers; our brand takes pride in delivering exceptional service which can only be achieved with exceptional employees.” 302

Section 138 and the Modern Awards Objective

890. The ACTU, AMWU and AMWU – Vehicle Division have not made any attempt at addressing why the proposed provision is necessary in the sense contemplated by s.138. There is a complete absence of material before the Commission that would enable it to conclude that the provision is necessary to ensure that each of relevant awards provides a fair and relevant minimum safety net of terms and conditions.

891. As reflected in the submissions above, it is our contention that the clause is at

299 Response ID 200.
300 Response ID 47.
301 Response ID 56.
302 Response ID 154.
odds with the following elements of s.134(1):

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

- Section 134(1)(d): the need to promote flexible modern work practices and the efficient and effective performance of work;

- Section 134(1)(f): the likely impact on business, including on productivity, employment costs and the regulatory burden;

- Section 134(1)(g): the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

- Section 134(1)(h): the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

Conclusion

892. For all of the reasons stated above, the unions’ claim should be dismissed.
19. THE REQUIREMENT TO PROVIDE CERTAIN INFORMATION TO CASUAL EMPLOYEES UPON ENGAGEMENT

The Claim

893. The ACTU is seeking the insertion of a clause in 109 modern awards\(^\text{303}\) that requires an employer to provide casual employees with certain information upon engagement. The model clause proposed is in the following terms:

An employer when engaging a casual must inform the casual that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required.

894. The clause applies when an employer engages a casual employee. It requires that at that time, the employer must inform the employee of their category of employment, the identity of the employer, the classification, the rate of pay and the likely number of hours required. The clause does not stipulate the form in which such information must be provided.

895. Of the 109 awards that form part of the ACTU’s claim, there are two awards in respect of which the AMWU has proposed a different variation. Those awards are:

- The Manufacturing Award; and
- The FBT Award.

896. In respect of those awards, the AMWU seeks the following variation to the existing clause 14.3 in the Manufacturing Award and clause 13.3 in the FBT Award:

“An employer when engaging a casual must inform the employee in writing that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay, an employee’s right to become full-time or part-time consistent with clause X.X Casual Conversion and the likely number of hours required.”

\(^{303}\) See Attachment B to the ACTU’s submission dated 19 October 2015.
897. Similarly, the AMWU – Vehicle Division seeks to vary clause 13.2 of the Vehicle Award as follows:

13.2 An employer when engaging a casual must inform the employee in writing that they are employed as a casual employee, stating by whom the employee is employed, the classification level and rate of pay, the employee’s right to become full-time or part-time consistent with clause 13.4 Casual Conversion, and the likely number of hours required.

898. The AMWU and AMWU – Vehicle Division’s proposal goes further than that proposed by the ACTU in two respects:

- the information would need to be provided in writing; and

- in addition to the matters already identified by the pre-existing provisions, an employer would be required to inform employees that they have the right to convert under the relevant casual conversion provisions.

899. Ai Group opposes the variations sought.

The ACTU’s Justification for the Model Clause

900. The ACTU has not offered any justification in its written submissions for the model clause. It has neither explained the intention underpinning its proposal, nor has it addressed why the provision is ‘necessary’ in each of the awards it has nominated. Further, it has not pointed to any of the evidence it has called in support of its claim.

The AMWU’s Justification for the Proposed Variation

901. The AMWU has offered only the following arguments in support of the variations it has proposed to the Manufacturing Award and FBT Award:

- There is evidence that many employers do not notify their employees of their conversion entitlements and many employees are not aware of
their conversion entitlements. Reference is made to the ACTU and AMWU surveys.\textsuperscript{304}

- Identification upon engagement of an employee’s entitlement to convert will assist employers and employees to understand their obligations and encourage improved workforce planning.\textsuperscript{305}

902. The AMWU – Vehicle Division supports and relies upon the submissions of the ACTU and AMWU in respect of it claim to vary the Vehicle Award.\textsuperscript{306} It cites evidence ‘which suggests that significant proportion of employees are not aware their conversion rights under the Awards, despite an explicit obligation on an employer to inform them of such rights’.\textsuperscript{307}

903. We address each of the above arguments later in this section of our submission.

**Prior Consideration of the Issue**

904. As part of the AMWU’s application to vary casual employment provisions in the Metals Award 1998, it sought the insertion of the following clause:

“All upon engagement, an employer shall provide to a casual employee an instrument of appointment in writing which stipulates the type of employment and informs the employee of the duties required, the number of hours required, and the rate of pay.”\textsuperscript{308}

905. The proposed clause required an employer to provide to a casual employee, in writing, an ‘instrument of appointment’ setting out the type of employment, the duties required, the number of hours required and the rate of pay.

\textsuperscript{304} See AMWU submission dated 13 October 2015 at paragraph 65
\textsuperscript{305} See AMWU’s submissions dated 13 October 2015 at paragraph 66
\textsuperscript{306} See AMWU – Vehicle Division’s submissions dated 2 November 2015 at paragraph 90
\textsuperscript{307} See AMWU – Vehicle Division’s submissions dated 2 November 2015 at paragraph 89
\textsuperscript{308} Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [28])
906. Employer representatives and the Commonwealth resisted the claim on various grounds, including the imposition of ‘unnecessarily onerous processes on employment’ and an additional administrative burden.  

907. The AIRC recognised that there was force to each of the arguments put by the employer representatives and stated its reluctance to ‘burden employers or employees with unnecessary paper work.’ Despite this, the AIRC determined on a provisional basis that the following modified clause would be inserted:

“An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual, stating by whom they are employed, the duties, the actual or likely number of hours required, and the relevant rate of pay.”

908. Ultimately, following the settlement of orders process, the provision below was inserted:

“An employer when engaging a person for casual employment must inform the employee then and there that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed and the classification level, the actual or likely number of hours required, and the relevant rate of pay.”

909. The above clause did not require the provision of the relevant information in writing and modified, to some degree, the information that an employer was required to be given. A separate provision was also inserted in respect of ‘a casual employee who has been engaged for one or more periods of employment extending over three or more weeks in any calendar month, and whose employment is or is likely to be ongoing’. In such circumstances, the employer was required to provide written advice to an employee about the matters there listed.

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309 Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [119]).
310 Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [120]).
311 Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [124]).
312 PR901028.
313 Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [124]) and PR901028.
910. It is important to note that the AMWU’s claim was granted in the context of submissions and evidence specific to the manufacturing industry, which led the AIRC to conclude that the union’s claim should be granted. Further, the claim was considered against a markedly different statutory scheme. This is in contrast to the vacuum in which the Commission has here been called upon to consider the claims, absent any argument, assertion or evidence that the provision is necessary to achieve the modern awards objective in each of the 109 awards nominated by the ACTU.

The Fair Work Regulations 2009

911. Section 536(1) requires that an employer must give an employee a pay slip within one working day of paying an amount to the employee in relation to the performance of the work. The pay slip must include any information prescribed by the Fair Work Regulations 2009 (Regulations). Regulation 3.46 sets out the matters that must be included in a pay slip. Relevantly:

- Regulation 3.46 sets out the matters that must be included in a pay slip. Relevantly:
  - Regulation 3.46(1)(a) requires that a pay slip must specify the employer’s name;
  - Regulations 3.46(1)(e) and (f) require that a pay slip must specify the gross and net payment made;
  - Regulation 3.46(1)(g) requires that a pay slip must specify any amount paid to the employee that is a loading; and
  - Regulation 3.46(3)(a) requires that if the employee is paid an hourly rate of pay, the pay slip must include the rate of pay for the employee’s ordinary hours (however described).

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314 See s.536(2)(b).
912. By virtue of s.536(1) and the Regulations cited above, an employee, including a casual employee, will necessarily be informed each time they are paid an amount in relation to the performance of work as to:

- whom they are employed by; and

- their hourly rate of pay, including the casual loading.

913. By virtue of s.323(1)(c), an employee must be paid in relation to the performance of work at least monthly. Many modern awards contain terms that require that payment be made weekly or fortnightly. Pay slips are therefore also required to be provided to employees weekly, fortnightly or monthly each time they are paid. We note that the Commission has decided to insert a note in all exposure drafts (and ultimately, the awards) that refers to Regulation 3.46, thereby drawing the employer’s attention to the requirement that certain content be included in a pay slip.\(^{315}\)

914. In 2000 when the *Metal Industry Casual Employment Decision* was handed down, the pay slip content requirements in Regulation 132B of the *Workplace Relations Regulations* did not require that casual loadings be separately specified, unlike Regulation 3.46(1)(g) in the Regulations. Also, the pay record requirements in Regulation 131T did not require that an employer specify whether an employee’s employment was full-time, part-time or casual, unlike Regulation 3.32 of the Regulations.

915. In light of detailed pay slip obligations in the Regulations, it is unnecessary for a modern award to include a requirement that an employee be provided with such information upon their engagement. The application of the Act and the Regulations will ensure that an employee will be informed of the identity of their employer and their hourly rate of pay on an ongoing basis. This means that if the rate of pay changes over the course of their employment, the employee will be informed of this. This is in fact a more effective mechanism for ensuring that

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\(^{315}\) 4 Yearly Review of Modern Awards [2015] FWCFB 4658 at [57]
an employee is aware of their current hourly rate of pay than notification at the
time of engagement, after which that rate may change.

916. We note that s.536 is a civil remedy provision and thus an employee or the
FWO may seek orders against an employer in a competent jurisdiction if an
employer is in contravention of the relevant provision.

917. The introduction of an award obligation to provide information that an employer
is already required to provide to an employee each time they are paid creates
unnecessary duplication and an additional administrative burden on employers.
The unions have not established why the provision is nonetheless ‘necessary’
to achieve the modern awards objective.

Pre-Existing Award Terms

918. Whilst the vast majority of awards do not presently contain a provision of the
sort proposed by the ACTU, some already require that an employer advise a
casual employee of certain conditions, such as the fact that they are a casual
employee.316 Other awards contain provisions that require that an employer
inform an employee of their ‘terms of engagement’.317

919. The model term would result in overlap, duplication and confusion in certain
awards. The ACTU has made no attempt at explaining how the model clause
might interact with pre-existing provisions or indeed why the model clause is
‘necessary’ in awards that contain provisions such as the above.

920. The ACTU should be put to the task of explaining what work its proposed
clause will do in each of the relevant awards, having regard to any pre-existing
terms that require the provision of information to an employee upon
engagement. To the extent that any of the awards that form part its claim
include a provision of this nature, the ACTU ought to clarify how the model term

316 See for example clause 10 of the Aged Care Award 2010, clause 11.1 of the Airline Operations –
Ground Staff Award 2010, clause 10.2 of the Ambulance and Patient Transport Industry Award 2010.
317 See for example clause 10.2 of the Electrical Power Industry Award 2010 and clause 11.2 of the
Waste Management Award 2010.
would intersect with such terms and why the model term is necessary to achieve the modern awards objective.

**The Employee's Classification Level**

921. The model clause requires that the employer advise the employee of their classification at the time of engagement. We are concerned that this may have unintended but substantive implications under certain awards, where a casual employee is not engaged for one specific classification. That is, the employee’s engagement is not in all circumstances as a ‘level 2’ employee. Rather, their classification level may change depending upon the type of work that the casual is engaged to carry out.

922. Take for instance the Horse and Greyhound Award. Clause 10 is headed ‘types of employment’ and requires only that it must be ‘clearly indicated by the employer whether the employee is engaged on a full-time, part-time or casual basis’. The terms of clause 10.4 (casual employment) do not, either expressly or impliedly, require that a casual employee be engaged at a particular classification or that an employee be informed of their classification at the time of engagement.

923. Clause 13.1 sets out the classification levels. An employee is to be paid the minimum wage prescribed for the relevant classification. The classification structure does not presuppose the appointment of an employee to a particular level. With the exception of stablehands, it does not specify a minimum amount of experience or qualifications. An employee is simply classified in accordance with the work a casual employee is required to perform which, under the terms of the award, may well differ each time.

924. The requirement that a casual employee be engaged at a particular classification can have unintended consequences for the application of other award terms, such as clause 17 (higher duties). Clause 17.1 applies where an employee is required to do work ‘for which a higher rate is fixed than that provided for in their ordinary duties’.
925. If an employee is advised upon engagement that they are classified at a particular level, it may be argued that the minimum award wage payable for that classification is the rate prescribed for their ‘ordinary duties’. If a casual employee were subsequently required to perform work for which a higher rate is fixed, and such work exceeded four hours on any day, the employee would be entitled to be paid at the higher rate for all work done on that day.

926. This differs from the operation of the present award, which requires that a casual employee be paid ‘the appropriate minimum wage prescribed in clause 13’. Thus, a casual employee is paid, on an hourly basis, the appropriate minimum rate prescribed in accordance with the relevant classification, which is contingent upon the work they are performing. This can very hour to hour, shift to shift, engagement to engagement.

927. The Horse and Greyhound Award provides only one example of an issue that we consider is likely to arise in other awards. The unions have not made any attempt to explain how the model term would interact with the pre-existing terms of the relevant awards, so as to satisfy the Commission there is no unintended consequence or alteration to award entitlements that extends beyond the provision of certain information upon the employee’s engagement.

928. For these reasons, the Commission should not introduce a model provision across the modern awards system without giving due consideration to how it would intersect with pre-existing provisions of each of the awards.

The Widespread use of In-house Job Titles and Classifications

929. Employers very commonly use ‘in-house’ job titles rather than those in awards. For example, an employee may refer to an employee as a ‘boilermaker’ or ‘fitter’ rather than an ‘Engineering Tradesperson – Fabrication’ or an ‘Engineering Tradesperson – Mechanical’ respectively. A requirement to provide the award classification level to an employee on engagement would impose an unnecessary administrative burden upon employers.
930. In the initial version of the *Workplace Relations Regulations 2006*, as made at the time when the Work Choices legislation was implemented in March 2006, an employer was required to specify each employee’s award classification in pay records and on pay slips. The requirement caused widespread problems because of the fact that employers very commonly use in-house job titles and classifications, rather than award classifications.

931. The requirement was removed from March 2007 as a result of amendments to the *Workplace Relations Amendments 2006*. The Explanatory Statement for the *Workplace Relations Amendment Regulations 2006 (No. 4)* relevantly stated (emphasis added):

"The amendments in Schedule 2 amend the Principal Regulations by repealing the existing Part 19 of Chapter 2 and replacing it with a streamlined set of record keeping and payslip requirements. The streamlined requirements are designed to ensure that sufficient records are maintained in order to ensure compliance with the Australian Fair Pay and Conditions Standard, while significantly reducing the administrative burden on employers.

The Government received a number of representations concerning the operation of the record keeping requirements from stakeholders and constituents and discussed possible changes with a number of key stakeholders who are required to keep records under the regulations. On 13 November 2006, the Minister issued a media release explaining the proposed amendments to streamline the record keeping requirements to more closely reflect the pre-WorkChoices requirements."

932. The requirement has not been reintroduced under the Fair Work system - no doubt in recognition of the problems that arose in 2006.

**The Employee’s Rate of Pay**

933. The model clause requires that an employer inform a casual employee of ‘the rate of pay’. The meaning of this term is entirely unclear. For instance:

- Does the clause require the employer to inform the employee of the relevant minimum rate prescribed by the award?

- Does this include separately identifiable amounts such as loadings, penalties and allowances?
• Does this include over award amounts?
• Is the rate of pay to be expressed as an hourly amount?
• Which rate of pay is an employer to provide to an employee covered by an award such as the Horse and Greyhound Award, where the employee is not employed at a particular classification?

934. The proposed clause is clearly ambiguous. The ACTU has failed to explain how the model clause is intended to operate and the circumstances in which the obligation imposed by the clause would be satisfied.

935. We refer to the submissions earlier made regarding the Regulations. By virtue of the Act and the Regulations we have cited above, an employee’s pay slip must state their hourly rate of pay, including the casual loading. This necessarily includes any overaward amounts. As a result, where an employee is in receipt of overaward payments, they will be informed of their actual rate of pay via the pay slip that their employer is required to provide. Our central contention, therefore, is that it is not ‘necessary’, in the sense contemplated by s.138, to insert an award obligation to provide information that is already required by the Fair Work regime.

936. As the Commission has earlier determined in this Review, modern awards provide a safety net of minimum terms and conditions. They prescribe the minimum rates that an employer must pay an employee covered the relevant award. 318 Over award payments are not a matter dealt with by the awards system. Therefore, it is not appropriate for an award to require the provision of information regarding an employee’s entitlements that are not mandated or made compulsory by the award system.

937. We are also concerned that information provided as a consequence of the model clause may effectively create a contractual obligation between an employer and employee, which would then require an employer to maintain

overaward payments. Such an obligation extends well beyond the provision of a ‘fair and relevant minimum safety net’ as required by s.134(1) of the Act.

938. Accordingly, should the ACTU’s claim be granted, the model clause should only require that the employer inform the employee of the minimum rate prescribed by the award.

The Likely Number of Hours

939. The ACTU’s model clause requires an employer, when engaging a casual employee, to inform the casual of the ‘likely number of hours required’. This element of the ACTU’s claim is highly problematic.

940. Firstly, it is unclear what the clause in fact requires. That is:

- Does the model clause require an employer to specify a precise number of hours, or is it sufficient to provide a range of hours that will likely be required? That is, is the obligation satisfied if an employer informs an employee that the likely number of hours required will be 10 – 20 hours per week?

- Does the model clause require an estimation of the number of ordinary hours that will be required, or is the employee to be advised of the likely number of hours inclusive of overtime?

- Is the ‘likely number of hours’ to be expressed as a daily, weekly, fortnightly, or monthly amount? Does the clause require the employer to advise of the likely number of hours that will be required over the entire duration of the casual employee’s engagement? Or does it require the employer to inform the employee of the number of hours that will be required each time the employee is required to work (i.e. for each day/shift)?

941. The provision, as presently drafted, is clearly ambiguous and on this basis alone, should not be inserted into the award system. The clause is by no means ‘simple and easy to understand’.
942. Secondly, we deal with the obvious practical difficulties associated with informing a casual employee upon their engagement of the ‘likely number of hours required’. Casual employees are employed by the hour. It is often impracticable, if not impossible, to determine the likely number of hours a casual employee will be required to work when they are engaged. The model clause erroneously assumes that a casual employee will in fact have a likely number of hours.

943. The evidence filed by the unions shows that often casual employees have variable hours. For instance, we refer to the evidence of Ms Linda Rackstraw. In her witness statement of 8 October 2015, she stated:

“The first 2.5 years of my employment at McDonalds I received a reasonably regular number of hours of work (normally approximately 18 hours per week) except during school holidays when I received very little work and in the last year of my employment I was only given approximately 5 hours per week. … My hours of work dropped significantly to approximately 10 hours per fortnight from May 2015 until I finished working there in July 2015.”

944. Ms Rackstraw’s evidence establishes that over the course of her engagement as a casual employee, her hours varied from 5 hours a week to 18 hours a week. There does not appear to be any argument by the unions that this was contrary to or inconsistent with the terms of the relevant modern award or enterprise agreement. The evidence rather demonstrates the flexibility that casual employment affords and the ability of an employer to meet its operational requirements by utilising casual labour to varying degrees.

945. It is difficult to fathom how, in circumstances such as Ms Rackstraw’s, an employer could inform a casual employee of their ‘likely number of hours’ at the time of engagement. The nature of casual employment is such that there is the clear possibility of significant variability in the hours that will be worked by a casual employee. This poses an obvious difficulty for an employer to whom the model clause would apply.

319 See paragraph 10 of the Statement of Linda Rackstraw, dated 8 October 2015.
946. There may well be occasions upon which an employer cannot identify a likely number of hours that will be required, as that is a matter that is contingent upon various factors over which the employer has little (if any) control. This includes seasonal fluctuations, variations in customer demand, climatic conditions, emergencies, changes within the businesses of suppliers and/or customers etc. Businesses in certain industries may be particularly susceptible to such unpredictability. Indeed, this is the very reason why many employers utilise casual labour.

947. We are concerned that the very nature of casual employment is such that there will be a very significant proportion of circumstances in which it would be virtually impossible for an employer to comply with this element of the ACTU’s model clause. For example, this would be particularly so for labour hire providers, who may not be able to inform a casual employee at the time of engagement as to their likely number of hours as this is determined according to their client’s needs. These difficulties, compounded by the lack of clarity around the obligation that is in fact imposed by the term, calls upon the Commission to exercise its discretion to dismiss the ACTU’s claim.

948. Thirdly, as we have earlier stated, casual employment is employment by the hour. By its very definition, the hours that a casual employee is required to work may vary. We are concerned that the provision of information pursuant to the model clause may be construed as a contractual obligation to require a casual employee to work only the number of hours identified at the time of their engagement as the likely number of hours. This would, in effect, undermine and run contrary to the notion of casual employment under the award system which, as we have consistently argued throughout this submission, provides employers with a necessary flexibility as such employees do not have a fixed number of hours.

949. Fourthly, the insertion of the model clause has implications for the scope of the dispute settlement procedure that is present in every award. It is triggered ‘in the event of a dispute about a matter under [the relevant] award’. Where such a dispute arises, the dispute resolution clause states that:
• In the first instance, the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor.

• If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner between the employee or employees concerned and more senior levels of management as appropriate.

• If the dispute cannot be resolved at the workplace and the above steps have been taken, a party to the dispute may refer it to the Commission. The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

• Where the matter remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

950. The dispute settlement procedure would apply to a dispute about a matter arising from the model clause. For instance, if an employer did not provide information to an employee in accordance with the model clause and a dispute arose in this regard, the dispute settlement procedure would apply. Moreover, if an employer informed an employee at the time of engagement that the likely number of hours required would be, for instance, 20 hours per week, and during the course of their engagement the employee was required to work less than or in excess of 20 hours in a week, and in this context a dispute arose about the information provided to the employee pursuant to the model clause, the dispute settlement procedure would also apply.

951. We are concerned that in this way, an employee may be given a formal avenue through which they can seek an alternation to the hours that they are required to work by their employer, by reference to the information provided to them pursuant to the proposed clause. That is, an employee may argue that the information provided pursuant to the model clause creates an obligation on the
employer to offer the employee the number of hours of work nominated by the employer at the time of engagement.

952. The agitation of disputes in this regard by employees and their union representatives would appear a likely consequence of inserting the model clause across the award system. To compel an employer to require a casual employee to work hours that are consistent with the information provided at the time of engagement as to the likely number of hours that will be required would be a serious encroachment upon an employer’s prerogative. These concerns also tell against granting the ACTU’s claim.

953. Fifthly, the provision of information pursuant to the model clause may interact with the unfair dismissal regime provided for in the Act. A casual employee may be protected from unfair dismissal. Amongst other criteria, the employee must have completed a period of employment with his or her employer of at least the minimum employment period.\(^\text{320}\) A period of service as a casual employee does not count towards the minimum employment period unless:

- the employment as a casual employee was on a regular and systematic basis; and

- during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.\(^\text{321}\)

954. A determination of whether, during the period of service, a casual employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis, is a matter of fact that must be established by way of evidence. The provision of information by an employer pursuant to the model clause may be relied upon by an employee as evidence of this determinant. That is, if an employer, in accordance with the model clause informs an employee at the time of engagement that the likely number of hours that they will be required to work is 20 hours a week, an employee may seek to

\(^{320}\) See s.382(a).

\(^{321}\) See s.384(2)(a).
rely upon the provision of such information in support of the proposition that during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis (i.e. that the employee had a reasonable expectation of continuing employment by the employer for 20 hours a week).

955. Information provided by an employer in compliance with the model clause could provide probative evidence of an employee’s reasonable expectation of continuing employment on a regular and systematic basis even in circumstances where there is little (if any) other evidence to support this contention. In this way, the model clause would significantly impact upon the eligibility of casual employees to seek an unfair dismissal remedy and undermine the intent of the legislative regime to limit the application of the relevant provisions to a certain category of casual employees.

956. Similar concerns arise regarding the circumstances in which a casual employee is entitled to request a change in working arrangements pursuant to s.65(1). By virtue of s.65(2)(b)(ii), a casual employee is not entitled to make a request unless the employee has a reasonable expectation of continuing employment on a regular and systematic basis. Further, s.67(2) sets out the circumstances in which a casual employee is entitled to parental leave and related entitlements. It lists various limitations including a requirement that the employee would have a reasonable expectation of continuing employment by the employer on a reasonable and systematic basis.

957. The ACTU has not addressed any of the potential implications that may arise as an extension of the model clause being inserted. It is not clear whether they are intended consequences or inadvertent but potential outcomes that are sought by the ACTU, without justification. In any event, they are of obvious significance and would actively undermine the legislative scheme. Indeed if the provision of information by an employer as to the likely number of hours required in accordance with an award clause alone constitutes evidence of a reasonable expectation of continuing employment by the employee on a regular and systematic basis, the model clause would virtually undermine the
limitation otherwise imposed by the legislation on the circumstances in which a casual employee is eligible for the relevant entitlements. The need to otherwise establish such an expectation may no longer arise.

958. Information provided by an employer in accordance with the model clause may also have a bearing on an order made by the Commission for the payment of compensation to a person who has been unfairly dismissed. Section 392 of the Act states that in determining an amount for the purposes of such an order, the Commission must take into account all the circumstances of the case including the matters there listed. One such matter is ‘the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed’. The likely number of hours identified by an employer at the time of engagement may also be relied upon by the Commission for the purposes of making such an assessment.

959. Our concerns are of course premised on the assumption that despite the information provided by an employer at the time of engagement the hours actually worked by a casual employee could vary considerably from that which they were advised of. It is for this reason that an assessment of whether a casual employee had a reasonable expectation of continuing employment on a regular and systematic basis and of the remuneration that the employee would have received or would have been likely to receive had they not been dismissed, would ordinarily be made based on the particular circumstances of each individual case. This would require an analysis of the facts of each case. To the extent that such an approach would be circumvented by simply relying upon information that an employer is required to provide in accordance with an award clause, that is clearly problematic for all the reasons we have here outlined, is of obvious concern.

960. For all of the reasons we have here outlined, we urge the Commission to resist the ACTU’s claim.

322 See s.392(2)(c).
961. Further, the AMWU has identified\(^{323}\) that 16 modern awards\(^{324}\) presently require an employer to inform a casual employee at the time of engagement of the likely number of hours required (or in some cases, the ‘actual or likely number of hours required’). For the reasons here stated, we propose that those 16 awards be varied by removing this requirement.

The Requirement to Provide the Information in Writing

962. The amendments proposed by the AMWU and AMWU – Vehicle Division to the Manufacturing Award, FBT Award and Vehicle Award, if made, would require an employer to provide the relevant information to a casual employment upon engagement in writing. The current clauses do not prescribe the medium by which the information must be communicated to an employee. The unions have not provided any submissions or evidence in support of their proposal.

963. We refer to the Metal Industry Casual Employment Decision regarding the AMWU’s application to vary the Metals Award. The union had there sought the insertion of a clause that would require the provision of information in writing to a casual employee upon engagement.

964. The AIRC recognised that the proposed clause may create unnecessary paper work and would, at least in the context of short term engagements, be burdensome.\(^{325}\) Accordingly, the Full Bench decided to insert a modified version of the AMWU’s proposal, which did not require the provision of written advice, except in certain circumstances.\(^{326}\)

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\(^{323}\) See AMWU’s submissions dated 13 October 2015 at paragraph 370.

\(^{324}\) Alpine Resorts Award 2010, cl. 10.6(a); Aluminium Industry Award 2010, cl. 10.4(c); Broadcasting and Recorded Entertainment Award 2010, cl. 10.5(a); Building and Construction On-Site General Award 2010, cl. 14.3; Food, Beverage and Tobacco Manufacturing Award 2010, cl. 13.3; Higher Education (Academic Staff) Award 2010, cl. 14.1; Joinery and Building Trades Award 2010, cl. 12.2; Live Performances Award 2010, cl. 10.4(a); Manufacturing and Associated Industries and Occupations Award 2010, cl. 14.3; Mobile Crane Hiring Award 2010, cl. 10.3(b); Pastoral Award 2010, cl. 10.4(a); Seafood Processing Award 2010; 12.3; Sporting Organisations Award 2010, cl. 13.1; Transport (Cash in-transit) Award 2010, cl. 11.5(b); Vehicle Manufacturing, Repair, Services and Retail Award 2010, cl. 13.2; Waste Management Award 2010; cl. 14.2.

\(^{325}\) Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [120]).

\(^{326}\) Re Metal, Engineering and Associated Industries Award, 1998 – Part I (Print T4991 at [124]).
965. The Commission should again decline to make the variation sought by the unions. As accepted by the AIRC, the proposal would introduce a significant and unnecessary additional administrative burden on employers, that is potentially time consuming and costly. In many cases, it may result in duplication where an employer, as a matter of course, provides some of the information listed in the relevant clauses to their employees by way of a letter of appointment or contract.

966. Above all else, the unions have not established that the current provisions are failing to achieve the modern awards objective or that the clause proposed is necessary to achieve such objective. They have provided few if any arguments in support of a change that would result in the imposition of a greater regulatory burden on employers.

967. The variation proposed by the unions should not be made.

The Casual Conversion Clause

968. The AMWU and AMWU – Vehicle Division are seeking a variation to existing provisions in three modern awards\(^{327}\) such that an employer would be required to inform a casual employee, in writing, at the time of engagement of an employee’s right to become full-time or part-time consistent with the casual conversion provisions contained in those awards. The variation is sought on the basis that there is evidence that currently, employers covered by those awards do not notify employees of their right to convert. The unions assert that as a result, employees are not aware of this entitlement.

969. The Manufacturing Award\(^{328}\), FBT Award\(^{329}\) and Vehicle Award\(^{330}\) each require that an employer must give the employee notice in writing of the provisions of the casual conversion clause within four weeks of becoming eligible to convert to permanent employment. In this way, an employer is presently required to

\(^{327}\) That is, the Manufacturing Award, FBT Award and Vehicle Award.

\(^{328}\) See clause 14.4(b).

\(^{329}\) See clause 13.4(b).

\(^{330}\) See clause 13.3(b).
notify an employee of their right to convert within four weeks of that right crystallising. The unions submit that their claim is in response to non-compliance with these provisions.

970. The unions have brought insufficient evidence to make good the proposition that there is widespread non-compliance with the current clauses. However, even if the unions’ submission were accepted, the union has not made submissions or called evidence which establishes that the variations proposed will effectively address their concerns.

971. In order to determine whether the proposals will serve their intended purpose, consideration must be given to the cause for non-compliance. This does not appear to have been undertaken by the unions. They have not provided any analysis as to whether:

- The alleged failure to notify employees of their right to convert occurs because an employer has not understood, from the terms of the current clause, that they are required to do so; or

- The alleged non-compliance with clauses that require notification of the right to convert when that right arises will necessarily be addressed by a provision that instead requires an employer to inform an employee of that right upon engagement; or

- The proposed variations would simply add an additional layer of obligations on employers that would not aid in addressing the non-compliance that the unions complain of.

972. The proposal introduces an additional requirement rather than addressing the alleged failure to comply with a pre-existing obligation under the relevant awards. Such non-compliance can, of course, be dealt with through the dispute resolution procedure contained in awards or by making an application to a court of competent jurisdiction on the basis that an employer has contravened a term of the award.\(^{331}\) Not surprisingly the unions have made no submissions about

\(^{331}\) See s.45.
the number of applications they have made to deal with disputes over the alleged non-compliance with the requirement to notify employees of their right to convert. Ai Group is unaware of any such applications being made over the past 16 years.

973. In addition, the following problems would arise from the union’s proposal:

- Many casuals do not work on a regular or systematic basis for at least six months and such casuals are likely to be misled into believing they have a right to elect to convert; and

- At the time when a casual is engaged there is no way of knowing whether the casual will be engaged on a regular and systematic basis for the next six months.

974. As set out in Ai Group’s October 2015 submission, the requirement to advise employees of their right to convert is an unnecessary red tape burden on employers, for all of the reasons set out in that submission. Most of the arguments in our October 2015 submission would apply equally to an obligation to advise employees in writing of the right to request conversion at the time of engagement.

Access to the Award

975. Each modern award presently contains a clause in the following terms:

“The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.”

976. The clause has been the subject of review by a Full Bench in the context of the exposure drafts published by the Commission. In a decision of December 2014, the Commission decided that the term would be amended:

“The employer must ensure that copies of the award and the NES are available to all employees to whom they apply, either on a notice board which is
conveniently located at or near the workplace or through accessible electronic means, whichever makes them more accessible.\(^332\)

977. The rationale for the revised clause was explained by the Full Bench as follows:

“[29] We agree with the submissions of the AMWU and the existing clause will be retained. Further we propose to delete the words ‘whichever makes them more accessible’ from the current formulation. It seems to us that these words give rise to an obligation which would be difficult to meet in practice and that the primary obligation under the clause is clear, that is: ‘The employer must ensure that copies of the award and the NES are available to all employees to whom they apply…’. We will also add the word ‘accessible’ before ‘electronic means’ in the current clause to make it clear that if the award and the NES are provided by electronic means then the means provided must be accessible to all employees. \(^333\)”

978. The provision requires an employer to ensure that the award is available to all employees to whom it applies. The intention of the provision is clearly to make certain that employees have access to the award and can ascertain their entitlements under it. The obligation created by the clause is an ongoing one; it is not limited, in a temporal sense, to the time of engagement of an employee.

979. The insertion of an award term that requires an employer to provide information about entitlements arising under the award is clearly not ‘necessary’ in circumstances where the awards already require that employees be provided access to the award over the course of their employment. This, in and of itself, enables an employee to determine their classification, rate of pay (particularly given that the awards will now contain schedules summarising hourly rates of pay) and their right to convert (where relevant). The additional provision proposed by the ACTU, and the amendments sought by the AMWU and AMWU – Vehicle Division, are unnecessary given the existence of the aforementioned clause in all modern awards.

Section 138 and the Modern Awards Objective

980. An award may include terms that it is permitted or require to include, only to the extent necessary to achieve the modern awards objective. As we have earlier stated, the ACTU and its affiliates have not cited s.138, the modern awards objective, or any elements of it in support of its claims. They have failed to establish that the terms proposed meet the threshold requirement established by s.138 of the Act.

981. The matters we have here raised clearly indicate that the variations proposed are contrary to the following elements of the modern awards objective:

- the need to promote flexible modern work practices and the efficient and productive performance of work; and
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

982. Further, it would appear that the remaining matters listed at s.134(1) are either irrelevant to the matter here before the Commission or are not advanced by the proposals.

983. It is apparent the provisions proposed are not necessary, in the sense contemplated by s.138.

334 See s.138
335 See s.134(1)(d)
336 See s.134(1)(f)
337 See s.134(1)(g)
Conclusion

984. For all of the reasons stated above, the ACTU's claim to insert the proposed model clause should not be granted. If the Commission decides against us, we submit that the provision sought should be amended to ensure that it goes no further than to require that an employer, when engaging a casual employee, inform the employee that they are employed as a casual and by whom they are employed. There should be no requirement that the advice be given in writing.

985. The variations sought by the AMWU and AMWU – Vehicle Division should not be granted.
20. CLAIMS TO REMOVE THE CASUAL EXCLUSION FROM PROVISIONS REQUIRING A MINIMUM BREAK AFTER OVERTIME

986. Ai Group opposes the AMWU’s claim to remove the exclusion for casuals from the following:

- Clause 40.4(b) of the Manufacturing Award;
- Clause 33.3(b) of the FBT Award;
- Clause 31.4(b) of the Sugar Award; and
- Clause 23.3(a)(ii) of the Oil Refining Award.

987. The AMWU incorrectly characterises the above clauses (as they currently operate) as excluding casual employees from provisions which require that a minimum break of 10 hours be taken after overtime.

988. Each of the above awards includes a provision that states:

“(a) When overtime work is necessary it must, wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.”

989. The above subclause (a) appears immediately before subclause (b) which states:

“(b) An employee (other than a casual employee) who works so much overtime between the termination of the employee’s ordinary work on one day and the commencement of the employee’s ordinary work on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to this clause, be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.”

990. It is clear that the AMWU has mischaracterised the basis of its claim. Subclause (a) does not exclude casual workers from a rest period after working overtime - it applies to all employees covered by the relevant award.
991. The effect of subclause (a), despite the claims by the AMWU, is to protect all employees from working arrangements whereby they would not have a 10 hour rest period after overtime.

992. Subclause (b) (which is the clause subject of the AMWU claim) provides an entitlement to employees other than casual employees to 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

993. It follows that the obligation for an employer to provide a rest period of 10 consecutive hours off duty between the work on successive days provided for in subclause (a) is a different and separate obligation to the entitlement in subclause (b), which requires the employer to provide a payment to employees (other than casual employees) who are not provided with such a rest period.

994. The AMWU, at paragraph 382 of its submission, suggests that the exclusion of casual employees from a 10 hour rest period after overtime has “critical implications for workplace health and safety and fatigue management”. The AMWU also relies on the evidence of Ms Valance to support its argument.\(^{338}\) The argument holds little weight, given that employers are, by effect of subclause (a), required, wherever reasonably practicable, to provide a rest period of 10 consecutive hours off duty between work on successive days.

995. The AMWU’s submission attempts to draw a correlation between the history of the ‘rest break after overtime’ clause in the metals and manufacturing industry and the ‘changing nature of casual work’ to suggest that the exclusion of casual employees is no longer justified.\(^{339}\) The AMWU’s reasoning is flawed.

996. We note that the exclusion of casuals from the provision of payment for work performed without a 10 hour rest period in the then Metals Award 1998 was raised in the Metal Industry Casual Employment Case at paragraphs 13 and 17.

\(^{338}\) AMWU Submission dated 13 October 2015 at paragraph 383.

\(^{339}\) AMWU Submission, paragraph 381
of the decision. The provision equivalent to subclause (b) remained in the Metals Industry Award 1998 following this case.

997. Also noted is that the exclusion of casuals from the payment described in subclause (b) was considered during award simplification and the making of the Metals Award 1998. Subclause (b) was agreed to by the parties, which included the AMWU. An extract from the Senior Deputy President Marsh’s decision is provided below (emphasis added):

"6.4.4 Rest Period After Overtime

6.4.4(a), (b) and (c)

These provisions are agreed between the parties with the exception of the MTIA proposed additional sentence to 6.4.4(c) which states:

"By agreement between the employer and individual employee, the 10 hour break provided for in this clause may be reduced to a period no less than 8 hours."

The existing award provision (clause 21) provides for a 10 hour break in certain circumstances and for an 8 hour break in others. The non agreed provision in the proposed award provides for a reduction in the 10 hour break to 8 hours on the basis of individual agreement. On the basis that the safeguards set out in clause 2.2.2 (Facilitation by Individual Agreement) apply to this clause I am prepared to adopt the MTIA provision. The clauses are allowable pursuant to s.89A(2)(b) and (k) and s.89A(6)."

998. The Commission should not permit a party to depart from a consent position which it has reached, other than where there are very strong cogent reasons, because to do so would significantly reduce the chances of consent being reached in the future.

999. We note the following comments of Senior Deputy President Kaufman in the Contract Call Centre Award during the 2012 Modern Awards Review:

"[40] It is manifestly undesirable that an Award that resulted from the agreed adoption of the Contract Call Centres Award 2003, which itself was made by consent after lengthy negotiations involving not only the ASU and AIG, but with other unions as well as the ACTU, should not be disturbed in the 2012 Review without, Fair Work Australia being provided with very strong cogent reasons for

340 Metal Industry Casual Employment Case, 29 December 2000, Print T499189 at 13 and 17.
341 Print P9311.
342 Print P9311.
343 [2012] FWA 9025
so doing. This, the ASU has failed to do.

[41] Not only was the Award based on the Contract Call Centre's consent award, but that award largely replicated another consent award to which the ASU was also a party - the Telecommunications Services Industry Award 2002."^344

1000. Similarly the relevant industry parties, including the AMWU, did not raise issue with the exclusion of casuals from the payment described in subclause (b) during the making of the Manufacturing Award.

1001. During the making of the Manufacturing Award, the Award Modernisation Full Bench noted that the terms of the modern award had been largely agreed between Ai Group and the MTFU (of which the AMWU is a member).^345 The relevant extract from the decision is provided below:

"[177] The terms of the modern Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing award) are largely those agreed between AiGroup and the Metal Trades Federation of Unions (MTFU)."

1002. The joint Ai Group / MTFU draft award submitted to the AIRC during the award modernisation process included the following relevant extract (emphasis added):

"5.5.4 Rest period after overtime (AGREED)

5.5.4(a) When overtime work is necessary it must, wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive working days.

5.5.4(b) An employee (other than a casual employee) who works so much overtime between the termination of his or her ordinary work on one day and the commencement of their ordinary work on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to this subclause, be released after completion of the overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. …"^346

1003. In the case of the FBT Award, the Full Bench of the AIRC decided that the modern award would be based on the draft award submitted by Ai Group at the

^344 [2012] FWA 9025
^345 [2008] AIRCFB 1000 at [117]
time, which largely adopted the terms and conditions of the modern Manufacturing Award. 347

1004. The incidence of casual employment has not increased since 1998 (see section 6 of this submission). There have been no significant changes to casual employment since the key events identified above that would warrant the removal of the exclusion of casual employees in subclause (b).

1005. The exclusion of casual employees from payment for work performed without a 10 hour rest period continues to have important work to do. The provision enables the engagement of casual employees, where it is not reasonably practicable to provide a 10 hour rest break (see subclause (a)).

1006. It provides necessary flexibility to employers and the opportunity for extra hours of work for casual employees to account for unforeseen circumstances.

1007. The AMWU’s survey – particularly question 25 which asked respondents “[h]ave you ever worked so much overtime that you didn’t get a break of at least 10 hours before the start of your next shift?” – cannot be relied upon as credible because the question is asked without any qualifying context. For example, was the respondent required to work because it was not reasonably practicable for the employee to have a 10 hour break, or was the respondent covered by a modern award or enterprise agreement which enabled the employee to work overtime between successive shifts with a rest period of less than 10 hours? For example, some awards require an eight hour break.

1008. Furthermore, the characterisation of a casual employee within the AMWU’s survey is flawed. See for example the dichotomy which exists between question 1 of the survey (which asks respondents to describe their ‘employment situation’) and question 3 of the survey (which asks respondents whether they work ‘full time’ or ‘part-time’ hours). Therefore, despite the AMWU’s assertion that 22 percent of casual and labour hire respondents

347 [2009] AIRC 450 at [87].
answered Yes to question 25, 348 no-one can be certain that the respondents surveyed for the purpose of question 25 where casual employees.

1009. Also, given that a casual employee is engaged by the hour and that their hours of work can be varied more flexibly than the hours of work for a permanent employee, it would be logical that subclause (b) relating to payments would only apply to permanent employees. This is consistent with the comments of by Public Service Arbitrator Galvin (formerly Galvin 39 C) in AEU & others v Minister for Navy (1955) 35 CPSAR 461, referred to by the Full Bench of the AIRC in the Metal Industry Casual Employment Case:

“who stated that, since casual employment at the Naval Dockyards was hourly employment, it would be inconsistent to apply to casuals the then eight hour minimum break after overtime” 349

1010. It is clear that the AMWU’s arguments in support of its claim do not meet the ‘necessary threshold’ in s.138 of the Act for a variation to a modern award term. The AMWU must show that the variation is necessary to achieve the modern awards objective in s.134. The AMWU has failed to do this.

1011. The Manufacturing Award, in so far that it includes clause 40.4(b), continues to be meeting the modern awards objective, namely those elements dealing with:

• Relative living standards and the needs of the low paid (s.134(1)(a)) and the need to promote social inclusion through increased workforce participation (s.134(1)(c)):

The current provisions further these objectives by providing casual employees (including casuals who are women, older workers, younger worker and workers with a disability) with the opportunity to work additional hours.

• The need to encourage collective bargaining (s.134(1)(b)):

348 AMWU Submission, paragraph 383.
349 Metal Industry Casual Employment Case, 29 December 2000, Print T499189 at 89.
To the extent that employee bargaining representatives may seek to provide a payment to casual employees who work without a 10 hour rest period between successive shifts, the existing provisions encourage collective bargaining.

- The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)) and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)):

  The unions’ claim would reduce flexibility and adversely impact upon efficiency and productivity. For example, the existing provision provides necessary flexibility to enable employers to deal with unforeseen circumstances.

1012. The same considerations apply to the unions’ claims to vary clause 33.3(b) of the FBT Award, clause 31.4(b) of the Sugar Award and clause 23.3(a)(ii) of the Oil Refining Award.

1013. The AMWU’s claim should be rejected.
21. VARIATIONS SOUGHT TO THE FAST FOOD INDUSTRY AWARD 2010

1014. On 17 July 2015, the SDA Newcastle and Northern Branch filed correspondence and draft determinations regarding variations it seeks to multiple awards, including the Fast Food Award. In that correspondence, it noted that its claim in respect of the Fast Food Award was not incorporated in the schedule attached to the Commission's directions of 29 June 2015. It requested that its claim be referred to this Full Bench and included in the schedule.

1015. It appears that the matter has not yet been referred as sought by the SDA. Further, the union did not file any submissions or evidence in support of its claims in accordance with the aforementioned directions.

1016. It is not clear whether the union continues to press its claim and if so, whether it is to be dealt with by this Full Bench or during the award stage of the Review. We note that similar variations sought by the SDA to the Retail Award and the Hair and Beauty Award have been referred to this Full Bench.

1017. Ai Group has a significant interest in the Fast Food Award. Should the SDA subsequently seek to file material in support of its claim as part of these proceedings or otherwise, Ai Group will seek an opportunity to respond.

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350 See SDA’s correspondence of 17 July 2015.
22. VARIATIONS SOUGHT TO THE HORTICULTURE AWARD 2010

1018. The AWU and NUW seek variations to the Horticulture Award in respect of casual and part-time employment. Those claims have been referred to the Full Bench as presently constituted. We here deal with each in turn.

22.1 THE AWU’S CLAIM REGARDING ORDINARY HOURS AND OVERTIME

1019. The AWU seeks a variation to the Horticulture Award so as to extend the entitlement of overtime rates to casual employees other than shiftworkers and introduce new restrictions as to when a casual employee may perform ordinary hours of work. We first consider the relevant provisions of the Award before turning to the AWU’s claim and its effect.

The Current Award Provisions

1020. Clause 10.4 of the Horticulture Award relates specifically to casual employees. Subclause (a) serves two purposes. It provides a definition of a ‘casual employee’ and the ordinary hours of a casual employee: (emphasis added)

“(a) A casual employee is one engaged and paid as such. A casual employee’s ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.”

1021. Clause 10.4(a) provides for the determination of the ordinary hours of work for a casual employee. It is the only provision that purports to do so in respect of casual employees. That is, a casual employee’s ordinary hours are either an average of 38 hours per week or the hours required to be worked by their employer, whichever is less. The Award does not impose any restrictions as to when these ordinary hours may be performed or the maximum number of ordinary hours that may be worked in a day. This is an important distinction that can be drawn between permanent employees and casual employees to whom the Award applies, and affords employers with a necessary flexibility.
1022. The remaining subclauses prescribe the minimum amount that a casual employee must be paid for each hour worked and the matters that the casual loading is intended to compensate an employee for. Relevantly, subclause (c) states: (emphasis added)

(c) The casual loading is paid instead of annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other entitlements of full-time and part-time employment provided for in this award.

1023. Clause 22.1 of the Award prescribes the ordinary hours of work for full-time and part-time employees other than shiftworkers: (emphasis added)

“22.1 The ordinary hours of work for all full-time and part-time employees other than shiftworkers will not exceed 152 hours over a four week period provided that:

(a) The ordinary hours will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.

(b) The ordinary hours will be worked between 6.00 am and 6.00 pm except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.

(c) The ordinary hours will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.

(d) All time worked by full-time and part-time employees in excess of the ordinary hours will be deemed overtime.”

1024. Clause 22.1 effectively sets the parameters within which the ordinary hours of work of full-time and part-time employees (other than shiftworkers) must be arranged. By virtue of clause 22.1(d), hours worked in excess of ordinary hours by a full-time and part-time employee other than a shiftworker will be deemed overtime.

1025. Where an employee works such overtime, the rates prescribed by clause 24.2 are payable. We observe that clause 24.2 does not purport to define the circumstances in which overtime rates are payable. That is left to other
provisions of the Award. Rather, it merely sets out the rates that are payable when overtime is performed.

**The Current Entitlement to Overtime**

1026. It is important to first consider the entitlement of casual employees to overtime rates under the Award as presently drafted. It is Ai Group’s position that, contrary to the AWU’s assertion, a casual employee other than a shiftworker is not entitled to the overtime rates prescribed under clause 24. That is, casual employees other than shiftworkers are excluded entirely from the overtime rates under the Horticulture Award.

1027. Later in this submission, we detail the Part 10A Award Modernisation Process that preceded the making of the Award. We there establish that the ordinary hours of work and the entitlement of casual employees to overtime rates was the subject of explicit and repeated consideration by the AIRC, the industrial parties involved and the then Minister. The procedural history indicates an acceptance by Ai Group, the NFF and the AWU that under the predominant pre-reform federal award, the *Horticultural Industry (AWU) Award 2000* (**2000 Horticultural Award**) the vast majority of employers (listed as respondents at Schedules B and C to that award) were not required to pay their employees overtime. As we later explain, the modern award was amended soon after it was made to ensure that it was consistent with the terms and conditions applying to Schedule B and C respondents to the 2000 Horticultural Award. The AWU did not oppose the variation, despite being well aware of the employer representatives’ position as to the entitlement of casual employees to overtime. The submissions made by the parties and the AIRC’s decision evince an intention to preserve the position under the 2000 Horticultural Award.

1028. The current provisions of the Award should be read in light of this history and the clear intention of the parties and the AIRC when the Award was made and subsequently varied.
1029. Before dealing with the proper interpretation of the current award terms, we briefly turn to the relevant provisions of the 2000 Horticultural Award applying to Schedule B and C respondents:

- Clause 15.4 was headed ‘casual employment’. Clause 15.4.1 defined a casual employee as one that is engaged and paid by the hour. It went on to state that a casual employee is neither a shiftworker nor a weekly employee for the purposes of the award. Clause 15.4 did not contain any other subclause that dealt with a casual employee’s ordinary hours or entitlement to overtime. It did not contain a provision that would correspond with the current clause 10.4(a).

- Clause 26.2 dealt with the hours of work. Clause 26.2.1 stipulated that the ordinary hours of work for weekly employees would not exceed 152 hours in any consecutive four weeks and would be worked between 6.00 am and 6.00 pm, Monday to Friday, with the exception of shiftworkers. The clause went on to deal with the way in which the ordinary hours of work may be arranged. The final subclause, 26.2.6, specified that all time worked by weekly employees in excess of the ordinary hours prescribed above would be deemed overtime. These provisions did not apply to casual employees.

- Clause 29.2 dealt with shiftwork. By virtue of clause 15.4.1, it did not apply to casual employees.

- The instrument did not contain any provisions that would allow for a distinction to be drawn between the ordinary hours and overtime of a casual employee. That is, it did not contain a clause that defined or described the ordinary hours of a casual such that the performance of work outside or in excess of those hours would necessarily constitute overtime.

- Clause 28.2 specified the relevant overtime rates. It did not make any express reference to weekly employees or otherwise. Nonetheless, by virtue of the observation we have made above, it could not apply to
casual employees. That is to say, the award did not specify circumstances in which work performed by a casual employee would constitute overtime, nor did it provide for the determination of a rate of pay for it.

1030. As can be seen from this summary, the 2000 Horticultural Award did not grant the benefit of overtime rates to casual employees.

1031. The ordinary hours of work provisions in the modern award are reflective of those found in the 2000 Horticultural Award. There is, however, one identifiable difference between the two instruments which, as we understand it, has given rise to the AWU’s assertion that a casual employee is entitled to overtime rates for work performed in excess of 38 ordinary hours in a week. That is the presence of clause 10.4(a), which states that a casual employee’s ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.

1032. Whilst the AWU has not articulated the basis upon which it has formed the view that casual employees are entitled to overtime for work performed in excess of their ordinary hours as defined by clause 10.4(a), we assume that it is premised upon the argument that follows. That is, the argument that hours worked in excess of an employee’s ordinary hours must necessarily be overtime, and that time worked by an employee must either form part of their ordinary hours or be considered overtime. It is argued that hours worked in excess of a casual employee’s ordinary hours as determined in accordance with clause 10.4(a) are overtime and to be paid in accordance with clause 24.2.

1033. As we have earlier stated, clause 10.4(a) provides for the determination of a casual employee’s ordinary hours. Such a provision must be included in a modern award for the purposes of satisfying s.147 of the Act; a matter that we return to later in this submission. Having regard to the making of the modern award, we have not been able to identify any submission or decision of the AIRC that might suggest that its inclusion was for the purposes of, or was intended to, create an entitlement to overtime rates where a casual employee
works in excess of their ordinary hours as defined by clause 10.4(a). Indeed the submissions below will demonstrate that the making of the Award and a subsequent variation made to it lend themselves to a conclusion to the contrary; that it was the intention of the parties and the AIRC that casual employees be excluded from the entitlement to overtime rates.

1034. That this was in fact the intention is made clear by the existence of provisions that expressly deem certain time worked as overtime. It is of obvious relevance that the Award does not contain such a provision in respect of casual employees. Rather, clauses 22.1(d) and 22.2(h) exhaustively stipulate the circumstances in which an employee is entitled to the overtime rates contained in clause 24.2.

1035. We also refer to clause 10.4(c) of the Award, which we have earlier reproduced. It states that the casual loading prescribed by clause 10.4(b) is paid instead of various entitlements arising under the NES “and the other entitlements of full-time or part-time employment provided for in this award”. Clause 10.4(c) expressly contemplates that the casual loading is to be paid in lieu of various other award entitlements that are limited in their application to full-time and part-time employees. This necessarily includes the entitlement of overtime rates, which are payable only to full-time and part-time employees.

1036. To the extent that the Commission forms the view that the Award as presently drafted is ambiguous or unclear in this regard, it should be varied such that it expressly states that a casual employee other than a shiftworker is not entitled to the overtime rates contained in clause 24.2.

The Fair Work Ombudsman

1037. The AWU refers to correspondence sent by the FWO to the Commission, dated 2 March 2015, in which it identified a number of ‘queries commonly raised with the FWO and issues which may be a source of uncertainty for workplace participants to understand and implement award entitlements’.

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351 See clauses 22.1(d) and 22.2(h).
1038. The application of overtime rates to casual employees is one such matter:

The FWO has received enquiries about whether casual employees are entitled to overtime rates of pay.

Clauses 22.1(d) and 22.2(h) define overtime as work in excess of ordinary hours. Clause 22.1 and 22.2 set out ordinary hours for full-time and part-time employees and shiftworkers but not for casuals.

Clause 10.4(a) states that a casual employee's ordinary hours will be the "lesser of an average of 38 hours per week or the hours required to be worked by the employer". Clause 10.4(c) states that the casual loading provided for in clause 10.4(b) is paid "instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment''.

The interaction of these provisions may cause uncertainty amongst award users regarding whether the overtime rates in clause 22.1 and 22.2 apply to casual employees.  

1039. The AWU submits that the FWO has ‘identified the issue of whether casual employees are entitled to overtime rates as an area of ambiguity’.

1040. We refer to Attachment 22A to these submissions; a letter from the FWO to Ai Group dated 12 June 2013 regarding this very issue. As can be seen, it states that the FWO’s view is that casual employees are not entitled to overtime rates under the Horticulture Award. Its reasoning is consistent with that which we have earlier set out. We note that since the time of writing the letter, the relevant provisions of the Award have remained unchanged and therefore, the FWO’s advice continues to be relevant.

1041. We sought and obtained permission from the FWO for their letter to be submitted in these proceedings.

Casual Shiftworkers

1042. Clause 22.2 provides for the ordinary hours of a shiftworker. The Award does not define ‘shiftworker’, however the clause contains definitions for an ‘afternoon shift’ and a ‘night shift’. The purpose of a shiftwork provision such as that contained at clause 22.2 is to enable the performance of ordinary hours of

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352 See FWO’s correspondence dated 2 March 2015 at page 6 of the attachment.
work outside the spread of hours prescribed by the Award for day work, without necessarily incurring an overtime penalty. Where an employee performs work on an afternoon shift or a night shift, they must be paid 15% more than the ordinary rates for such shifts. But for the shiftwork provisions, work performed at such times would fall outside the ordinary hours prescribed by clause 22.1 and would therefore attract overtime rates if the employee were engaged on a full-time or part-time basis.

1043. The AWU submits that clause 22.2(h) entitles casual employees performing shiftwork to overtime rates and that this creates an anomaly when compared to clause 22.1(d). We raise two arguments in response.

1044. Firstly, we accept that the terms of clause 22.2, on their face, do not appear to exclude casual employees. Therefore, a plain reading of clause 22.2(h) does suggest that a casual shiftworker is entitled to overtime rates. However this, in and of itself, cannot displace the clear exclusion of casual employees other than shiftworkers from the current entitlement to overtime. Further, to the extent that it does create an anomaly (albeit a contention that we do not accept), it does not overcome the deficiencies in the AWU’s case, as a result of which it has failed to establish that the proposed clause 22.1 is necessary to achieve the modern awards objective.

1045. Secondly, we refer to our earlier recitation of the relevant provisions contained in the 2000 Horticultural Award. Clause 15.4.1 stated that a casual employee was not a shiftworker for the purposes of that award. Therefore, the shiftwork provisions it contained, including a clause that required the payment of overtime rates in certain circumstances, did not apply to a casual employee.

1046. The shiftwork provisions at clause 22.2 of the Award were inserted after it was made, as a result of a joint application by Ai Group and the NFF. Detailed reference is made to the parties’ submissions in relation to the application and the AIRC’s consideration of it. As will be seen, the application was made on the premise that the Award be amended to reflect the ordinary hours of work provisions contained in the 2000 Horticultural Award, including the shiftwork
provisions. Those shiftwork provisions, however, did not apply to casual employees.

1047. Consequently, it is not clear to us that clause 22.2 was in fact intended to apply to casual employees. The alleged anomaly may in fact be explained by this history. Should the Commission form the view that clause 22.2(h) is anomalous, having regard to the submissions made by the parties during the Part 10A process, clause 22.2 should be remedied by expressly excluding casual employees.

The AWU’s Claim

1048. The variation sought by the AWU is set out in its draft determination of 17 July 2015. It seeks to replace clause 22.1 of the Horticulture Award with the provision there set out. The clause proposed by the AWU differs from the current provision in only one respect; it does not contain any explicit references to ‘full-time and part-time’ employees. That is, the AWU seeks the removal of the text underlined in clause 22.1 as set out above.

1049. The AWU misdescribes the effect of its claim as ‘[confirming] that casual employees are entitled to the overtime rates specified in clause 24 of the Award when they work outside the day work span of ordinary hours’353. The effect of the claim is in fact far broader and goes well beyond ‘confirming’ a casual employee’s entitlement to overtime rates under the Award.

1050. Properly understood, the AWU’s claim would have the following consequences in respect of casual employees, other than shiftworkers:

- Clause 22.1 would purport to specify, or provide for the determination of the ordinary hours of work of a casual employee. That is, it would require that a casual employee’s ordinary hours ‘not exceed 152 hours over a four week period’.

353 See AWU’s submissions dated 14 October 2015 at paragraph 3.
• Clause 22.1(a) would restrict the days of the week upon which a casual employee may perform ordinary hours of work. That is, the clause would require that the ordinary hours of work be performed between Monday and Friday inclusive, except by arrangement between the employer and the majority of employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive. This is significant, given that under the current terms of the Award, a casual employee may perform ordinary hours of work on any day of the week.

• Clause 22.1(b) would impose an additional restriction as to the times within which a casual employee may perform ordinary hours of work. The provision would require that ordinary hours be worked between 6.00am and 6.00pm, except if varied by agreement between the employer and the majority of the employees in the section/s concerned. Presently, a casual employee may perform ordinary hours of work at any time, on any day of the week.

• Clause 22.1(c) would impose a new limitation on the maximum number of ordinary hours that may be performed in a day by a casual employee. That is, a casual employee would be precluded from performing more than eight ordinary hours of work in a day, except by arrangement between the employer and majority of employees in the section/s concerned, in which case ordinary hours should not exceed 12 hours on any day. The Award does not presently prescribe a daily maximum number of hours in respect of casual employees.

• All time worked in excess of ordinary hours as set out in clause 22.1 would attract the overtime rates set out in clause 24.2. This would effectively introduce an entitlement to overtime for casual employees other than shiftworkers in circumstances where there is presently no such benefit.
The AWU's Case

1051. Whilst we do not propose to deal with the AWU's evidence comprehensively for the purposes of these written submissions, we note that the witness evidence relied upon by the union serves only to support Ai Group's interpretation of the current provisions. That is, the AWU's evidence establishes that many operators in the industry interpret the Award to exclude casual employees from the application of the provision that prescribes overtime rates.

1052. The evidence also demonstrates the significance of the variations it seeks and the impact that they would have. The unions' claim is neither trivial nor insignificant. Whilst its brief submissions and its characterisation of the claim as one that seeks to 'clarify' the terms of the current Award might suggest that the impact of the changes sought are but trifling, a considered review of the implications that would flow reveals that the change sought is of clear substance and should only be granted if the union has provided compelling submissions and probative evidence in support. Arguments limited to the 'industrial merit' of its case or an assertion that the provision sought 'should not be controversial in Australia in 2015'\textsuperscript{354} are hardly sufficient.

1053. It strikes us that variations sought to awards to reduce penalty rates have been the subject of ongoing proceedings in the context of this Review for a period of over than 12 months, involving dozens of witnesses, mountains of evidentiary material and significant costs have been incurred by the proponents of those claims in order to mount a credible case. The imposition of serious new inflexibilities and financial obligations upon employers are of no less significance.

The Part 10A Award Modernisation Process

1054. The Horticulture Award was made during stage 2 of the Part 10A Award Modernisation Process. During this process, Ai Group made submissions

\textsuperscript{354} See AWU's submission dated 14 October 2015 at paragraph 25
regarding the need for flexible hours of work provisions, given the nature of the work performed in the horticulture industry:

"With seven day a week food and beverage manufacturing and supermarket/shop trading hours, horticulture businesses are required to provide fresh produce seven days a week. Due to the perishable nature of horticulture products, changing volume levels dependent on customer demands, and the seasonal nature of fruit and vegetables, the industry cannot limit its operations to Monday to Friday. Therefore, in developing a modern award for the sector, the Commission must carefully consider the cost implications for work outside day work on Monday to Friday."355

1055. When the Award was made, the AIRC noted that it had made amendments to the hours of work and overtime provisions it had originally proposed in its exposure draft and that the provisions in the Award were ‘largely in line with the relevant provisions of the Horticultural Industry (AWU) Award 2000, as it [applied] to what [were] referred to as the Schedule A respondents to that award’.356

1056. Clause 10.4(a) of the Award, when made, was in the same terms as it now appears. The ordinary hours of work were expressed as follows:

“22. Ordinary hours of work and rostering

22.1 The ordinary hours of work for employees other than packing house employees will not, without payment of overtime, exceed 38 hours in a week of five days other than a Sunday.

22.2 Provided it is stipulated at the time an employee is engaged, when tree fruit picking is carried on, the ordinary hours of work may be worked over five and a half days, other than Sunday. However, no more than 38 hours may be worked over the five and a half days without payment of overtime.

22.3 The ordinary hours of duty for packing house employees will not exceed 38 per week without the payment of overtime and may be worked in five days of not more than eight hours Monday to Friday inclusive between 6.00 am and 6.00 pm.”

1057. The clause applied to all employees, including casuals, but provided less prescription as to how and when the ordinary hours of work may be performed.

For instance, the clause does not specify a maximum number of daily ordinary

355 See Ai Group’s submissions dated 13 February 2009 at paragraph 88
356 Award Modernisation [2009] AIRCFB 345 at [60]
hours or a spread of hours, other than at 22.3 in respect of packing house employees. Further, ordinary hours could be performed on a Saturday.

1058. The AIRC subsequently considered submissions made by various parties regarding the form that any transitional provisions should take. Ai Group made the following submission in this regard:

“93. The modern Horticulture Award 2010 will have a significant cost impact upon employers in this industry. The Horticulture Industry in Australia is vulnerable to international competition. Increases in labour costs imposed through the modern award will make the industry less competitive against overseas farmers and growers.

94. Ai Group submits that the Commission should delay the operation of the hours of work, weekend penalty rates, piecework and casual loading provisions of the Horticulture Award 2010 until after the two year review provided for in Item 6, Schedule 5 of the Transitional Bill. This will enable the employers to gather accurate data about the cost impact of the new provisions whilst not having to incur the costs in the short term.”

1059. After highlighting the main issues of concern arising from the Award (including the hours of work provisions and increased penalty rates), Ai Group submitted that based on ‘initial data gathered by employers in the sector’ it appeared that ‘these changes will increase labour costs by approximately 30%’.

1060. The AIRC acknowledged these submissions, and similar submissions made by other employer parties in its decision regarding transitional provisions. In so doing, it expressly stated that ‘a number of modern award provisions may require re-examination … in particular … provisions relating to hours of work, overtime and penalties’: (emphasis added)

“[99] A number of employer representatives including the Horticulture Australia Council, the National Farmers’ Federation (NFF) and the AiGroup submitted that the operation of the Horticulture Award 2010 should be delayed for two years pending the review of modern awards provided for in item 6 of Schedule 5 to the Transitional Act. They all expressed concern about the cost of implementing the award, particularly the provisions relating to piecework, casual loading, span of ordinary hours, overtime and penalty rates. It was suggested that, due to the wide range of provisions in award-based transitional instruments, two years will be needed to properly identify the effect of the new award and to develop proposals for variations. No union responded to those submissions, although the

357 See Ai Group’s submissions dated 29 May 2009 at paragraphs 93 – 94
358 See Ai Group’s submissions dated 29 May 2009 at paragraphs 95 – 99
AWU did file a submission setting out its position in relation to transitional provisions generally.

...  

[101] Given the scale of the cost increases referred to in the employers' submissions, which at this stage at least have not been contradicted, we have concluded that a number of the modern award provisions may require re-examination. We mention in particular the piecework provisions and provisions relating to hours of work, overtime and penalties. Despite that conclusion it would not be appropriate to simply postpone the operation of the provisions for two years. The appropriate course is for one or more of the employer groups to lodge an application to vary the modern award. If that is done we will establish a program to determine the application before the end of the year.  

1061. On 26 August 2009, after the AIRC handed down the decision cited above, the award modernisation request made by the Minister for Employment and Workplace Relations was varied. The following was inserted in respect of the Horticulture Award: (emphasis added)

“50. The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.

51. Where a modern award covers horticultural work, the Commission should:

- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and

- provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.”

1062. In response to this variation to the request and the AIRC’s Statement of 10 September 2009, applications were made to vary the hours of work provisions by Ai Group, the NFF and the Horticulture Australia Council. Ai Group and the NFF’s joint application sought, amongst various other changes, a new clause 22.1 in the very terms that now appear in the Award.

359 Award Modernisation[2009] AIRCFB 800 at [99] – [101]
360 Award Modernisation[2009] AIRCFB 835
1063. The modern award, when made, was based primarily on the 2000 Horticultural Award. That award contained two sets of key terms and conditions; one that applied to the respondents listed at Schedule A to the award and the other applied to Schedule B and C respondents. The modern award terms were largely taken from the terms applying to Schedule A respondents. 362

1064. The NFF submitted that given the scope of Schedules B and C to the 2000 Horticultural Award, the terms and conditions applying to those respondents should be considered the predominant pre-reform federal award. 363 It argued that the Award when first made contained ordinary hours and overtime provisions that reflected those applying to Schedule A respondents to the 2000 Horticultural Award, which would result in significant changes when compared to other pre-reform horticulture industry awards. 364 One such change identified by the NFF was ‘the introduction of ordinary hours and overtime entitlements for casual employees which [did not] exist for Schedule B & C employers’. 365 The NFF submitted that:

“92. Further, the NFF is concerned that the flexibility of working 152 hours over 4 weeks as opposed to 38 hours per week coupled with the extension of overtime to casual employees dramatically increases the cost of employing casuals who regularly work overtime particularly in peak season.

93. The NFF is of the view that this is such a significant departure resulting in a significant cost increase and it is inconsistent with the existing industry standards.

...

100. An important aspect of the hours of work clause is that it does not cover casual employees, an exclusion that exists in the current provision.

101. The NFF strongly states that the casual exclusion cannot be removed. Any attempt to remove the exclusion would dramatically alter the nature of the

362 Award Modernisation [2009] AIRCFB 345 at [60]
363 See NFF submission dated 23 October 2009 at paragraph 32 – 33
364 See NFF submission dated 23 October 2009 at paragraph 88
365 See NFF submission dated 23 October 2009 at paragraph 90
current safety net and would therefore be inconsistent with the award modernisation process as outlined earlier in these submissions.\textsuperscript{366}

1065. Ai Group supported the NFF's submissions. In its submissions in reply, the AWU indicated that it did not oppose the proposal advanced by Ai Group and the NFF on the basis that it reflected the provisions applying to Schedule B and C respondents to the 2000 Horticultural Award.\textsuperscript{367}

1066. The Horticulture Australia Council also sought a variation to the ordinary hours provisions which, albeit in different terms, contained a clause that would exclude casual employees from an entitlement to overtime.\textsuperscript{368}

1067. A Full Bench of the AIRC dealt with the applications as follows:

\textquote{[17] In relation to hours of work and overtime provisions, there are two approaches before us. First, there are the provisions in the joint application which are not opposed by the AWU. Secondly, there are the provisions proposed by the HAC, which the AWU opposes. … We will vary the hours of work provisions as proposed in the joint application.}\textsuperscript{369}

1068. The submissions made by Ai Group and the NFF, and the absence of any opposition from the AWU, was based on a joint acceptance of the significant change that would result if the Award was not varied as proposed. The AWU appeared to have acknowledged that Schedule B and C respondents under the 2000 Horticultural Award, which represented the predominant set of terms and conditions applying to the horticulture industry prior to the modernisation process, were not required to pay casual employees overtime rates. At the very least, the AWU was well aware that the position of the relevant employer organisations was that, predominantly, casual employees were not entitled to overtime rates under the 2000 Horticultural Award and that the intention of the variation proposed was to maintain this.

1069. The concerns expressed by employer organisations, including Ai Group, as to the significant financial impost on employers if the Award were to deviate from

\textsuperscript{366} See NFF submission dated 23 October 2009 at paragraph 92 – 93 and 100 - 101  
\textsuperscript{367} See AWU submission dated 13 November 2009 at paragraphs 106 – 108  
\textsuperscript{368} See Horticulture Australia Council application dated 7 October 2009 at page 6  
\textsuperscript{369} Re Horticulture Award 2010 [2009] AIRCFB 966 at [17].
the pre-modern standard as well as the subsequent amendment to the Minister’s request, which expressly required the that the AIRC ‘provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed’, are also relevant to the context in which the variation was made.

1070. There was a clear recognition on the part of the industrial parties, the AIRC and the Minister that the nature of the work performed and the seasonal fluctuations experienced by the industry warranted an approach that would maintain existing flexibilities. The hours of work provisions and their interaction with overtime entitlements were given detailed consideration by the parties involved in the process, including the AWU, and the AIRC. There appears to have been some consensus amongst the stakeholders that a modern award that required the payment of overtime rates to casual employees would amount to a significant change to the pre-modern standard, which would create a serious new financial obligation and inflexibilities.

1071. The above recount of the Part 10A process makes clear that there was an intention to preserve the obligations imposed by the 2000 Horticultural Award in the modern award; that is, that casual employees would not be entitled to overtime rates. Unsurprisingly, the AWU has not dealt with this history in the material it has filed in these proceedings.

1072. Whilst we do not contend that the Commission is formally bound by the decision of the AIRC, its clear and explicit consideration of the issue, the agreement reached between the parties and the Minister’s amended request tell against the Commission making sweeping changes to the Horticulture Award in the absence of compelling evidence that might enable it to form the view that the changes proposed are necessary.

1073. We have earlier set out the relevant passages from the Commission’s Preliminary Jurisdictional Issues Decision, however we here reproduce a paragraph that is particularly pertinent to this matter:
“[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”

1074. The Commission is also well aware of the Nguyen v Nguyen principle adopted by the Full Bench in that same decision: (emphasis added)

“[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.”

1075. The historical context applicable to the Horticulture Award is instructive and should be given due consideration. It is incumbent upon the AWU to establish that, despite the Commission’s decision that the Award prima facie achieved the legislative objective of providing a fair and relevant minimum safety net at the time that it was made, that objective is no longer being met and the proposed clause 22.1 is the necessary remedy. The AWU’s submissions and evidence fall well short of establishing this.

Section 147 of the Act

1076. Section 147 of the Act is in the following terms:

“A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.”

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1077. The effect of s.147 is to mandate the inclusion of an award term that specifies, or provides for the determination of, the ordinary hours of work for casual employees, being a ‘type of employment’ permitted by the Horticulture Award.

1078. Clause 10.4(a) provides for the determination of a casual employee’s ordinary hours; they are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. The provision does not, however, specify the period over which the ordinary hours may be averaged. It is the AWU’s contention that as a result, the ordinary hours for a casual employee cannot be conclusively determined. On this basis, the AWU submits that the provision does not meet the requirements of s.147.

1079. The Award does not prescribe the period over which a casual employee’s ordinary hours are to be averaged and in doing so, leaves the matter to the employer’s discretion. We do not consider that consequently, the Award does not allow for the determination of a casual employee’s ordinary hours such that the requirements of s.147 are not met.

1080. All that is required is an award provision that ‘provides for the determination’ of ordinary hours. That is, the award clause must provide a means or mechanism by which the ordinary hours of work can be ascertained. No further prescription is necessary.

1081. The ordinary hours of work of a casual employee can be readily determined once an employer identifies a period over which to calculate the average. Whilst we accept that an ‘average’ number of weekly hours cannot be determined without selecting the number of weeks over which it is to be calculated, this is a matter that can (and in our view, should) be left to the employer’s discretion. The absence such prescription does not render the clause incapable of providing for the determination of the ordinary hours of work. The AWU’s submission is ill-considered and should not be accepted.

1082. For completeness, we note that the AWU submits that its proposal to vary clause 22.1 should be adopted as it will ensure that s.147 is satisfied. This is
because clause 22.1 would thereafter apply to casual employees and provide that:

"The ordinary hours of work for all employees other than shiftworkers will not exceed 152 hours over a four week period …"

1083. When read with clause 10.4(a), the effect of the proposed clause 22.1 would be to place a limitation on the way in which a casual employee’s ordinary hours may be worked. Whilst an employer may presently determine any length of time over which a casual employee’s ordinary hours may be averaged, clause 22.1 would constrain this discretion by requiring that a casual employee’s ordinary hours of work not exceed 152 hours over a four week period.

1084. The AWU has not provided any justification, apart from its reliance on s.147, for adopting the four week limitation. There is no evidence or argument in support of this proposal. No material has been put before the Commission that might enable it to reach the conclusion that clause 22.1, as varied in this respect, is ‘necessary’ to achieve the modern awards objective.

1085. If the Full Bench nonetheless concludes that it is necessary to specify the averaging period, we submit that it should be no less than 12 months. This would appropriately provide an employer with the ability to take into consideration seasonal fluctuations over the course of a year. There is no case before the Commission to justify the adoption of a lesser period.

**Casual Employees in the Horticulture Industry**

1086. Casual employment is an essential feature of the horticulture industry. The nature of the work performed in inherently seasonal and contingent upon various factors including climatic conditions. The vast majority of horticultural crops can be harvested only during specific months in a year. As a result, businesses in the industry face distinct peaks and troughs that can often only be met through the use of casual labour.

1087. Typically, a horticultural enterprise will engage a significant number of casual employees for a few months in a year, during which the employees work regular hours that are akin to, and in some cases in excess of, the hours of a
full-time employee. Towards the end of the harvest period, however, the volume of work that needs to be performed, be it picking, sorting, cleaning or packing, gradually declines and eventually ceases to exist. After such time, the casual labour engaged for the peak season is no longer required as there is simply no work for them to perform.

1088. The survey conducted by Ai Group and other employer organisations for the purposes of these proceedings provides a useful insight into the reasons why employers engage casual employees and the reasons why the flexibility currently afforded by the Award is essential. The table below contains a sample of responses from employers covered by the Horticulture Award to questions as to why the respondents’ organisations employ casual employees ‘on an irregular basis’ or ‘on a regular full-time’ basis:

<table>
<thead>
<tr>
<th>Response ID</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>213</td>
<td>This is answer is based on current requirements. The answer for us will change month to month and year to year depending on harvest volumes and also due seasonality of work on orchards which changes throughout the year.</td>
</tr>
<tr>
<td>1147</td>
<td>Levels of work change dramatically based on both seasons and weather. Employing them on a full time (or even permanent part time) would not be financially viable</td>
</tr>
<tr>
<td>2665</td>
<td>Seasonal work - the need is often full time but only for a portion of the year.</td>
</tr>
<tr>
<td>3417</td>
<td>To meet seasonal requirements of our business, and also to cover peaks and troughs in operational requirements during other periods.</td>
</tr>
<tr>
<td>4412</td>
<td>The majority of casuals are only employed during the season when we are at our busiest. Hours are less than full-time at the start and end of the season.</td>
</tr>
<tr>
<td>4719</td>
<td>some seasons the crop may be larger than others or the period required to get fruit to market may be shorter</td>
</tr>
<tr>
<td>4733</td>
<td>Due to seasonality of business - harvest periods etc</td>
</tr>
<tr>
<td>4961</td>
<td>Casual employees provide us with a full time level of staffing in suitable weather conditions, that can be sent-home if rainy weather is experienced. Most of our company’s work is outdoor, bushland based that cannot be undertaken if unsuitable, usually prolonged wet weather is experienced. We</td>
</tr>
</tbody>
</table>
can find office and workshop, wet-weather suitable work for our 8-full-time staff, but we cannot find work for the remaining 17-casual staff, when wet weather is experienced. Most of our company’s work is on a “do-and-charge” basis, so if we cannot “do” the work we cannot charge for it. Casual employees allow us to knock off a fair proportion of our work force if unsuitable wet weather is experienced, offsetting the financial burden of paying staff that we cannot charge-out-for.

1089. The responses above indicate that casual employees are typically engaged for a portion of the year and may be required to work ‘regular full-time hours’. Such businesses often engage casual labour in very high volumes for the harvest period and require them to work on any day of the week and outside the spread of hours currently applying to full-time and part-time employees.

1090. As a result, the variations sought by the AWU, which would result in new limitations on when a casual employee can perform ordinary hours of work and the entitlement to overtime rates, would result in very significant adverse implications for these operators. They would introduce, for the first time, restrictions and costs that would seriously undermine their current operations. The changes proposed are unsustainable and entirely inappropriate when regard is had to the seasonal nature of the work.

Section 138 and the Modern Awards Objective

1091. In exercising its discretion to vary the Award, the Commission must have regard to s.138 and the modern awards objective. In order to adopt the variation proposed by the AWU, the Commission must be satisfied that the proposed clause 22.1 is necessary to ensure that the Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

1092. We note also the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision (emphasis added):

“[33] There is a degree of tension between some of the s.134(1) considerations. The Commission’s task is to balance the various s.134(1) considerations and
ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.\(^{372}\)

1093. The AWU has not established that the term it has proposed is necessary to ensure that the Award meets the modern awards objective. Its failure to successfully mount a merit case for its proposal leads to the inevitable conclusion that its claim must be dismissed.

Relative living standards and the needs of the low paid (s.134(1)(a))

1094. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a):

“[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.

[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life, assessed in the context of contemporary norms.”\(^{373}\)

1095. Further, the term “low paid” has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

“[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award.


\(^{373}\) [2015] FWCFB 3500 at [310] – [311]
Nothing put in these proceedings has persuaded us to depart from this approach.\footnote{Annual Wage Review 2012 – 2013 [2013] FWCFB 4000. See also Annual Wage Review 2013 - 2014 [2014] FWCFB 3500 at [310].}

1096. The AWU has not undertaken the analysis required by s.134(1)(a), including:

- Whether casual employees to whom the Horticulture Award applies are low paid;

- To the extent that such employees are considered ‘low paid’, an assessment of the extent to which they are able to purchase the essentials for a decent standard of living and to engage in community life, assessed in the context of contemporary norms; and

- A comparison between casual employees to whom the Horticulture Award applies and are paid the minimum award rates and other groups of employees that are deemed to be relevant.

1097. As a result, there is no material before the Commission that would enable it to reach a conclusion that this factor lends support to the AWU’s claim.

The need to encourage collective bargaining (s.134(1)(b))

1098. The current clause 22.1 leaves greater room for bargaining and may incentivise employers and employees to negotiate a higher rate. The insertion of the provision proposed by the AWU would only serve to raise the minimum safety net, thus limiting the scope of matters that might otherwise encourage an employer and its employees to participate in the process of collective bargaining.

1099. The significance of this element of the modern awards objective is reinforced by s.3(f) of the Act, which emphasises the importance of enterprise bargaining.
The need to promote social inclusion through increased workforce participation (s.134(1)(c))

1100. There is no evidence that the introduction of overtime rates for casual employees will increase workforce participation and therefore promote social inclusion. We note that the AWU has not sought to rely upon this element of the modern awards objective in its submissions.

1101. To the extent that the variation proposed by the AWU discourages employers from engaging casual employees in light of the additional costs that would be incurred, the variation proposed is contrary to s.134(1)(c).

The need to promote flexible work practices and the efficient and productive performance of work (s.134(1)(d))

1102. We have earlier identified the raft of changes that to an employer’s ability to require a casual employee to perform ordinary hours of work that would result if the AWU’s claim was granted. It would introduce numerous limitations as to when such work could be performed by a casual employee. Self-evidently, this undermines flexible work practices, such as those implemented by employers during the harvest, and the efficient and productive performance of work.

The need to provide additional remuneration (s.134(1)(da))

1103. We acknowledge that, since the passage of the Fair Work Amendment Act 2013, the Commission is required to consider the need to provide additional remuneration for employees working in various circumstances including overtime, shifts, and on weekends and public holidays. It should be noted however, that this is but one of many factors listed at s.134(1) to which the Commission must have regard, in determining whether the Award achieves the modern awards objective. As stated by the Commission in its Preliminary Jurisdictional Issues decision, which we have earlier cited, no one factor arising from s.134(1) is to be given particular primary. Each of the matters arising under s.134(1) are to be treated as issues of significance, which should be given due consideration and weight.
1104. For these reasons, it is not sufficient for the AWU to rest its case entirely on the basis of s.134(1)(da). Although the Commission may form the view that considerations arising from this subsection alone lend support for the AWU's claims, this is not determinative. Equal consideration should be given to matters arising under each of the other limbs of s.134(1), which we have here addressed.

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e))

1105. This element of the modern awards objective is not relevant to these proceedings.

The likely impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

1106. The impact of the variation proposed on employment costs and business is self-evident. The change would clearly impose a significant additional employment cost. To the extent that it discourages employers from engaging casual employees or alters the way in which they are required to work due to the proposed inflexibilities, the impact of the variation may also be felt by way of a reduction in productivity. Either result cannot be reconciled with s.134(1)(f).

1107. We note of course, that the need to have regard to the impact of any variation on small and medium enterprises is particularly pertinent and reinforced by s.3(g) of the Act.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

1108. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138. This is particularly relevant in circumstances where the current Award is intended to reflect the position in the predominant pre-modern awards. To now introduce new
financial penalties that would impose significant additional costs, without there being any evidence that the Award does not presently provide a fair and relevant minimum safety net, is contrary to s.134(1)(g).

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

1109. To the extent that the matters arising from ss.134(1)(b), (d), (f) and (g) adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy, the AWU’s claim also conflicts with s.134(1)(h).

Conclusion

1110. For all of the reasons stated above, the AWU’s claim should be dismissed.

22.2 THE NUW’S CLAIM REGARDING ORDINARY HOURS AND OVERTIME

1111. The NUW, in its submissions of 14 October 2015, has expressed its support for the AWU’s claim. Its submissions do not seek to advance the case any further and provide little if any justification for the variations sought.

1112. We refer to our above response to the AWU’s submissions in this regard.

22.3 THE NUW’S CLAIMS REGARDING PART-TIME EMPLOYEES

1113. Clause 10.3 of the Award is headed ‘part-time employment’. Subclause (a) defines a part-time employee as one who:

- is engaged to work an average of fewer than 38 ordinary hours per week; and

- receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.
1114. Clause 10.3(c) states that an employer must inform a part-time employee of their ordinary hours of work and starting and finishing times. The clause, in a temporal sense, is not limited to the time of engagement. That is, the obligation to advise an employee of their ordinary hours of work and starting and finishing times is not limited to the point at which the employee is engaged. Rather, the provision creates an ongoing requirement that extends throughout the course of the employment relationship.

1115. The provision also provides an employer with absolute discretion to determine a part-time employee’s ordinary hours and starting and finishing times. It does not place any limitation on the employer’s ability to do so, nor does it require the consent of the employee. It allows for the possibility that a part-time employee’s ordinary hours may, at the employer’s discretion, be varied from time to time.

1116. The NUW has sought variations to each of the aforementioned provisions.

1117. Firstly, it has proposed the insertion of additional text in the definition of a part-time employee at clause 10.3(a), such that in addition to the pre-existing criteria, a part-time employee must also have “reasonably predictable hours of work”.

1118. It also seeks to replace clause 10.3(c) with the following: (emphasis added)

“(c) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.”

1119. The effect of the variation would be to require agreement between the employer and part-time employee as to the employee’s ordinary hours of work and when they are to be performed, at the time of engagement. That agreement must be recorded in writing. Further, it appears that the Award would not provide for any ability to vary that agreement.

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375 See NUW’s submission dated 14 October 2015 at paragraph 14.
1120. The NUW’s submissions in support of its claim could only be described as scant. It offers only following arguments for the variations sought:

- ‘The Award requires a number of variations that would improve its ability to meet the modern awards objective’;\(^{376}\)

- The ‘inability to assess entitlements and conditions for workers engaged under the casual and part-time employment provisions of the Award creates an environment of inconsistent implementation’;\(^{377}\)

- It is necessary to vary the definition of part-time employment ‘to enable comprehension of the employment type and related entitlements under the Award’;\(^{378}\)

- The variations are ‘necessary in order for the [Award] to better meet the modern awards objective’;\(^{379}\) and

- The ‘ambiguity that currently guides part-time and casual employment under the Award results in the inability of the Award to possibly provide a fair and relevant minimum safety net of terms and conditions, taking into account section 134(1)’;\(^{380}\)

1121. We deal with arguments pertaining to s.138 and the modern awards objective in greater detail below. The remaining submissions made by the NUW can be disposed of briefly.

1122. The NUW has not called evidence that might establish or explain the basis upon which it asserts that:

- There is presently an inability to assess entitlements and conditions for part-time employees engaged under the Horticulture Award;

\(^{376}\) See NUW’s submission dated 14 October 2015 at paragraph 8.

\(^{377}\) See NUW’s submission dated 14 October 2015 at paragraph 9.

\(^{378}\) See NUW’s submission dated 14 October 2015 at paragraph 13.

\(^{379}\) See NUW’s submission dated 14 October 2015 at paragraph 15.

\(^{380}\) See NUW’s submission dated 14 October 2015 at paragraph 16.
• The current provisions create ‘an environment of inconsistent implementation’;

• That there are in fact any difficulties associated with the current definition of a part-time employee;

• That the current provisions regarding part-time employment are ambiguous;

• That any such ambiguity, to the extent that it in fact exists, results in the Award failing to achieve the modern awards objective.

1123. We urge the Commission to dismiss the NUW’s claims in light of its clear failure to prosecute a case that is founded in meaningful submissions and probative evidence.

Section 138 and the Modern Awards Objective

1124. Section 138 states that a modern award must only include terms that it is permitted to include to the extent necessary to achieve the modern awards objective. This requires a preliminary assessment as to whether the Award is achieving the objective of providing a fair and relevant minimum safety net. If it is established that this is not the case, the proponent of a variation must demonstrate that if the variation it has proposed were included in the Award, it would only include terms necessary to achieve the objective. In making this assessment, the Commission must take into account the matters listed at s.134(1).

1125. The NUW’s submission suggests that the Award is presently achieving the modern awards objective. That is, there is an implicit acceptance in the union’s submission that the objective is presently being achieved, however in order to better achieve it, its proposals should be adopted by the Commission. The relevant provisions of the Act, however, are not directed towards ‘better achieving’ the modern awards objective. There is no grant of power under the Act to vary an Award to include a provision on that basis. For this reason alone, the NUW’s claims should be dismissed.
1126. Whilst the NUW has not made any attempt to address the matters listed at s.134(1), we note that the variation it has proposed runs contrary to:

- The need to encourage collective bargaining;\(^{381}\)
- The need to promote social inclusion through increased workforce participation;\(^{382}\)
- The need to promote flexible modern work practices and the efficient and productive performance of work;\(^{383}\)
- The likely impact on business including on productivity, employment costs and the regulator burden;\(^{384}\)
- The need to ensure a simple, easy to understand, stable and sustainable modern award system;\(^{385}\) and
- The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.\(^{386}\)

1127. To the extent that greater certainty is sought by part-time employees as to their ordinary hours of work and when they will be performed, or a requirement that agreement is required to set those ordinary hours, the current provisions may encourage such employees to engage in collective bargaining for the purposes of securing a provision such as that proposed by the NUW.

1128. The imposition of greater rigidity around the engagement of part-time employees may discourage employers from engaging such employees. A loss of flexibility may result in employers, for instance, engaging casual employees rather than part-time employees. This is contrary to the need to promote social inclusion through increased workforce participation.

\(^{381}\) See s.134(1)(b).
\(^{382}\) See s.134(1)(c).
\(^{383}\) See s.134(1)(d).
\(^{384}\) See s.134(1)(f).
\(^{385}\) See s.134(1)(g).
\(^{386}\) See s.134(1)(h).
1129. The introduction of a requirement that the ordinary hours of work of a part-time employee must be fixed at the time of engagement, without the ability to subsequently vary them, is quite clearly contrary to the need to promote flexible modern work practices and the efficient and productive performance of work. Such a requirement would preclude an employer from altering the hours of work, and when those hours are to be performed, in response to seasonal fluctuations and changes in demand; factors that are particularly relevant to the horticultural industry.

1130. The variation is likely to adversely impact upon productivity. The provision would not enable an employer to vary a part-time employee’s ordinary hours of work over the course of their employment to meet the peaks and troughs faced by businesses in the industry. The provision would also likely result in an employer incurring greater employment costs in the form of overtime rates payable for work performed at times other than those that were determined at the time of engagement. Further, the proposed clause would introduce an additional regulatory burden, as it would require a written agreement at the time of engagement.

1131. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138. To introduce new financial obligations that would impose significant additional costs, without there being any evidence that the Award does not presently provide a fair and relevant minimum safety net, is contrary to the need to ensure a simple, easy to understand, stable and sustainable modern awards system.

1132. To the extent that the matters above adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy, the claim also conflicts with the final factor listed at s.134(1).

Conclusion

1133. For the reasons stated above, the NUW’s claim should not be granted.
22.4 THE NUW’S CLAIMS REGARDING CASUAL EMPLOYEES

1134. Clause 10.4(b) of the Horticulture Award deals with the amount payable to an employee for each hour worked. It states:

“(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for an employee in that classification in clause 14 – Minimum wages, plus a casual loading of 25%.”

1135. The clause stipulates the minimum amount payable to a casual employee for each hour of work performed. That is, it requires that a casual employee be paid no less than the minimum hourly rate to be derived from clause 14 of the Award, plus a 25% loading. The clause must be read with other provisions of the Award in order to ascertain whether there are circumstances in which a casual employee is entitled to a higher amount.

1136. The NUW seeks to replace clause 10.4(b) with the following:

(b) Casual employees will be paid, in addition to the ordinary hourly rates and rates payable for shift, weekend and overtime work that apply to full-time employees, an additional loading of 25% of the ordinary hourly rate for the classification under which they are employed.

1137. Whilst the union has not made any attempt at explaining the impact that its proposed variation would have, we here deal with each of the implications that we have been able to identify.

The Ordinary Hourly Rate

1138. The current provision requires that a casual employee be paid an hourly rate that is calculated by dividing the appropriate minimum weekly wage in clause 14 by 38. The proposed provision replaces this mechanism with the term ‘ordinary hourly rate’. That terminology is not used elsewhere in the Award, nor is it defined by clause 3. Its meaning is ambiguous and the NUW has not provided any explanation as to what it might encapsulate or indeed why the current clause should be amended in this way. To adopt the term proposed by
the NUW is contrary to the need to ensure that the Award is ‘simple and easy to understand’.  

The Casual Loading

1139. The proposed clause purports to require that where an employee performs work that attracts a special rate payable for ‘shift, weekend and overtime work’, the casual loading of 25% must be paid in addition to that amount. This is a substantive change to the current Award terms.

1140. Clause 10.4(b) presently requires that a casual employee be paid no less than 1/38th of the minimum weekly rate (which we hereafter refer to as the ‘minimum hourly rate’) plus a casual loading of 25%. That is, for every hour worked, a casual employee must receive at least 125% of the minimum hourly rate. Clause 10.4(b) precludes a casual employee’s hourly rate from falling below this minimum.

1141. Clause 10.4(b) does not, however, create an entitlement to be paid the casual loading for every hour worked. Where a casual employee, by virtue of a separate provision, is entitled to a higher rate for work performed in particular circumstances, such that the employee would be receiving at least 125% of the minimum hourly rate, clause 10.4(b) is satisfied. The Award does not provide a separate entitlement to a 25% loading for every hour worked in addition to other penalties or loadings prescribed by the Award.

1142. Take for instance work performed by a casual employee on a public holiday. By virtue of clause 28.3, all work performed on public holidays will be paid for at the rate of 200%. A casual employee in receipt of 200% of the minimum hourly rate is clearly being paid no less than 125% of the minimum hourly rate. That is all that is required by clause 10.4(b). It does not require that, in addition to the amount payable under clause 28.3, a casual employee be paid a loading of 25%.

387 See s.134(1)(g)
1143. The NUW proposal is opposed. The proposed provision would effectively increase the monetary entitlement of a casual employee without so much as a shred of evidence or submissions that might explain why the provision proposed is necessary to achieve the modern awards objective. This element of the proposal is contrary to ss.134(1)(b), (c), (f) and (g).

**Weekend and Overtime Work**

1144. We assume that the reference to ‘weekend work’ in the proposed clause 10.4(b) is intended to capture the overtime rates payable for such work. The Award does not, as such, prescribe a separate penalty for work performed on a weekend.

1145. In any event, if the NUW’s claim were granted in this regard, it would have the effect of extending the entitlement to overtime rates to casual employees, which is also the intent of the variation sought by the AWU (and supported by the NUW).

1146. For all of the reasons we have earlier stated in respect of the AWU’s claim, particularly regarding our interpretation of the current clauses, Ai Group opposes such a reference being inserted in clause 10.4(b).

**The Deletion of Clause 10.4(c)**

1147. It is not clear from the NUW’s submissions whether the union is also seeking the deletion of the current clause 10.4(c).\(^{388}\) As we have set out in our submissions regarding the AWU’s claim, clause 10.4(c) makes clear that entitlements prescribed by the Award for full-time and part-time employees do not extend to casual employees and that the casual loading is intended to compensate casual employees for such benefits. The provision is relevant to and aids in the interpretation of the Award. It should therefore be retained.

\(^{388}\) See NUW’s submission dated 14 October 2015 at paragraph 14.
Conclusion

1148. Given the complete absence of any submissions or evidence filed by the NUW in support of their claim, and adverse impact that the variation would likely have when considered against the matters listed at s.134(1), the NUW’s claim should be dismissed.
23. VARIATIONS SOUGHT TO THE WINE INDUSTRY AWARD 2010

1149. In accordance with the directions of the Full Bench dated 29 June 2015, United Voice filed a draft determination on 17 July 2015, accompanied by correspondence indicating its intention to pursue two variations to the Wine Award as part of the casual and part-time common issues:

- The introduction of a minimum weekly engagement for part-time employees of 15 hours per week (see item 2.1.3 of the aforementioned directions).

- A variation to the current clause 12.2 such that the clause would list the matters in respect of which an employer and part-time employee must reach agreement at the time of engagement. This would include the hours to be worked by the employee, the days upon which those hours will be worked and the starting and finishing times.

1150. We note that the table attached to the Commission’s directions also lists an additional claim by United Voice to vary the Wine Award at item 2.5.1. The union’s correspondence of 17 July 2015 confirms that the variation thereforeshadowed is no longer sought.

1151. The Commission’s directions required the proponent of any claim to file submissions and evidence in support of variations sought by 12 October 2015. United Voice does not, however, appear to have filed any such material. On this basis, it is our submission that the union’s claim should be dismissed.

1152. Should United Voice seek, and be granted, a further opportunity to file material in support of its claim, Ai Group requests that interested parties that oppose the proposed variations be afforded a corresponding opportunity to respond.
24. THE HSU’S CLAIMS TO VARY SEVERAL AWARDS

1153. On 11 November 2014, the HSU filed an outline of submissions,\(^{389}\) in accordance with the Commission’s statement\(^ {390}\) of 1 October 2014. It there set out, in broad terms, the variations it seeks regarding the:

- AACHS Award;
- Aged Care Award;
- Ambulance Award;
- Health Award;
- Medical Practitioners Award;
- Nurses Award;
- Pharmacy Award; and
- SACS Award.

1154. The outline does not include the precise terms of the variations sought, nor does it include submissions or evidence in support of the claims.

1155. The HSU has not subsequently filed draft determinations or submissions and evidence in support of its claims, as required by the Full Bench’s directions of 29 June 2015.

1156. As we understand it, the HSU has raised the variations it seeks in the context of the award stage of the review. Some have been the subject of discussions between interested parties. Others have not yet been dealt with. As we understand it, these matters have not yet been formally referred to this Full Bench.

\(^{389}\) See HSU’s outline of submissions dated 11 November 2014.
1157. Should the HSU's claims subsequently be referred, parties that oppose the claims should be given an opportunity to respond.